City v. L.924, DC37, 47 OCB 24 (BCB 1991) [Decision No. B-24-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

LOCAL 924, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

DECISION NO. B-24-91

DOCKET NO. BCB-1342-90 (A-3587-90)

DECISION AND ORDER

On December 5, 1990, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration, which was submitted by Local 924, District Council 37, AFSCME, AFL-CIO ("the Union") on September 28, 1990. The grievance concerns the fact that no action was taken on a transfer request of a Department of Parks and Recreation Laborer from one job to another. The Union filed an answer to the City's petition on January 30, 1991. The City filed a reply on March 8, 1991.

BACKGROUND

Edward Furfur ("the grievant") holds the Civil Service title of Laborer. He works for the New York City Department of Parks and Recreation ("the Department") in the borough of the Bronx. In early 1988, he submitted to the Department a "Request for Transfer Within the Borough" form, dated February 17, 1988. The reason that he gave for his request was "advancement." In the Summer of 1989, the grievant submitted another Request for Transfer form, dated July 7, 1989, asking to be moved from Lawn Rehabilitation to Road Repair. The reasons that he gave for the second request were "promotional" and "can do the job."

By form dated August 29, 1989, the grievant filed a Step I grievance

claiming that he had been "overlooked" in "transfer from A Laborer to C+ Laborer." That same day, the grievant's supervisor denied the grievance on the ground that "there are no vacancies for C+ Laborers."[1]

By letter dated September 26, 1989, the grievant's Union filed a request for a Step II hearing on his claim, alleging a violation of "the Comptroller Determination in Job Assignment
Agreement with the Union, DC 37." In a Step II decision dated December 8, 1989, the Department's Deputy Director of Labor Relations denied the grievance, stating that the grievant was not improperly by-passed when he was not upgraded to a C+ Laborer. The Deputy Director also held that "this matter is not grievable as it does not violate any contractual matter or the Comptroller's Determination in any manner whatsoever."

By letter dated December 18, 1989, the Union appealed the Department's Step II decision to City's Office of Labor Relations. The appeal continued to claim a violation of "the Comptroller's Determination in job assignment agreement with DC 37." It added an alleged violation of "Paragraph 8. of the Department of Parks Working Condition Agreement" as a second basis for the

[1] Labor group designations A, B and C+ were created by a determination of the Office of the Comptroller for the City of New York. These groups are not Civil Service designations. See Discussion, infra.

grievance, however.[2]

In a Step III decision, dated May 31, 1989, the Office of Labor Relations concurred with the Step II result. The Step III Review Officer denied the grievance on the ground that:

> [t]he Department's not having appointed grievant, as he requested, to a C+ Laborer position does not represent a matter which can be addressed in the grievance procedure because there are no relevant contractual provisions which address appointments such

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[2] The "Working Conditions Agreement" is incorporated in a memorandum dated May 15, 1986, executed by the Executive Director of District Council 37 and City's Director of Labor Relations. It is a wide-ranging agreement covering pay, time and leave regulations, seasonal employment, provisional promotions, and out-of-title work. Paragraph 8., entitled "Transfer Policy," reads as follows:

> Any employee serving in a permanent position may request a transfer within title to another location by making written application to the Personnel Officer. The applications shall be placed on file in accordance with seniority in a transfer registry, copies of which shall be available in all Borough Offices. The trans-fer registry shall be made available to the Union every three (3) months. Voluntary transfers shall be made on the basis of seniority in title. Transfers based upon responsibility and ability to perform the work required can be made after notice to and discussion with the Union. The DPR reserves the right to make transfer for the good of the agency, after notice to and discussion with the Union. Transfer will not be made for arbitrary and capricious reasons.
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> Involuntary transfers shall be made on the basis of least seniority in title. Seniority in title shall commence on the date of permanent Civil Service appointment and ties will be broken on the basis of original list number. An employee accepting a transfer will forfeit his seniority for a period of six (6) months. An employee declining a transfer will forfeit his seniority for a period of six (6) months. In filling available vacancies, transfer requests shall have priority over the assignment of new employees. However, in cases involving inter-borough transfers only, at least 30% of transfer registry request shall have priority over the assignment of new employees.
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> Probationary employees may be granted transfer requests on the basis of hardship.
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> Temporary transfers outside the district shall be offered on a voluntary basis or in order of inverse seniority, or on any other basis the supervisor may deem appropriate. These assignments shall not be made in an arbitrary or capricious manner. These assign-ments shall be limited to a period of not more than four (4) months. In most instances employees shall be returned to their original assignment unless impractic-able.

as grievant seeks.

