

City v. L.371, SSEU, 47 OCB 29 (BCB 1991) [Decision No. B-29-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of Arbitration

-between-

DECISION NO. B-29-91
DOCKET NO. BCB-1336-90
(A-3421-90)

THE CITY OF NEW YORK,

Petitioner,

-and-

LOCAL 371, SOCIAL SERVICES
EMPLOYEES UNION,

Respondent.

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Decision and Order

On November 9, 1990, the City of New York, appearing by its Office of Labor Relations ("the City" or "OLR") filed a petition challenging the arbitrability of a grievance submitted by Local 371, SSEU ("the Union") on behalf of Mary Davis, Terry Curtis, James Rennick, Mattie Reedy, and Miriam Betancourt ("grievants"). After several extensions of time, the Union submitted an answer on January 18, 1991. The City filed a reply on January 31, 1991.

Background

The grievants are employed by the New York City Department of Health ("the Department"), in the civil service title of Community Associate. On January 9, 1990, the Union filed a letter grievance with OLR, at Step III of the grievance

procedure. The grievance was filed on behalf of Mary Davis, Terry Curtis, and James Rennick and stated, in relevant part, as follows:

On October 7, 1986 a stipulation of settlement ["Stipulation"] was entered in the above case. At the time that settlement was entered into the agency failed to disclose to the Union that individuals Mary Davis, Terry Curtis and James Rennick were included in the group. As a result, these workers have not been paid in accordance with the terms of settlement.

Demand is hereby made that these workers receive the same terms and conditions set forth in the aforementioned stipulation of settlement, a copy of which is enclosed for your reference.

Thereafter, by letter dated February 12, 1990, counsel for the Union supplemented the grievance by adding grievants Mattie Reedy and Miriam Betancourt. On March 14, 1990, a Step III determination was rendered denying the grievance on the ground that the five grievants were not among the individuals named in the Stipulation.

No satisfactory resolution of the dispute having been reached, on April 30, 1990, the Union filed a request for arbitration pursuant to Article VI, Section 2 of the parties' collective bargaining agreement ("the agreement"). Therein, the Union stated that the grievance to be arbitrated involved the City's "non-compliance with the [Stipulation] for named grievants herein regarding out-of-title work." The Union also cited Article VI, Section 1(C), the out-of-title work provision, as the contract provision which had been violated. As a remedy, the Union seeks compliance with the Stipulation.

The Stipulation at issue settled a grievance which the Union filed at step I on January 18, 1985 on behalf of Sandra James, Milford Mahon, Olga DeJuana, et al., all of whom were Community Associates in the Department of Health. This grievance alleged that the grievants were performing out-of-title work and sought additional compensation. Having received no reply to the Step I grievance, the Union filed a Step II grievance on behalf of the group named at Step I. Sometime thereafter,¹ a Step III grievance was filed and settlement negotiations were entered into. The Union alleges that during the negotiations the City representatives provided the Union with the names of those persons whom they stated represented all of the individuals performing the work in question, and that the Union relied on the accuracy of this list. These negotiations resulted in the Stipulation which provided for the payment of a salary differential to each of the named employees, ie., "Sandra James, Teresa Ennis, Weldon G. Flemming Sr., Gwendolyn L. Jackson, Virginia Knowland, Olga Dejuana, and Milford J. Mahon."

Position of the Parties

City's Position

The City claims that the Union's request for arbitration must be denied for several reasons. First, none of the five

¹ In its answer, the Union stated that it was unable to locate the step III appeal in its files.

grievants named in the request for arbitration were parties to the Stipulation and, therefore, the Stipulation bears no relation to the grievants. The City argues that the grievance settled by the Stipulation was an individual grievance in which several specified individuals were named, not a group grievance identifying a specific group within the bargaining unit. According to the City, if the parties had wanted to confer the benefits set forth in the Stipulation on all employees who were Community Associates at the time that the Stipulation was executed, they would have done so. The City maintains that the Union cannot expand the list of grievants now in its request for arbitration. To do so, the City argues, would "subvert the purpose of and deprive the other party of the benefits of the multistep grievance procedure."

