City v. L.371, SSEU, 47 OCB 46 (BCB 1991) [Decision No. B-46-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration -between- CITY OF NEW YORK, Petitioner, -and- SOCIAL SERVICE EMPLOYEES UNION LOCAL 371, Respondent.	DECISION NO. B-46-91 DOCKET NO. BCB-1294-90 (A-3445-90)

DECISION AND ORDER

On June 14,1990, 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 Michael Weiss ("the grievant"). After several extensions of time, the Union submitted an answer on March 21, 1991. The City filed a reply on May 17, 1991.

Background

The grievant is employed by the Child Welfare Agency ("CWA") of the City's Human Resources Administration ("HRA") in the position of Supervisor II. The grievant supervises a

"preventive" unit. In 1989 five CWA caseworkers, Jody Jennings, Nancy M. Scully, Cornell Williams, Louis Salinas, and Jocelyn Jordan ("the caseworkers"), were transferred from their "protective" units to the grievant's preventive unit.[1] Following their transfers, they were supervised by the grievant. The caseworkers were required to take their protective cases with them upon transferring, and continue working on them while under the grievant's supervision. The Union alleges that the grievant expressed his objection to being required to supervise the caseworkers' protective work and requested that such cases be removed from their caseloads. According to the Union, this request was denied.

On March 14, 1989, the Union, on behalf of the grievant and the caseworkers,[2] filed a Step I grievance with the Borough Director for HRA. Therein, the Union maintained that the

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[1] The pleadings submitted by the parties do not explain the difference between preventive and protective units. However, the Union did submit the Step II grievance form as an exhibit to the request for arbitration. In this document, the grievants state the following:

> Under the Reorganization Agreement only Protective, Sex Abuse, Hospital, Screening, CIU and ECS workers would be performing "protective functions" enabling them to be paid the reorganization differential. The workers in the "preventive" areas such as Family Services and Investigation and Report would not receive the reorganization differential and therefore would be exempt from working on "protective cases."

[2] The Step I grievance was filed on behalf of Weiss, Jennings, and Scully. The Step II grievance was filed on behalf of the same individuals, but included the phrase "et al." It appears that this was done because Williams, Salinas, and Jordan were transferred to the grievant's unit sometime after Jennings and Scully were transferred. Finally, the Step III grievance was filed on behalf of Weiss and Scully.

inclusion of protective cases in a preventive unit is a violation of the Reorganization Letter Agreement ("the letter agreement").[3] The Union requested one of two remedies; either removal of the protective cases from the preventive unit or payment of the protective differential to the grievant and the caseworkers. This grievance was denied, as were the subsequent Step II and Step III grievances. No satisfactory resolution of the dispute having been reached, on May 17, 1990, the Union filed a request for arbitration naming only the grievant. The request for arbitration characterizes the grievance as a "[v]iolation of

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[3] The Reorganization Agreement was negotiated in 1987 in response to a reorganization within CWA's predecessor agency, Special Services for Children ("SSC"). It provides, in relevant part:

> The parties recognize that the instant SSC Reorganization is limited to "Protective" units and that any reorganization of "Preventive" units is a matter for future discussion.
>
> The parties agree to amend Article III, Section 8 of the 1984-1987 Social Services Agreement to provide assignment differentials in the pro-rated annual amount indicated below:
>
> | Title | Annual Amount |
> |---|---|
> | Caseworker | $ 850 |
> | Social Worker | $1250 |
> | Supervisor I (Welfare) | $1250 |
> | Supervisor II (Welfare) | $1375 |
>
> These differentials shall be effective June 30, 1987, and shall apply solely to employees in the "protective" units affected by the SSC reorganization. Employees assigned to affected training units who have served continuously in such units for three (3) months will receive said differentials retroactive to their date of assignment.

[the] SSC reorganization letter agreement dated December 29, 1987 by failure to pay grievant assignment differential," and seeks as a remedy "[p]ayment of [the] differential for periods during which grievant performed covered work."

