City v. L.1930, DC37, 45 OCB 70 (BCB 1990) [Decision No. B-70-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE ARBITRATION

-between-

THE CITY OF NEW YORK,

Petitioner,

Decision No. B-70-90
Docket No. BCB 1269-90
(A-3369-89)

-and-

LOCAL 1930, DISTRICT COUNCIL 37,

Respondent.
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DECISION AND ORDER

On April 10, 1990, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a grievance which is the subject of a request for arbitration that was filed by District Council 37, Local 1930 ("the Union") on March 5, 1990. The Union filed an answer on May 15, 1990. The City filed a reply on May 30, 1990.

BACKGROUND

The grievant, Shirley Paris, has been employed by the Department of Records and Information Services ("DORIS" or "the Department") since 1971. In March 1982 the grievant was assigned to the Haven Emerson Public Health Library ("HEPHL") as a Department Senior Librarian.

In March 1986, the Union filed an out-of-title grievance alleging that the grievant was performing the work of a Department Supervising Librarian. By decision and award dated March 18, 1987, with technical corrections as of April 18, 1987, an arbitrator determined that the grievant had in fact been performing out-of-title work, and ordered that she be monetarily compensated for such work.

Thereafter, in June 1987, the grievant was informed that HEPHL was being merged with another library. The grievant was advised that as of July 1, 1987, she was to report to work at 125 Worth Street, Room 215-B. According to the Union, prior to the grievant's reassignment, Room 215-B was used solely as

a storeroom.

On October 7, 1987, the Union filed an improper practice petition with the Office of Collective Bargaining wherein it alleged that the grievant had been reassigned to Room 215-B, 125 Worth Street, in retaliation for her successful pursuit of a contractual grievance against the Department of Records. This petition was docketed as Case No. BCB-998-87, and is currently pending before the Board of Collective Bargaining. The remedy which the Union seeks in its improper practice proceeding is the grievant's reassignment "to a proper work location with job duties appropriate to her title and seniority," and that the Department cease and desist from interfering with the grievant's protected statutory rights.

On June 7, 1989, the Union filed a Step I grievance alleging that the grievant had been assigned duties "below" her title as a Senior Librarian, and that her work location was "not only inadequate", but was "so totally removed from the DORIS facility that . . . [she was] completely detached from the work that . . . [her] title as Senior Librarian would be productively used for." An amended version of the grievance was filed on July 17, 1989. The grievance was denied on August 9, 1989, by Devra Zetlan, Chief of Public Services for the Department.

On October 3, 1989, the grievance was submitted to the Office of Municipal Labor Relations at Step III of the grievance procedure. The Step III Hearing Officer dismissed the grievance in a decision dated January 5, 1990, wherein he determined that the grievant's duties were not substantially different from the duties of a Senior Librarian, and that the designation of the grievant's worksite was within management's prerogative.[1]

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[1] In his determination, the Step III Hearing Officer evaluated the Union's argument, in relevant part, as follows:

> The Union asserts that ever since the grievant won another out-of-title work grievance at the level of arbitration in April 1987 . . . , the Department has assigned her to "demeaning" clerical tasks such as opening and locking up assigned facility, performing work of a routine nature consistent with Department Library Assistant or Library Page, filing books, periodicals, answering telephones, picking up the mail, etc.. In the Union's view, the grievant has been shunted from the main D.O.R.I.S. facility to a small room at 125 Worth Street. The Union offers various exhibits showing the competence of the grievant's work performance over the years and

No satisfactory resolution of the dispute having been reached, the Union filed a request for arbitration pursuant to Article VI of the Agreement[2] stating the grievance as follows:

> Has the grievant, Shirley Paris been per-forming duties substantially different from those stated in the job specification of her title, Department Senior Librarian; and has grievant been assigned to perform her duties in inadequate working facilities.

The Union alleges a violation of Article XVII of the Clerical Administrative Title Agreement ("the Agreement"),[3] As a remedy, the Union seeks an order that the City cease and desist from assigning the grievant to duties that are different from those of a Senior Librarian, and that the grievant be transferred to the main Department of Records facility at 31 Chambers Street, or to a facility appropriate for performing the duties of a Department Senior Librarian.

POSITIONS OF THE PARTIES

City Position

wonders why she is being underutilized by the Department.

[2] Article VI, Section 1(C) of the Agreement defines a grievance as follows:

> D E F I N I T I O N: The term grievance shall mean:
>
> (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

[3] Article XVII of the Agreement provides, in relevant part, as follows:

> PHYSICAL WORKING CONDITIONS
>
> The Employer agrees to provide for all Mayoral agencies and Health and Hospitals Corporation employees covered by this Agreement the following:
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> a. Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees.
> b. Where necessary, first aide chests . . .
> c. If the size of the affected staff warrants, a lounge area . . .
> d. A sufficient supply of typewriters and other necessary equipment.

