City v. L.371, SSEU, 47 OCB 2 (BCB 1991) [Decision No. B-2-91 (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-2-91
DOCKET NO. BCB-1281-90
(A-3414-90)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, AFSCME, AFL-CIO,
Respondent.
---------- X

DECISION AND ORDER

On May 17, 1990, the City of New York ("City"), through its Office of Labor Relations, filed a petition challenging the request for arbitration filed by the Social Service Employees Union ("SSEU" or "Union") on behalf of grievant Joseph Sperling. On August 29, 1990, SSEU filed its answer to the petition, and the City filed a reply on October 19, 1990. By permission, a sur-reply was filed by the Union on November 20, 1990.[1]

[1] In a letter dated October 25, 1990, Jeffrey Kreisberg, Esq., attorney for SSEU, requested that the Board grant oral argument in this matter. He indicated his belief "that petitioner's reply papers seriously misconstrue respondent's position herein and that there exists a substantial potential for confusion by the Board as to the arguments actually being made by respondent." This request for oral argument was denied by the Board in a letter dated November 9, 1990, which also indicated that Mr. Kreisberg could submit a sur-reply in order to alleviate any confusion he felt existed.

BACKGROUND

On April 28, 1989, grievant filed a Step I grievance in which he objected to the issuance of a notice to employees by the Human Resources Administration ("HRA") on April 17, 1989, which required employees to fill out an address verification form before receiving their paychecks. The notice stated as follows:

> Before you receive your paycheck today you are required to fill out and sign the address verification form supplied by your check distributor.
>
> You are required by the New York City Department of Personnel to review the address verification to ensure that your official address is correct on all N.Y.C. records. If any changes are required please enter the new address on the form where indicated. Your ZIP CODE, SUITE or APARTMENT NUMBER IS VERY IMPORTANT and NECESSARY as part of your address. So please do not forget to include them on the form.
>
> I M P 0 R T A N T
>
> Even if you have no changes you must sign the form yourself and return it to your check distributor immediately.
>
> If you fail to comply, we may be instructed by the New York City Department of Personnel to apply administrative sanctions. So, to avoid any unnecessary problems, please sign and return the form now!
>
> Thank you for your cooperation.

Grievant alleged that "HRA must pay wages for work already performed without any requirements" and that the language used in

the notice was "unprofessional and discourteous."

In a letter dated May 23, 1989, the Step I grievance was denied. The Deputy General Counsel for Executive Affairs of HRA stated that the memorandum referred to in the grievance was an administrative procedure mandated by the agency. The Deputy General Counsel added that the matter was not grievable since there was no violation of the collective bargaining agreement.

On June 2, 1989, the grievance was advanced to Step II. In a letter dated July 6, 1989, the Deputy Administrator of HRA's Office of Labor Relations similarly denied the grievance for not alleging a violation of the collective bargaining agreement. The Deputy Administrator also stated that the directions given in the memo were an extension of the rules and regulations of the City Personnel Director.

On July 19, 1989, the grievance was brought to Step III. The Office of Labor Relations Review Officer similarly denied the Step III grievance, finding that the matter did not constitute a "grievance" within the contractual definition of the term and adding that a violation of state labor law is not reviewable under the contractual grievance procedure.

The Union then filed a request for arbitration pursuant to Article VI, § 2 of the parties' collective bargaining agreement. The Union requested arbitration of the "[r]equirement imposed by HRA Office of Personnel Services that employees provide updated

address verification form as a condition for receiving pay check on April 17, 1989. "The Union claims a violation of Article III, §1 of the collective bargaining agreement, which provides for the payment of wages.[2] The Union requests a "cease and desist order"

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[2] Article III, § 1 states the following:

(a) This Article III is subject to the provisions, terms and conditions of the Alternative Career and Salary Pay Plan Regulations, dated March 15, 1967 as amended to date, except that the specific terms and conditions of this Article shall supersede any provisions of such Regulations inconsistent with this Agreement subject to the limitations of applicable provisions of law.

(b) Except as otherwise specified, all salary provisions of this Agreement, including minimum and maximum salaries, advancement increases, general increases, education differentials and any other salary adjustments, are based upon a normal work week of 35 hours. The normal work week for employees in the titles of Community Assistant and Houseparent Aide shall be 40 hours and for employees in the titles of Houseparent and Senior Houseparent it shall be 60 hours.* An employee who works on a part-time per annum basis and who is eligible for any salary adjustments provided in this Agreement shall receive the appropriate pro-rata portion of such salary adjustment computed on the relationship between the number of hours regularly worked each week by such employee and the number of hours in said normal work week, unless otherwise specified.

* The 60 hour work-week includes 40 hours at straight time and 20 hours of overtime. See Section 2(b) of this Article III.

(c) Employees who work on a per diem or hourly basis and who are eligible for any salary adjustment provided in this Agreement shall receive the appropriate pro-rata portion of such salary adjustment computed as follows, unless otherwise

(continued...)

as a remedy.

