City v. L.375, DC37, et. al, 45 OCB 77 (BCB 1990) [Decision No. B-77-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

DECISION NO. B-77-90
DOCKET NO. BCB-1278-90
(A-3308-89)

THE CITY OF NEW YORK,
Petitioner,

-and-

CIVIL SERVICE TECHNICAL GUILD,
LOCAL 375, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,
Respondent.
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DECISION AND ORDER

On April 30, 1990, the City of New York ("City") , through its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO ("CSTG"). On June 5, 1990, CSTG filed its answer to the petition, and the City filed a reply on July 2, 1990.

BACKGROUND

On August 21, 1989, a group grievance was filed by Senior Air Pollution Inspectors ("SAPIs") directly at Step III. The grievance alleged the following:

> Violation of Collective Bargaining Agreement Article VI(c) claimed Assignment to Duties substantially different from those stated in their job specifications; Sr. A. P. Inspectors are being asked to perform the duties of an attorney representing the Dept. of Administrative hearings.
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> Violation of Collective Bargaining Agreement Article XVI: As Dept. of Air Resources Representative (DAR Rep.) (Office title) they are performing duties of a special nature requiring greater responsibilities - performance of an attorney's duties - than is required of the Sr. A.P. Inspector.

As a remedy, the SAPIs sought "removal from the 'attorney' position" and a "salary differential."

On December 7, 1989, the Step III grievance was denied. The City noted that the same grievance had been filed at Step III approximately eight years earlier and was denied. In its decision denying this grievance, the City stressed that the grievants were not acting in the capacity of an attorney since "they [were] not required to follow technical rules of evidence in the presentation of a case." The City added that "while their questioning of Departmental witnesses and offering of documents to the Environmental Control Board may [have involved] a knowledge of court procedures and the manner in which evidence is to be presented, such expertise does not in itself constitute assignment to the duties of an attorney. Finally, the City examined the job description for the title of Senior Air Pollution Inspector and noted that the duties the grievants claimed to be performing were not substantially different.

On December 29, 1989, the Union filed a Request for Arbitration on the question of whether the grievants were assigned to duties substantially different from those in their job specifications. The Union claims a violation of Article VI,

Section 1 (C) of the collective bargaining agreement.[1] The Union seeks a remedy of "back pay for the entire period of out-of-title work, subject only to the limitations of the contract, and a cease and desist order."

POSITIONS OF THE PARTIES

City's Position:

In its Petition Challenging Arbitrability, the City argues that respondent's Request for Arbitration should be denied under the doctrine of res judicata. The City notes that the instant Request for Arbitration involves an issue which was resolved by a prior arbitration award.[2] The City adds that res judicata has been employed by the Board to prevent vexatious and oppressive relitigation of a previously litigated dispute.

The City refers to a three part test employed by the Board in order to determine whether the doctrine of res judicata should bar arbitrability. According to the City, the following elements must be shown to support a finding of res judicata:

(1) a final judgment on the merits in an earlier suit,
(2) an identity of the cause of action in both the earlier and later suit, and

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[1] This provision defines a "grievance" as:

A claimed assignment of employees to duties substantially different from those stated in their job specifications.

[2] Case No. A-1483-82.

(3) an identity of the parties or their privies in the two suits.[3]

The City argues that all three elements are clearly present in the instant dispute. The first element, a final judgment, is satisfied by the arbitration award issued by Arbitrator LaRue, docketed as A-1483-82, which was not vacated or modified. The City claims that it becomes apparent that the second element, similar causes of action, is satisfied when the grievance form in the present dispute is compared to the one dated September 21, 1981. The descriptions of contract violations in the two grievance forms allegedly are almost identical. The petition notes that the third element, identity of the parties or their privies, is satisfied since the parties, Civil Service Technical Guild, Local 375 and the Office of Labor Relations are the same in both disputes. The City also maintains that the grievances in both cases affect identical claims of violation of the same contract right of employees in the same title, i.e., Senior Air Pollution Inspectors. The City concludes that since it has met all three elements of the res judicata test, the Request for Arbitration should be dismissed.

In its second challenge to arbitrability, the City argues that the Request for Arbitration should be denied because the grievants cannot satisfy the waiver requirement established in NYCCBL Section

[3] Decision No. B-35-88 at 14.

12-312(d).[4] In this regard, the City contends that the Union cannot satisfy the terms of the waiver since it previously submitted the identical underlying issue to arbitration in Case No. A-1483-82.