With no satisfactory resolution of the grievance having been reached, the Union, on September 28, 1990, filed a request for arbitration. The "Comptroller's Determination in Job Assignment

Agreement," which had formed part of the basis of the grievance at the lower steps, was not referred to by the Union in its arbitration request. The request was predicated solely upon an alleged violation of the "Department of Parks and Recreation Working Conditions [Agreement] ¶8." As a remedy, the Union asked that the grievant be transferred "to C+ Laborer with full back pay and seniority benefits and in all other ways be made whole."

POSITIONS OF THE PARTIES

City's Position

The City maintains that it is under no obligation to arbitrate the dispute underlying the grievance in this case because allegedly the Union has failed to make a connection between the act complained of (the grievant's non-transfer) and a provision of the agreement cited by the Union (Paragraph 8. of the Working Conditions Agreement). According to the City, the transfer policy provisions contained in the Working Conditions Agreement apply to geographic moves from one location to another. The provisions assertedly do not provide for level changes, salary increments, or promotions. Thus, the City argues, the Department's declination to upgrade the grievant's title bears no relationship to the transfer policy restrictions cited by the Union. In the alleged absence of the necessary nexus between the
basis of the grievance and a contractual provision relating to it, the grievance assertedly is not arbitrable.

Secondly, the City claims that the request for arbitration lacks specificity because the Union does not provide sufficient information concerning the actions that the Department allegedly took, and the date or dates upon which those actions occurred. The City points out, for example, that although the Union accuses the Department of transferring people with less seniority ahead of the grievant, it neither identifies the individuals

nor reports their title levels before they were transferred. Without this information, the City contends, it is unable to address the timeliness of the grievance or formulate a suitable response to it.

Finally, the City concludes that because there is no relationship between the terms of Working Conditions Agreement and gravamen of the Union's allegations, and because, in making decisions on the upgrading of personnel, the Department acted within its statutory managerial authority under Section 12-307b. of the New York City Collective ("NYCCBL"),[3] the Union's request for arbitration has no basis and must be dismissed.

Union's Position

The Union notes that this Board limits its inquiries in arbitrability disputes to the question of whether a prima facie relationship exists between an act complained of and the source of the right claimed by a grievant. Once the Board establishes that relationship, assertedly it will not examine the merits of a claim.

The Union points out that the parties' contractual definition of a grievance includes the application or interpretation of a written agreement. It contends that because the Working Conditions Agreement arguably is related

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[3] Section 12-307b. of the NYCCBL, provides, in pertinent part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; . . . .

to the claimed failure of the Department to transfer the grievant from an "A Laborer" group classification to a "C+ Laborer" group classification, the necessary nexus has been established. The Union underscores the fact that the City, in its own pleadings, acknowledges that "transfers requested by employees are granted on the basis of seniority."

Contradicting the City's geographic location claim, the Union maintains that nothing in the transfer policy restricts it to transfers between boroughs. The Union reasons that if such were the case, it would mean that Laborers in one borough could apply for transfers to higher paying positions in another borough, but intra-borough transfers would be precluded. In the Union's view, so narrow an application of the transfer provision would be arbitrary, capricious, and discriminatory.

Responding to the City's claim that the grievance lacks specificity, the Union maintains that all the pertinent information is within the Department's knowledge. It asserts that all transfers requests are on record, as are the names of those employees who were transferred to the C+ Laborer classification over the years. Moreover, the Union notes that in its answer it has given the City the name of at least one Laborer "with far less seniority than [the grievant]" who received a transfer to the C+ Laborer position. With this information, according to the Union, the City "can surely formulate a 'suitable response'."

Finally, the Union contends that the City has mistakenly "raised the specter" of management rights in its objections to the arbitration of this dispute. The Union maintains that the Working Conditions Agreement does not prevent management from transferring employees; it only requires that voluntary transfers are to be based on seniority. According to the Union, it is this limiting language, incorporated in a collectively bargained agreement, that places a restriction on management's general statutory right to reassign personnel.

DISCUSSION

It is public policy, expressed in the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[4] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[5]

In this case, we must determine whether a nexus exists between the act complained of, the failure to transfer a Laborer working for the Department of Parks and Recreation, and certain provisions in the Department of Parks and Recreation Working Conditions Agreement, agreed to by City and by District Council 37, which is the source of an alleged right to arbitration.

There is but one Civil Service title for "Laborer." This is expressed by the Department of Personnel job specification (Code No. 90753, dated February 24, 1969), by the parties' contractual "Unit Recognition and Unit

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[4] E.g. Decision Nos. B-76-90; B-73-90; B-52-90; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[5] Decision Nos. B-76-90; B-73-90; B-52-90; B-31-90; B-11-90; B-41-82; and B-15-82.