POSITIONS OF THE PARTIES

City's Position

The City argues that the instant grievance cannot be maintained since Respondent has failed to state a provision of the collective bargaining agreement which is related to the grievance sought to be arbitrated. The City argues that Article III, §1, the salary provision which the Union claims has been violated, does not restrict or prohibit the City from implementing an address verification form. Nor, according to the City, does the section require the City to use "professional" or "polite" language in its staff notices. Therefore, the City asks that the request for arbitration be dismissed, as the Union has

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2(... continued)
specified:

Per diem rate - 1/261 of the appropriate minimum basic salary.
Hourly rate - 35 hour week basis - 1/1827 of the appropriate minimum basic salary;
37.5 hour week basis - 1/1957.5 of the appropriate minimum basic salary or
40 hour week basis - 1/2088 of the appropriate minimum basic salary.

d) The maximum salary for a title shall not constitute a bar to the payment of any general increase, salary adjustment or pay differentials provided for in this Agreement but said increase above the maximum shall not be deemed a promotion.

failed to establish a nexus between the claimed violation and the cited contractual provision.

As a second ground for challenging arbitrability, the City argues that the instant grievance cannot be maintained because the Union has failed to identify an agency rule or policy, the violation of which is grievable under the terms of the collective bargaining agreement. The City contends that the parties have expressly agreed not to arbitrate the instant matter. The City refers to Article VI, §I(B) of the collective bargaining agreement which defines a "grievance" as follows:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration . . .

The city claims that, in accordance with this section, disputes involving rules or regulations of the City Personnel Director are not subject to the grievance procedure or arbitration.

The City notes that the disputed staff notice given to employees of HRA stated that they were required by the New York City Department of Personnel to review the address verification form in order to ensure that their official address was correct

on all New York City records. The City points out that the rules and regulations of the City Personnel Director state:

> Address
> (a) Each officer or employee in the classified service shall, upon appointment or promotion, notify the agency head of his or her address. Such officer or employee shall likewise inform the agency head of any change of address during the period of employment.

The City argues that there is no nexus in the instant case since the disputed notice constitutes an agency procedure for verifying an employee's correct address, which is derived from the rules and regulations of the City Personnel Director, and which, therefore, cannot be grieved under the :collective bargaining agreement between the City and SSEU.

In its reply, the city claims that the Union failed to allege any new facts in its answer that would demonstrate a relationship between the claimed violation and any rule, regulation, written policy or order. The City notes that the Union in its answer made a reference to "[l]ongstanding agency policy" which designates certain specific days as pay days. The City points out that the Union has not identified this "longstanding policy" as a written policy which would be grievable under the terms of the collective bargaining agreement. The city states that the term "grievance" is specifically defined in Article VI, §1(B) as "[a) claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or

orders of the Employer...." Accordingly, the City claims that Article VI limits grievances to violations of written policy. The City argues that "[a)s respondent has failed to identify a written agency policy which the Board has recognized as a grievable matter, and the Request merely seeks to circumvent a Rule and Regulation of the City Personnel Director, which has the force and effect of law, the Request for Arbitration must be dismissed."

Finally, the City argues that the Union has failed to identify a provision of the collective bargaining agreement which is related to the alleged dispute. The City alleges that the Union admits in its answer that there is "no provision" in the collective bargaining agreement which deals with the conditions surrounding the distribution of paychecks and that there is an "absence of any provision in the agreement" regarding the requirement of an address verification form. Thus, argues the City, the Union cannot establish a grievable dispute concerning the application or interpretation of the terms of the collective bargaining agreement.

Union's Position:

The Union argues that nothing in the collective bargaining agreement provides that payment of wages may be conditioned upon the completion and execution of an address verification form or

other similar document. The Union notes that Article III of the agreement provides that grievants are entitled to be paid at certain specific rates of pay and that longstanding policy designates certain specific days as pay days. The Union does not dispute the right of the agency to require the completion of an address verification form. However, the Union does dispute the right of the agency to condition the payment of wages upon the completion and execution of the form.

The Union notes that Article VI, §1(A) of the collective bargaining agreement defines a grievance to include "(a] dispute concerning the application or interpretation of the terms of this Agreement." The Union contends that conditioning the payment of wages on the completion of an address verification form is a violation of the agreement. The Union argues that since there is no provision of the agreement which authorizes the act, there is a dispute concerning the application or interpretation of the terms of the agreement within the meaning of Article VI, §1(A) of the agreement. The Union contends that an arbitrator could reasonably conclude that the City violated the agreement by issuing and enforcing the memorandum in the absence of a provision in the agreement authorizing the withholding of wages until an address verification form was properly completed. The Union further notes that an arbitrator could issue an appropriate remedy for such a violation: a cease and desist order.

The Union also questions the City's contention that the memorandum is immune from attack in the grievance forum because it was issued pursuant to the rules of the Personnel Director. The Union notes that the address notification rule does not authorize the withholding of wages until there is compliance with the rule. Although the Union states it does not dispute the right of the agency to require completion of the address verification form and to take appropriate action, including disciplinary action, to compel compliance, it argues that the withholding of wages is not an appropriate method to compel compliance.