The City also contends that a stipulation cannot be used as the basis for a grievance as defined by Article VI, Section 1² of the Collective Bargaining Agreement because it does not

² Article VI, Section 1 of the contract provides, in relevant part, as follows:

Definition: The term "Grievance" shall mean:

(A) A dispute concerning the application or interpretation of the terms of this Agreement;

(B) 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;

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

constitute a rule, regulation, written policy or order. Additionally, the City notes that by its own terms, the Stipulation provides that it shall have no precedential effect and cannot be used in any proceeding except one seeking to enforce the Stipulation itself. Since the grievants were not parties to the stipulation, the City claims that they lack standing to enforce it.

The City asserts that the Union has failed to establish a nexus between its grievance and the contract provision it alleges was violated. There is no arguable relationship, the City maintains, between a contract provision which concerns a wrongful assignment of work and the Petitioner's alleged failure to comply with a Stipulation pertaining to individuals that were the subject of another grievance.

Addressing the Union's claim that this is actually an out-of-title grievance, the City notes that the Step III letter contains no claim that the instant grievants have been doing out-of-title work. Furthermore, the City argues, the request for arbitration does not state that the grievants have been performing out-of-title work; there is no mention of the grievants' titles or duties.

Union's Position

The Union contends that the Petition Challenging Arbitrability "mischaracterizes" the request for arbitration as being based on the Stipulation. In fact, the Union maintains, the request for arbitration cites the out-of-title provision and is based upon a claimed violation of that provision. The Union submits that the grievants are performing duties which are substantially different from those stated in their job specification as Community Associate and that such a claim is clearly arbitrable.

The Union argues that notwithstanding the prohibition in the Stipulation against offering it as evidence in any other proceeding, the Stipulation should be admissible in the instant request for arbitration for two reasons:

First, as to Mary Davis, Terry Curtis, and James Rennick, "the failure by the Department of Health to disclose their names to the Union during the negotiations of the Stipulation, whether intentional or inadvertent, should vitiate the otherwise preclusive effect of the provision." The Union asserts that the grievance which led to the Stipulation was filed as a group grievance; individuals were not identified until the stipulation was drawn and at that point the Union relied on the City's representation that the list was complete. Thus, the Union argues, the City is bound by its representation.

Second, as to Weldon G. Fleming Sr. and Gwendolyn L. Jackson, the Union maintains that since they replaced individuals who were named specifically in the stipulation, "the preclusive language of the stipulation should not apply to them because they are successors in interest to the named employees covered by the Stipulation."

In any event, the Union argues, the admissibility of the Stipulation is an evidentiary question for the arbitrator to decide.

DISCUSSION

 In considering challenges to arbitrability, this Board has a responsibility to ascertain whether an apparent relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration.³ Thus, when challenged to do so, a party requesting arbitration has the burden of showing that the provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.⁴

In the instant case, the City argues that the Union has failed to demonstrate an arguable relationship between the provision which it claims has been violated, Article VI, Section 1(C), and its grievance. There is no nexus, the City contends,

³ E.g., Decision No. B-19-90.

⁴ E.g., Decision No. B-19-90.

between an alleged failure to comply with the Stipulation and the out-of-title provision of the Agreement. The City also argues that if this is an out-of-title grievance, as the Union maintains, this issue was not raised during the Step III grievance. As to the Stipulation, the City argues that it does not fall within the parties's definition of a grievance since it is not a rule, regulation, written policy or order. Additionally, the City contends, the grievants lack standing to enforce the Stipulation by virtue of the fact that they were not parties to its provisions.

The Union contends that, contrary to the City's assertion, this grievance is based not on the Stipulation, but on the out-of-title provision of the Agreement. The Union maintains that the grievants are performing out-of-title work and that such a claim is clearly arbitrable pursuant to the terms of the out-of-title provision. The Stipulation, the Union asserts, is being offered only as evidence, and evidentiary questions must be left to the arbitrator to decide.

