City v. L.371, SSEU, 47 OCB 45 (BCB 1991) [Decision No. B-45-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
-between-	DECISION NO. B-45-91
	DOCKET NO. BCB-1366-91
CITY OF NEW YORK,	(A-3652-90)
Petitioner,	
-and-	
SOCIAL SERVICE EMPLOYEES UNION LOCAL 371,	
Respondent.	

DECISION AND ORDER

On February 4, 1991, the City of New York ("the City"), appearing by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance submitted by Local 371, SSEU ("the Union") on behalf of Andrea D. Bates ("the grievant"). On March 22, 1991, the Union amended its request for arbitration. On April 15, 1991, the City filed an amended petition challenging arbitrability. The Union submitted an answer to the amended petition on June 21, 1991. The City did not file a reply.

Background

The grievant is employed by the City's Human Resources Administration ("HRA") in the position of Supervisor I. On December 6, 1989, two grievances were filed at Step I of the

grievance procedure on behalf of the grievant. The first grievance alleges violations of the HRA Non-Managerial Performance Evaluation Manual ("HRA Manual") pertaining to several evaluation periods. This grievance was granted at Step II and the evaluations were expunged from the grievant's personnel folder.

The second grievance alleges a violation of Article X, Section 1 of the Citywide Collective Bargaining Agreement.[1] The Union maintains that the grievant's personnel folder contains a "derogatory" memo that the grievant never saw. According to the Union, this memo purports to be a covering letter for an evaluation recommending demotion which does not exist. This grievance was denied at Step I, Step II and Step III of the grievance procedure.

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[1] Article X, Section 1 of the Citywide Agreement provides: An employee shall be required to accept a copy of any evaluatory statement of the employee's work performance or conduct prepared during the term of this Agreement if such statement is to be placed in the employee's permanent personnel folder whether at the central office of the agency or in another work location. Prior to being given a copy of such evaluatory statement, the employee must sign a form which shall indicate only that the employee was given a copy of the evaluatory statement but that the employee does not necessarily agree with its contents. The employee shall have the right to answer any such evaluatory statement filed and the answer shall be attached to the file copy. Any evaluatory statement with respect to the employee's work performance or conduct, a copy of which is not given to the employee, may not be used in any subsequent disciplinary actions against the employee. At the time disciplinary action is commenced, the Employer shall review the employee's personnel folder and remove any of the herein-described material which has not been seen by the employee.

An employee shall be permitted to view the employee's personnel folder once a year and when an adverse personnel action is initiated against the employee by the Employer. The viewing shall be in the presence of a designee of the Employer and held at such time and place as the Employer may prescribe.

No satisfactory resolution of the dispute having been reached, on January 14, 1991, the Union filed a request for arbitration on behalf of the grievant. The request for arbitration does not cite the Citywide Agreement; rather, it characterizes the grievance as a "[v]iolation of the HRA Non-Managerial Employee Performance Evaluation Manual regarding the grievant by including in her personnel folder memoranda regarding her performance not previously shown to her." As a remedy, the grievant seeks "[e]xpungement of aforesaid memoranda."

By letter dated March 22, 1991, the Union, with the City's consent, amended its request for arbitration with the Office of Collective Bargaining. The letter stated that the request for arbitration should be amended "to delete therefrom any alleged violation of the HRA Non-Managerial Performance Evaluation Manual and to substitute as the alleged violation Article X, Section 1 of the Citywide Agreement." The letter also stated that the City's petition challenging arbitrability should be deemed withdrawn. However, by letter dated April 2, 1991, the Union informed the Office of Collective Bargaining that the March 22nd letter contained an error as a result of a misunderstanding; the City would not be withdrawing its petition challenging arbitrability, although it might elect to file an amended petition challenging arbitrability.

Positions of the Parties

City's Position

The Original Petition Challenging Arbitrability

The City argues, in its original petition challenging arbitrability, that the Union's request for arbitration should be denied because the Union did not allege that the HRA Manual had been violated in any of the earlier steps of the grievance procedure. The City argues that the Union may not raise a claimed violation of the Manual for the first time in the request for arbitration.

The City also argues that, in any event, the Union has failed to establish a nexus between the grievance and the HRA Manual. According to the City, the Manual only provides instructions for the evaluation of non-managerial employees; it is devoid of any provision that treats commentary memoranda placed in am employee's file.

Amended Petition Challenging Arbitrability

In its amended petition challenging arbitrability, the City contends there is no nexus between the grievance and the contract provision invoked. According to the City, Article X, Section 1 of the Citywide Agreement provides: 1) that employees are required to sign for and accept a copy of any evaluatory statement given to them; 2) that employees have the right to respond to any evaluatory statement and have their response attached to the statement in the file; 3) that no statement in

the file that had not been shown to an employee can be used in a subsequent disciplinary action against that employee; and 4) that employees may review their personnel files yearly or when disciplinary actions are commenced. There is nothing in this provision, the City contends, that obligates the City to show a statement to the employee prior to placing it in her file. The City argues that "[i]f such statements could not be placed in a file, there would be no reason to provide that statements in the personnel file not shown to the employee may not be used in disciplinary proceedings or for requiring that the employer remove such items from the file when disciplinary actions are commenced."

The City further argues that "there is also nothing in Article X, Section 1, of the Citywide Agreement that speaks to the HRA Evaluation Manual." The City explains that "[e]ven if the City's actions were to have violated the Manual, because the Manual has no connection to Article X, Section 1, a request for arbitration concerning such a violation and invoking that contract provision would not be arbitrable."