The City asserts that absent the existence of a contractual limitation, the assignment and placement of personnel is within its statutory management prerogative.[4] It notes that in evaluating a grievance wherein the right to assign personnel is challenged, this Board has ruled that the burden is on the proponent of arbitration to demonstrate prima facie that there exists a nexus between the acts complained of and the contract provisions which it alleges to have been violated.[5] The City argues that the violation of Article XVII alleged herein must be dismissed because the Union's request for arbitration is "utterly devoid of any specific facts or circumstances demonstrating how the grievant's working facilities are 'inadequate'." It contends that the claims being asserted by the Union are conclusory and patently insufficient to meet the Union's burden of establishing a nexus between the contractual limitation set forth in Article XVII of the Agreement and the right of the Department to assign the grievant to Room 215-B, 125 Worth Street.

The City further asserts that the lack of specificity in the request for arbitration has impeded its ability to prepare an effective challenge to the arbitrability of the Union's grievance. It contends that since "some elements of a work site are entirely ungrievable on mootness, timeliness etc., grounds, the Union's failure to provide specific factors of the alleged inadequacy deprives the City of its right to respond with challenges to the arbitrability of these factors."

Moreover, the City argues that in filing its request for arbitration,

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[4] The City notes that Section 12-307b. of the New York City Collective Bargaining Law provides, in relevant part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies;
> . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted;. . . and exercise complete control and discretion over its organization and the technology of performing its work.

[5] The City cites Decision Nos. B-61-88; B-35-88; B-6-88; B-4-88; B-54-87 and B-5-87 in support of its position.

the Union has violated the statutory waiver requirement set forth in Section 12-312(d) of the New York City Collective Bargaining Law ("the NYCCBL"), which precludes a union from submitting the same underlying dispute for resolution in more than one forum.[6] It alleges that the Union submitted the instant dispute for the consideration of the Board when it filed the improper practice petition docketed as BCB-998-87. It therefore asserts that the waiver filed by the Union in connection with its request for arbitration is invalid.

In this regard, the City further notes that the relief sought in the improper practice petition, i.e. that the grievant be reassigned "to a proper work location with job duties appropriate to her title and seniority," is essentially the same as the relief sought by the Union in its request for arbitration. It therefore contends that the dispute underlying the instant grievance will be resolved by the Board in the improper practice forum, and that in the interest of preventing repetitive and vexatious litigation, the Board should dismiss the Union's request for arbitration.

Union Position

The Union maintains that "[w]here a Union's assertion of contractual rights has met with a claim of management prerogatives, the BCB [Board of Collective Bargaining hereinafter referred to as "the Board"] has permitted arbitration if the Union alleges sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged right." The Union argues that such a relationship clearly exists in the

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[6] Section 12-312(d) of the NYCCBL provides, in relevant, part as follows:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

instant case wherein it alleges that the grievant was assigned to inadequate work facilities in violation of Article XVII of the Agreement. Moreover, the Union maintains that since the grievant "had practically no duties after being assigned to her new location," it has alleged the existence of an arbitrable out-of-title work grievance pursuant to Article VI, §1(C) of the Agreement as well.

The Union also argues that nothing in the decisional law of the Board requires more than notice pleading of the underlying facts of a grievance in order to establish that a claim asserted in a request for arbitration is arbitrable pursuant to provisions of an applicable collective bargaining agreement. In support of its position, the Union refers to Decision No. B-63-89 where the Board stated that it would "not dismiss an otherwise valid request for arbitration unless genuinely significant omissions or oversights actually obscure the issues as to which arbitration is sought." The Union asserts that in the instant case, the City should have been able to derive ample detail of the nature of the grievant's claims from the Step I and Step III grievance proceedings. Therefore, it maintains that the City has not been impeded in its ability to respond or to otherwise prepare for arbitration by any alleged lack of specificity in the request for arbitration.

Finally, the Union disputes the City's statutory waiver argument. It asserts that NYCCBL §12-312(d) does not automatically preclude the assertion in arbitration of a contractual right which arises out of the same circumstances that precipitated the filing of an improper practice petition. The Union points out that in order to evaluate an alleged violation of Section 12-312(d), the Board has held that it will consider "whether the issue presented could have been submitted, fully litigated, and effectively disposed of in one proceeding - either an improper practice proceeding or an arbitration proceeding."[7] In this respect, the Union contends that the crux

[7] Decision No. B-54-88.

of the dispute asserted in the improper practice proceeding is entirely different from the dispute which it is currently seeking to pursue in arbitration.