It is clear that an out-of-title grievance is arbitrable pursuant to Article IV, Section 1(C) of the parties' collective bargaining agreement. It is equally clear that the Stipulation is not arbitrable. As the City contends, a Stipulation is not a rule, regulation, written policy or order and therefore does not fall within the parties' contractual definition of the term

"grievance".⁵ In any event, the Stipulation, by its own terms, requires that it cannot be used in any proceeding, except one seeking to enforce the terms of the Stipulation itself. The grievants named in the request for arbitration were not parties to the Stipulation and, therefore, we find that the Union lacks standing to enforce the provisions of the Stipulation for their benefit. As the City convincingly argues, if the parties had wanted to include all Community Associates similarly situated in the Stipulation, they could have done so.

Thus, the dispositive issue in this case is whether the alleged violation of the out-of-title provision was properly raised at Step III of the grievance procedure, or whether it was a novel issue raised by the Union for the first time in its request for arbitration. This Board has consistently denied requests for the arbitration of claims that are not raised at the

⁵ In Decision No. B-59-90, we held that:

[A written statement by the Department] will not be accorded the status of a "written policy or rule" unless such a response is addressed generally to the Department and sets forth a general policy applicable to the affected employees... [O]nly if [written statements] meet these criteria can they be considered written rules of the Department.

See also, Decision No. B-74-90. Applying this principle to the instant matter, we note that the Stipulation, by its terms, was limited to the employees referred to therein. It was not applicable generally to all Community Associates.

lower steps of the grievance procedure.⁶ We have stated on many occasions that:

[t]he purpose of the multi level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at [arbitration]...a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement.⁷

Applying these principles, we note that if the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied.⁸ This is true even when the Union does not specifically refer to the applicable contract provision at Step III.⁹ However, the Union must comply with the specifications of prior Board decisions wherein we held that a union is obligated to inform the City when it believes that the scope of a grievance is broader than that stated by a hearing officer.

⁶ Decision Nos. B-29-89, B-40-88, B-31-86, B-6-80.

⁷ Decision Nos. B-29-89, B-10-88, B-35-87, B-31-86.

⁸ Decision Nos. B-29-89, B-13-87.

⁹ Decision No. B-29-89.

The record in the instant case demonstrates that at the Step III hearing the parties addressed themselves solely to the issue of the alleged non-compliance with the Stipulation. The January 9, 1990 grievance letter does not mention out-of-title work; it only alleges that the grievants have not been paid in accordance with the terms of the Stipulation. It is clear from the decision of the Hearing Officer at Step III that the out-of-title issue was not considered. The Hearing officer framed the grievance as follows: "[c]ounsel protests that these workers have not been paid in accordance with said settlement and demands that these workers receive the same terms and conditions set forth in the aforementioned Stipulation of Settlement." He concluded that "[s]ince the Union entered into a fully executed Stipulation of Settlement on behalf of the above named individuals, it cannot seek payment for the additional complainants according to said October 7, 1986 settlement."

If the Union believed that the scope of the grievance was broader than that defined in the decision of the Hearing Officer, we find that it had an obligation to make its belief known to the City. The record does not contain evidence of any objection by the Union to the City's stated understanding of the scope of the grievance. Having failed to object, we find that the out-of-title claim constitutes a new claim which the Union may not present for the first time in arbitration. Inasmuch as the alleged out-of-title violation may still exist, however, our

decision is without prejudice to the filing of another grievance by the Union on behalf of the grievants named herein.

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 request for arbitration filed by the Social Services Employees Union Local 371 on behalf of Mary Davis, Terry Curtis, James Rennick, Mattie Reedy, and Miriam Betancourt be, and the same hereby is denied; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted.

DATED: New York, N.Y.
May 23, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS GIBLIN
MEMBER