Furthermore, the City argues that Local 375 and the Senior Air Pollution Inspectors should be estopped from filing a second Request for Arbitration since they are in violation of the waiver requirement. Local 375 and the Senior Air Pollution Inspectors executed the appropriate waiver forms prior to the 1982 decision. The City argues that as the instant dispute is identical to the dispute recited in the 1982 waiver forms, the Union has violated the terms of the 1982 waiver, and therefore, should be estopped from relitigating the identical issue.

In its Reply, the City disputes an argument raised in the Union's answer. The Union argues that new evidence, an Intradepartmental Memorandum which lists the tasks and standards for SAPIs, refutes the City's res judicata argument. The City responds that it would be inequitable for the Board to label a

[4] Section 12-312(d) of the NYCCBL provides:

> 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.

document dated January 22, 1981 as "new" evidence. The City argues that a document which predates the 1982 Arbitration Award by more than seventeen months cannot be considered "new" evidence. Moreover, continues the City, the document itself is outdated, as it states at the top of the page "Tasks & Standards for period 7/1/80 - 12/31/80" and, therefore, is not relevant to the instant matter.

The City relies on a Board case which states it will "not reopen and reconsider a case based on the mere failure of a party to present evidence and argument which was available to it upon the initial litigation of the matter."[5] Concluding that the Intradepartmental Memorandum "cannot be offered as 'new' evidence nine (9) years [emphasis in original] after the identical issue was heard before Mr. LaRue," the City argues that the introduction of this document should be barred under the doctrine of estoppel.

In its Reply, the City also responds to the argument raised by the Union in its answer that factual circumstances exist which make the doctrine of res judicata inapplicable. The City notes that the task contested before Arbitrator LaRue in 1982 is identical to the task at issue in the instant matter, i.e., representing the Department of Environmental Protection at Environmental Control Board hearings. Therefore, according to the City, Respondent's allegation that facts have changed since the

[5] Decision No. B-10-78 at 7.

last arbitration is erroneous and its Request for Arbitration should be denied under the doctrine of res judicata.

Union's Position

The Union questions the City's analysis of the applicability of the doctrine of res judicata. The Union argues that the City's analysis is misleading because it assumes that the factual circumstances giving rise to the instant dispute are the same as in 1982. The Union acknowledges that the instant grievance and the 1982 grievance involve the same issue, namely, whether the Senior Air Pollution Inspectors are working out-of-title because they are being asked to serve as an "attorney" in administrative hearings. The Union further acknowledges that during the course of the 1982 arbitration the City denied that the SAPI acted as an attorney and contended that the SAPI was more an "expert" than a "prosecutor." The Union suggests that Arbitrator LaRue credited this testimony in denying the 1982 grievance. The Union argues that new evidence now exists which refutes the City's position that SAPIs are not acting as prosecutors.

This new evidence includes an Intradepartmental Memorandum, dated 1/22/81, which states the tasks and standards for SAPIs, including: "[a]ct as DEP Prosecutor at Environmental Control Board." The new evidence also includes a Performance Evaluation for SAPIs, dated 1/20/89, which states that a SAPI "[r]epresents

the Dept. at ECB hearings in the capacity of prosecutor with regard to violations issued by Dept. personnel." The Union argues that this new evidence constitutes proof that SAPIs are required to act as prosecutors at administrative hearings.

The Union emphasizes that the doctrine of res judicata only bars identical claims based on the same set of facts and does not apply when a subsequent case brings forth new facts. The Union argues that since out-of-title claims are so fact-based, each must be heard on the merits. The Union points out that without such scrutiny, an out-of-title claim could be cast aside "because of some prior arbitration award denying an earlier out-of-title claim involving [the same] titles."

Finally, the Union argues that since the facts underlying the instant grievance are not the same as those in the 1982 grievance, the City's waiver argument is also without merit.

DISCUSSION

The primary basis for the challenge to arbitrability herein is the City's contention that the Union's Request for Arbitration should be dismissed under the doctrine of res judicata. The City argues that the dispute the Union seeks to arbitrate -- whether SAPIs are performing out-of-title work, specifically, serving as attorneys at Environmental Control Board hearings -- was previously decided by Arbitrator LaRue in Case No. A-1483-82. The Union

argues in response that the facts of the present dispute differ from those in the 1982 dispute. In support of this claim, the Union offers two pieces of evidence: an Intradepartmental Memorandum dated 1/22/81 and a Performance Evaluation dated 1/20/89, both of which state that a SAPI acts as a "prosecutor." The Union contends that these two pieces of evidence constitute "facts" which differentiate this dispute from the one decided in 1982, thereby defeating the City's res judicata argument.