Specifically, the Union maintains that the improper practice charge alleges that the City engaged in improperly motivated retaliatory activity against the grievant due to her successful pursuit of an out-of-title grievance and thereby violated NYCCBL §§12-305 and 12-306.[8] In the instant case, the Union asserts that it is seeking to pursue in arbitration the questions of whether the grievant is being assigned work that is substantially different from the type of work specified in her job description, and whether the grievant's deployment to Room 215-B, 125 Worth Street constitutes a violation of the Agreement. The Union notes that the Board is without jurisdiction to resolve a contractual dispute, and that an arbitrator is precluded from considering a claim involving the alleged violation of a statutory right. Therefore, the Union concludes the dispute herein cannot be resolved in the improper practice forum, and that the Board should deny the City's petition challenging arbitrability.

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[8] Section 12-305 of the NYCCBL provides in relevant part as follows:

> **Rights of public employees and certified employee organizations.** Public employees shall have the right to self organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all such activities. . . .

Section 12-306 of the NYCCBL provides in relevant part as follows:

> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter; . . .
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization; . . .

DISCUSSION

Arbitrability

In considering a petition challenging arbitrability, it is our responsibility to determine whether there exists a prima facie relationship between the act complained of and the source of the right being invoked, and whether the parties have agreed to arbitrate disputes of that nature.[9] Once the proponent of arbitration has established the existence of these preliminary requirements, we will direct that the merits of the dispute at issue be resolved in arbitration.[10] Doubtful questions of arbitrability will be resolved in favor of arbitration.[11]

Our threshold arbitrability test requires more than mere "notice pleading" of the claims being asserted in a specific dispute, however. Where challenged to do so, the proponent of arbitration must establish the existence of a nexus between the grievance in question and the source of the right being invoked.[12] Such a relationship cannot be established on the basis of vague or conclusory allegations.[13] A request for arbitration may be rendered fatally defective by the omission of an allegation, the absence of which impedes the responding party from preparing an adequate defense.[14]

In this case, we consider initially the Union's contention that the assignment of the grievant to a former storeroom which is "totally removed" from the main DORIS facility is violative of Article XVII of the Agreement, which mandates that employees be assigned to "adequate" work facilities. The

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[9] Decision Nos. B-29-89; B-19-89; B-61-88; B-37-88.

[10] Decision Nos. B-49-89; B-29-89; B-54-88; B-13-87.

[11] Decision Nos. B-35-90; B-73-89.

[12] Decision Nos. B-20-90; B-19-90; B-18-90; B-74-89; B-51-89; B-11-88; B-44-88.

[13] Decision Nos. B-4-88; B-54-87.

[14] See, Decision Nos. B-19-90; B-35-87; B-14-84; B-6-80.

City asserts that this allegation is unduly vague and that, as a result, it has been "deprived . . . of its right" to effectively respond to the Union's request for arbitration.

We find the record sufficient to establish that the City was aware of the nature of this allegation. The grievant complained of her reassignment to Room 215-B in both her Step I and Step III grievances. We have repeatedly said that where the City is on notice of a grievant's claim at the lower steps of the grievance procedure, we will not hold that it lacks knowledge of the nature of the claim, or that it has been in any way surprised by a novel allegation when the claim is included in a request for arbitration.[15] Therefore, we reject the City's contention that due to a lack of specificity in the request for arbitration, it has been denied an opportunity to respond effectively to the Union's contention that the City violated Article XVII of the Agreement.

We also find that the deployment of the grievant to a former storeroom that is "totally removed" from the main Department of Records facility arguably constitutes an assignment to an "inadequate" work facility within the meaning and intent of Article XVII of the Agreement. Therefore, we find that there exists a nexus between a contractual provision and the management act being challenged.

We emphasize however, that this threshold determination involves neither a consideration of, nor comment upon, the merits of this dispute.[16] It is well settled that matters of contract interpretation and application are exclusively within the domain of the arbitrator once the proponent of arbitration establishes the existence of an arguable relationship between the grievance in question and the contractual provision cited.[17]

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[15] Decision Nos. B-29-89; B-61-88; B-35-87; B-23-83; B-12-83.

[16] Decision Nos. B-33-90; B-33-87; B-27-84; B-1-84.

[17] Decision Nos. B-73-89; B-2-89; B-71-88.