Finally, the City argues that the Union lacks standing to represent the employee in an arbitration concerning the Citywide Agreement. According to the City, Article I, Section 1 of the Citywide Agreement provides that District Council 37, AFSCME, AFL-CIO ("DC 37"), is the sole and exclusive collective bargaining representative on citywide matters. Therefore, the

City contends, the Union may not represent the grievant in this matter.

Union's Position

The Union argues that the nexus between the grievance and Article X, Section 1 of the Citywide Agreement is sufficient to allow this case to proceed to arbitration. The Union contends that the memorandum was clearly an evaluatory statement of the grievant's work performance or conduct within the meaning of Article X, Section 1. As such a memorandum, the Union argues, Article X, Section 1 of the Citywide Agreement requires the agency to give the grievant a copy of it.

According to the Union, the first sentence of the provision, which states that "[a]n employee shall be required to accept a copy of any evaluatory statement of the employee's work performance or conduct...if such statement is to be placed in the employee's permanent folder...," imposes an obligation on the part of the agency to give such material to the employee, and on the part of the employee to accept the material. This language, the Union contends, does not provide the City with the option of giving such material to the employee. According to the Union, an analysis of the remaining language found in this provision further supports the merits of this interpretation.

Addressing the standing issue raised by the City, the Union argues that as a constituent local union of DC 37 and therefore a

party to the Citywide Agreement, it clearly has standing to pursue this grievance. Should the Board find otherwise, the Union asserts that it is prepared to submit a written waiver from DC 37 authorizing respondent to represent the Grievant.

DISCUSSION

As a preliminary matter, we find that the Union's amended request for arbitration makes it clear that it is alleging a violation of the Citywide Agreement instead of the HRA Manual. Specifically, the amended request "deletes" any alleged violation of the HRA Manual and "substitutes" an alleged violation of the Citywide Agreement. Since the City consented to this amendment, we will deem the request for arbitration to allege only a violation of Article X, Section 1 of the Citywide Agreement and will not consider any of the City's arguments regarding the HRA Manual.

We note that the parties do not dispute that they are obligated to arbitrate their controversies; nor do they deny that a claimed violation of the Citywide Agreement is within the scope of their agreement to arbitrate. The issue we must address, therefore, is limited to the City's contention that the Union has failed to demonstrate a nexus between the right claimed to have been violated and Article X, Section 1 of the Citywide Agreement. In circumstances such as these, the union has the duty to show the existence of an arguable relationship between the provisions

invoked and the grievance to be arbitrated.[2] Once an arguable relationship is shown, this Board will not consider the merits of a case; it is for the arbitrator to interpret and decide the applicability of the cited provisions.[3]

The City argues, in essence, that the Union cannot establish the requisite nexus because Article X, Section 1 of the Citywide Agreement in no way obligates the City to show an evaluatory statement to an employee before placing it in her personnel folder. The Union, on the other hand, argues that it has established a nexus since the Citywide Agreement clearly imposes such an obligation.

Where we are required to determine whether a cited provision is arguably related to the grievance to be arbitrated, we need only find that the provision alleged to have been violated provides a colorable basis for the Union's claim.[4] We resolve doubtful issues of arbitrability in favor of arbitration.[5]

The Citywide Agreement provides that "[a]n employee shall be required to accept a copy of any evaluatory statement of the employee's work performance or conduct ... if such statement is

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[2] Decision Nos. B-46-91; B-73-90; B-25-90; B-11-90; B-68-89; B-35-86.

[3] Decision Nos. B-46-91; B-29-89; B-54-88; B-37-88; B-36-88.

[4] Decision Nos. B-46-91; B-30-89; B-5-89; B-24-88; B-9-83.

[5] Decision Nos. B-46-91; B-35-90; B-65-88; B-15-80.

to be placed in the employee's permanent personnel folder..." (emphasis added).[6] The Union argues that this language imposes an obligation on the part of the agency to give such material to the employee.[7] The Union's claim is not patently unreasonable and represents an arguable interpretation of this provision, the merits of which must be judged by an arbitrator. We therefore find that there is an arguable relationship between the Union's claim and the Citywide Agreement.

Once we have found that a nexus exists, our inquiry ends. Whether the City was obligated to show the grievant the memo in question prior to placing it in her personnel file, as claimed by the Union, is a matter of contract interpretation appropriately resolved by arbitration. We make no determination of that issue here. Having determined that the Union has demonstrated the requisite nexus between the provision of the Citywide Agreement and its claim, we deny the City's petition challenging arbitrability.

We next consider the City's argument that the Union lacks standing to represent the grievant in an arbitration concerning the Citywide Agreement. Only the Citywide representative and the

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[6] We note that in its argument, the City failed to include this language when it set forth the requirements of Article X, Section 1.

[7] The Union's analysis of the remaining language found in this provision goes to the merits of this dispute and are therefore for an arbitrator to decide.

City may initiate arbitrations under the Citywide Agreement. However, a unit representative may seek permission from the Citywide representative to process a grievance through the arbitration procedures.[8] In the instant case, the Union has offered to obtain such permission. Having found that the requisite nexus exists, we will grant the request for arbitration on the condition that the Union file such written authorization by DC 37 within 10 days from the date of receipt of this decision.

ORDER

[8] Decision No. B-18-81.

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

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

ORDERED, that the request for arbitration of the Social Service Employees Union Local 371 be, and the same is, granted provided the Union file written authorization by DC 37 within 10 days from the date of receipt of this decision.

DATED: New York, New York
November 25,1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
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MEMBER

GEORGE B. DANIELS
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