Designation" article (Article I),[6] and by the title code designation for Parks and Recreation Department Laborers listed in the periodic reports of the City Payroll Management System. There is no question that the grievant holds this Civil Service title.

The designations "Laborer Group A," "Laborer Group B," and "Laborer Group C+" (group designations) were created by a determination of the Office of the Comptroller for the City of New York and reflect differentials in wages and in examples of typical tasks. They do not constitute Civil Service classifications or modification of existing classifications, and the Civil Service Laborer title has remained undifferentiated.

The "Transfer Policy" provisions in the Working Conditions Agreement narrow the statutory right of management to reassign certain personnel working for the Department of Parks and Recreation, including Laborers. It is well established that the parties to a collective bargaining agreement may agree voluntarily to restrict a given management prerogative in the way that they have restricted management's right to transfer and reassign in the instant

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[6] The unit recognition and designation article reads as follows:

> Section 1.
> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for the bargaining unit set forth below, consisting of employees of the Employer wherever employed . . . [in] any of the below listed title(s):
>
> | Title | Title Code No. |
> |---|---|
> | Laborer | 90753 |
>
> Section 2.
> The terms "employee" and "employees" as used in this Agreement shall mean only those persons in the unit described in Section 1 of this Article.

matter.[7]

Both parties have acknowledged this restriction, and the meaning of the requirement that "[v]oluntary transfers shall be made on the basis of seniority within title" seems to speak for itself. However, if it is alleged that the parties, in their Working Conditions Agreement, intended the "transfers within title" provision to apply to group designations, rather than to the unitary Civil Service title of Laborer, that contention would raise a question of contract interpretation. The resolution of disputes concerning contractual intent and application, we have long held, must be left for an arbitrator to decide.[8]

There is evidence that the grievant, a unit member covered by the Agreement, sought and was denied voluntary transfers to other work assignments within his title on at least two occasions. Further, the Union has alleged that another Laborer, with less seniority than that of the grievant, gained a voluntary transfer ahead of him. In these circumstances, the Union is entitled to have the dispute heard by an arbitrator who will decide whether the facts asserted by the Union are true, and whether all provisions of the Working Conditions Agreement, as intended by the parties, have been satisfied.

The grievant's mention of "advancement" and "promotion" give some indication of the motivation behind his transfer requests. However, such motivation is irrelevant to a claim that provisions of an agreement between the parties prescribing standards and procedures to govern transfer policies have been violated. In other words, an unintended consequence such as an upgrade in a group classification has no direct bearing on our determination of the arbitrability of a dispute that arose under an agreement that ties

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[7] Decision Nos. B-76-90; B-64-89; B-67-88; B-53-88; B-31-87; B-14-87; and B-29-82.

[8] Decision Nos. B-71-89; B-69-89; B-2-89; B-71-88; B-65-88; B-24-88; B-30-86; B-10-86; and B-10-83.

voluntary transfers within title to seniority, when it is alleged by a covered employee that he was passed over for transfer by a fellow employee who held less seniority than he did when his own transfer request was denied.

In the same regard, we see nothing on the face of the transfer policy provisions that necessarily would limit their application to transfer requests in excess of a minimum distance, or from one political or administrative subdivision to another. The Working Conditions Agreement provides that an employee may request a transfer "to another location." A reasonable reading of the clause does not disclose any express intention by the parties to restrict "location" to specific applications. If they intended "location" to be more restrictive than its ordinary meaning would imply, that also is a question of contract interpretation, which is for an arbitrator, not this Board, to decide.[9]

Finally, we find the record sufficient to establish that the City was aware of the nature of the grievant's allegation. He complained that he had been passed over for transfer in the earliest step of his grievance filings. 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.[10] 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 Department violated Paragraph 8. of the Working Conditions Agreement.

For all the above reasons, we find that the Union has met its burden of establishing an arguable relationship between the subject of this grievance,

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[9] Supra, note 8.

[10] Decision Nos. B-70-90; B-29-89; B-61-88; B-35-87; B-23-83; and B-12-83.

transfer rights, and Paragraph 8. of the Working Conditions Agreement, which sets out a transfer policy. We emphasize that this in no manner reflects this Board's view on the merits of the Union's claim.

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 filed by the City of New York, and docketed as BCB-1342-90, be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local

924, District Council 37 in Docket No. BCB-1342-90 be, and the same hereby is granted.

DATED: New York, N.Y.
April 24, 1991

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

GEORGE B. DANIELS
MEMBER

ELSIE A. CRUM
MEMBER