With respect to the Union's assertion that the grievant is being assigned duties "below" her title, we find that this too alleges an arbitrable grievance. Inasmuch as the Step III Hearing Officer evaluated the Union's allegations regarding this issue, the City cannot now claim that it lacks notice of the nature of the Union's complaint.[18] Since the Union's allegation that the grievant is performing duties which are "substantially different from those stated in the job specification of her title" clearly falls within the parties' definition of a grievance,[19] this matter also may be resolved in arbitration.

Waiver

The statutory waiver provision established in Section 12-312(d) of the NYCCBL was enacted in order to prevent multiple litigation of the same dispute, and to insure that a grievant who elects to seek redress through the arbitration process will not attempt to relitigate the same matter in another forum.[20] A union is deemed to have submitted the same underlying dispute in two forums, and thus to have rendered itself incapable of executing an effective waiver under Section 12-312(d), where the proceedings in both forums arise out of the same factual circumstances, involve the same parties, and seek the determination of common issues of law.[21]

In this case, the request for arbitration and the improper practice claimed in Docket No. BCB-998-87 arise out of the same set of operative facts. However, although the causes of action and issues of law underlying the two disputes are thus related, they are not the same. The sole issue presented

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[18] See supra at note 1.

[19] "A claimed assignment of employees to duties substanti-ally different from those stated in their job descriptions." (Article VI, §1(C)).

[20] Decision Nos. B-35-88; B-10-85; B-13-76.

[21] Decision Nos. B-50-89; B-54-88; B-35-88; B-28-87.

for our consideration in the improper practice forum is whether the employer engaged in a course of improperly motivated retaliatory activity when it assigned the grievant to her current worksite and directed her to perform duties that she alleges are "below" the level of duties set forth in her job description. The issues presented for resolution in the Union's request for arbitration are whether the disputed worksite assignment is violative of Article XVII of the Agreement, and whether the duties assigned to the grievant are in fact substantially different from the duties listed in her job specifications.

Different issues of law notwithstanding, the questions of job duties and work location are essential elements of both disputes. It is thus possible that, should the arbitrator find that the reassignment and job duties were in violation of the contract, such a finding could call into question the basis of the improper practice charge. On the other hand, should the arbitrator determine that the reassignment and job duties were not violative of the agreement, a number of reasons, including anti-union animus, may account for it. Similarly, a finding of no contract violation could constitute a potential defense to the improper practice allegation, while a finding that the contract was breached could vitiate the City's management prerogative defense.

Accordingly, we find that these matters should be evaluated initially in the arbitral forum. We believe that it would be premature, at this point, for us to resume[22] a hearing before a Trial Examiner that would be likely to duplicate the evidence that will be adduced in the arbitration proceeding.

In so ruling, we stress that this does not end the matter as far as the Union's improper practice charge is concerned. The Union alleges that Ms. Paris' current assignment and job duties were motivated by anti-union animus,

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[22] The hearing in the improper practice proceeding commenced on October 17, 1989, but was recessed shortly after it began to permit the parties to resolve an issue concerning subpoenaed documents. No testimony was presented on the merits of the improper practice charge.

and might constitute a violation of the NYCCBL. As we have said, the assertion of a contractual right does not automatically preclude the assertion of an improper practice, even when both claims arise out of the same circumstances and involve the same parties.[23]

Therefore, we shall retain jurisdiction over the pending improper practice charge docketed as BCB-998-87, but we shall hold any further proceedings in that matter in abeyance until such time as an arbitrator has issued an opinion and award upon which we may further determine whether an improper practice was committed by the Respondent. This disposition is consistent with the deferral and waiver policy we have generally followed in matters involving commonly allowed claims of violations both of contract and of law. Generally we have not exercised our improper practice jurisdiction when the same claim and issues are pending in another forum in order to avoid unnecessary duplication of effort and the risk of an inconsistent determination.[24]

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

O R D E R E D, that the challenge to arbitrability raised herein by the City of New York be, and the same is hereby denied; and it is further

O R D E R E D, that the request for arbitration filed herein by the Union be, and the same is hereby granted; and it is further

O R D E R E D, that the improper practice petition of Shirley Paris and District Council 37 AFSCME, AFL-CIO, in Docket No. BCB-998-87 be, and the same hereby is, deferred until such time as an arbitrator reviews the underlying

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[23] Decision Nos. B-54-88 and B-3-85.

[24] See Decision No. B-16-90. See also Decision Nos. B-9-85 and B-3-85.

assignment and work location grievances of Shirley Paris and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the New York City Department of Records and Information Services.

Dated: October 17, 1990
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

JEROME E. JOSEPH
MEMBER

* City Members Dean L. Silverberg and George B. Daniels dissent from this Decision and Order without opinion.