In its sur-reply the Union remarks that the City's reply seems to construe the Union's answer as stating that the basis of the grievance herein is an alleged violation of the City's policy designating certain days as pay days. The Union asserts that this is not the basis of its grievance. Rather, the Union argues that in the absence of any specific provision of the agreement authorizing the withholding of wages until the completion of the address verification form, the agency may not withhold the payment of wages. The Union notes that Article III of the collective bargaining agreement specifies rates of pay for various titles and that pursuant to this article the City has designated certain specific days as pay days. The Union also notes that under established agency policy the payment of wages

has never been conditioned upon the completion of administrative forms, other than tax forms. Furthermore, the Union argues that the cited personnel director rule does not shield the challenged conduct from attack in the grievance forum because the rule does not authorize the challenged conduct.

Thus, the Union argues that it is entitled to challenge the policy set forth in the address verification memorandum. The Union asserts that the underlying dispute is one that should be resolved by an arbitrator and asks that its request for arbitration be granted.

DISCUSSION

In determining questions of arbitrability, it is the function of this Board to decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the contractual obligation is broad enough to include the act complained of by the Union.[3] Although it is the policy of the New York City Collective Bargaining Law ("NYCCBL") to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances, we cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[4] When

[3] Decisions Nos. B-58-90; B-31-90; B-6-88; B-30-86.

[4] Decision No. B-31-90.

arbitrability is challenged, the burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[5] Doubtful issues of arbitrability are resolved in favor of arbitration.[6]

In the instant case, the parties have agreed to arbitrate grievances as defined in Article VI of the parties' agreement. The City claims that the instant request for arbitration must be denied, however, because there is no nexus between a provision of the agreement and the grievance sought to be arbitrated. In this regard, the City maintains that Article 111, §1, the salary provision which the Union claims has been violated, does not prohibit the City from implementing an address verification form.

We must first consider whether the grievance involves a dispute concerning the application or interpretation of the terms of the collective bargaining agreement. Examination of the agreement reveals a specific salary provision which authorizes the payment of wages for work which has been performed. This provision, on its face, neither authorizes nor prohibits the conditioning of the payment of wages upon completion of an address verification form. It may reasonably be inferred from the notice challenged by the Union herein that an employee who does not complete the address verification form will not receive

[5] Decision Nos. B-58-90; B-6-88.

[6] Decision No. B-58-90.

his or her paycheck. It is the Union's position that such a withholding of wages would constitute a violation of Article III, §1 of the agreement. We find that the resolution of this dispute requires the interpretation and application of Article 111, §1, a matter which the parties have agreed should be resolved through arbitration. Inasmuch as this is a dispute over the payment or witholding of wages, it is relevant to note that we have found wage disputes to be arbitrable generally.[7] Moreover, this Board has noted that the expectation that earned wages will be paid promptly and in full is a quintessential quid pro quo of the employment relationship.[8] In the instant case, the fact that an employee may not receive wages arguably violates the salary provision of the agreement and thus, is a matter for arbitration.

In Decision No. B-30-86, this Board found an alleged failure to pay an employee the contractual wage to be an arbitrable matter. Dismissing the City's claim that the employee had absented himself voluntarily and thus was not entitled to be paid, we stated that the question of whether an employee is entitled to wages involves the merits of a dispute, which is for an arbitrator to decide. Similarly, in Decision No. B-19-83, a grievant alleged that wages he had earned for overtime and night

[7] Decision Nos. B-31-90; B-14-88; B-30-86.

[8] Decision No. B-31-90.

work were not paid for up to eight weeks. The grievant argued that this delay violated the Comptroller's determination which set the applicable wage rates. This Board found that whether the Comptroller's determination implies that the prevailing rate must be paid when due, or at any particular time, involved the merits of the grievance, which is for an arbitrator to decide.

In the instant case, having found that the subject of salaries is encompassed within the scope of Article III, §1 of the agreement, and that the grievance concerns the payment of salaries, we hold that the question of whether the agreement permits or prohibits the conditioning of the payment of salaries upon the completion of an address verification form involves a matter of interpretation of the agreement, which is for an arbitrator to determine. In addition, we find meritless the City's argument that the cited Personnel Director rule shields the challenged conduct from arbitration. As the Union stated in its answer, it does not contest the authority of the City to issue and require the completion of an address verification form, and to take necessary action to ensure compliance with the requirement of completing such form. However, the Union does contest the City's conditioning of the payment of wages upon completion of the form. The Union has established a nexus between the salary provision in the contract and the grievance for which it seeks arbitration.

Accordingly, for the reasons stated above, we shall deny the City's petition challenging arbitrability and grant the Union's request for arbitration.

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 petition challenging arbitrability by the City of New York be, and the same hereby is, denied, and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371 be, and the same hereby is, granted.

Dated: New York, New York
January 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

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