This Board has long held that in appropriate cases, the doctrine of res judicata may be employed to prevent vexatious or oppressive relitigation of a previously litigated dispute.[6] As noted by the City in its Petition Challenging Arbitrability and discussed, supra, at pages 3-4, this Board has established a test for determining whether the doctrine of res judicata should bar an arbitration.

There is no dispute that elements one and three of that test have been met herein, as Arbitrator LaRue issued an arbitration award in 1982 concerning the SAPIs' performance of the duties in question. The parties to the instant proceeding, CSTG and the City, were the parties in the matter before Arbitrator LaRue and they are bound by his award therein. In arguing that new facts exist which defeat the City's claim of res judicata, the Union is

[6] Decision Nos. B-39-90; B-34-90; B-17-90; B-35-88; B-25-88; B-16-75.

essentially denying that the second element of the test -- identity of issues -- is present here.

The Union asserts that Arbitrator LaRue, in denying the earlier grievance, credited testimony that SAPIs were more like "experts" than "prosecutors." In arguing that the facts have changed since the 1982 decision, the Union offers two documents which describe the SAPI as a "prosecutor." However, a more thorough reading of Arbitrator LaRue's opinion reveals this distinction to be irrelevant.

Arbitrator LaRue found that the work done by SAPIs before the Environmental Control Board was related to the tasks set forth in the SAPI job description. Arbitrator LaRue noted that the job description required the SAPI to assist in the presentation of alleged violations at administrative type hearings. Moreover, the job description required the SAPI to have a knowledge of court procedures and of the method for presentation of evidence. Arbitrator LaRue inferred from this that "[t]he SAPI, in presenting a case before the ECB, is not called upon to utilize any body of knowledge or skills not required by the job description."[7] Similarly, Arbitrator LaRue noted that the job description required the SAPI to "preside at hearings or conferences" and concluded that there was "not a significant difference between presiding at a hearing and being the one responsible for the

[7] Case No. A-1483-82 at 8-9.

presentation of one side of the case."[8]

The Union's justification for the instant attempt to review the claim that SAPIs are being assigned out-of-title work is that the present case differs from the one decided in 1982. Specifically, the Union points to two documents in which management refers to SAPIs serving as prosecutors, which would be in evidence here, but were not considered in the 1982 arbitration. The implicit significance of this contention is that in referring to them as prosecutors, management admits that it is using SAPIs as "attorneys." We note, firstly, that there is no perceptible basis for the Union's assumption that "prosecutor" means "attorney." We find, moreover, that whatever the descriptive term - including "attorney" - management might use in setting out the duties of SAPIs, it would not offset the fact that Arbitrator LaRue made what would seem to have been an exhaustive examination of the work actually performed by SAPIs including their prosecutorial duties. We are satisfied that it was on the basis of this inquiry that Arbitrator LaRue determined that the duties performed by SAPIs, including the prosecution of cases before the Environmental Control Board, did not constitute out-of-title work in violation of the collective bargaining agreement between CSTG and the City.

Thus, there is no difference between the present dispute and the one decided by Arbitrator LaRue. Both allege that in

[8] Id. at 9.

presenting a case before the Environmental Control Board, the SAPI is performing a task that is beyond the scope of the SAPI's job description. The evidence now being offered by the Union, which describes the SAPI as a "prosecutor," does not change this.

For these reasons, we find that the Union's Request for Arbitration is barred by the doctrine of res judicata.[9] Accordingly, the City's Petition Challenging Arbitrability is granted.

ORDER

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

ORDERED, that the City's Petition Challenging Arbitrability be, and the same hereby is granted; and it is further

[9] Because we find that the Union's Request for Arbitration is barred by the doctrine of res judicata, we need not reach the City's waiver and estoppel arguments. Similarly, we need not reach the issue, raised in the City's Reply, of whether a document dated 1/22/81 constitutes "new" evidence.

ORDERED, that Local 375's Request for Arbitration be, and the same hereby is, denied.

Dated: New York, N.Y.
December 19, 1990

MALCOLM D. MACDONALD
Chairman

DANIEL G. COLLINS
Member

GEORGE NICOLAU
Member

CAROLYN GENTILE
Member

JEROME E. JOSEPH
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