Positions of the Parties

City's Position

The City argues the Union's request for arbitration should be denied because the Union has failed to establish any nexus between the grievance and the letter agreement it claims has been violated. The burden of proof to establish the nexus, the City argues, is on the Union. The City contends that the Union cannot meet this burden since the grievant is assigned to a unit that is expressly exempt from the letter agreement. In this regard, the City contends that none of the decisions cited by the Union entail a situation in which the grievant was expressly exempt from the agreement.

In support of its argument that preventive units are expressly excluded from the letter agreement by "clear and unambiguous language", the City points out that the agreement states that "differentials...shall apply solely to employees in the protective units affected by the SSC reorganization." Further, the City notes, the agreement provides:

> The parties recognize that the instant SSC Reorganization is limited to "Protective" units and that any reorganization of "Preventive" units is a matter for future discussions.

Since the agreement applies solely to employees in the protective units, the City argues, the Union cannot establish the requisite nexus and should not be allowed to invoke the agreement as a source of the right to arbitrate a claim brought by a preventive unit grievant. In furtherance of this argument, the City refers the Board to Decision No. B-68-89 which, in relevant part, states:

> Where contract language or a provision of a department order or policy is clear and unambiguous on its face, as in this case, we will look no further into the intent of the parties or to other provisions of the policy at issue.

The City also argues that the letter agreement implicitly acknowledges the possibility that some employees doing protective work will not receive the differential. According to the City, this is implied in two ways. First, the City maintains, by specifying that only employees in "protective units affected by the SSC reorganization" shall be eligible for the differential, the agreement implies the existence of units not effected by the reorganization. Second, the letter agreement provides that even employees in the affected units do not receive the differentials until they have "served continuously in such units for three (3) months." Therefore, the City argues that the letter agreement recognizes, by inference, the existence of employees who might be doing protective unit work but do not receive the differential

because they are not in units covered by the letter agreement or have not served in such units for three months. Thus, according to the City, the Union's argument that the agreement is "silent" on the issue presented must fail.

Finally, the City argues that the Union had the opportunity to include preventive unit employees in the letter agreement at the time of negotiation, but failed to do so. Furthermore, the City maintains, subsequent to the signing of the letter agreement the Union still failed to obtain inclusion of the preventive unit employees. Therefore, the City argues, the Union should not be permitted to achieve through arbitration what it failed to achieve through collective bargaining.

Union's Position

The Union argues that the nexus between the grievance and the letter agreement is sufficient to allow this case to proceed to arbitration. The Union contends that the letter agreement was clearly intended to compensate employees performing protective work. While the Union concedes that the letter agreement provides no differentials for employees in preventive units, it argues that the agreement is silent on the subject of whether the differential is payable under the facts of this case, i.e., where a supervisor in a preventive unit is required to supervise work on protective cases performed by employees transferred into his

unit. The Union contends that the resolution of the instant grievance requires the application or interpretation of the letter agreement, and that such application or interpretation is properly part of the arbitral process.

The Union argues that the nonpayment of the differential to the grievant is at least an arguable violation of the letter agreement, and refers the Board to Decision No. B-2-91. The factual situation presented in the instant case, the Union argues, is one which could rationally be construed by an arbitrator as requiring payment of differential under the letter agreement. The Union argues that whether the differential is payable could be found by the arbitrator to depend on several factors such as the amount of the protective work performed in comparison with preventive work performed and the duration of the work. The Union contends that these are questions that go to the merits of the dispute, and are therefore for the arbitrator to decide.

DISCUSSION

As a preliminary matter, 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 letter 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 the letter 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.[4] 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.[5]

The City argues, in essence, that the Union cannot establish the requisite nexus since preventive units are both expressly and implicitly excluded from the letter agreement. The Union, on the other hand, argues that it has established a nexus in light of the fact that the letter agreement was intended to compensate employees performing protective work. According to the Union, the resolution of the instant grievance requires the interpretation and application of the letter agreement, and is therefore within the arbitrator's realm.

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

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[4] Decision Nos. B-73-90; B-25-90; B-11-90; B-68-89; B-35-86; B-25-83.

[5] Decision Nos. B-29-89; B-54-88; B-37-88; B-36-88; B-10-83.

provides a colorable basis for the Union's claim.[6] We resolve doubtful issues of arbitrability in favor of arbitration.[7]

The letter agreement grants "assignment differentials" solely to employees in protective units. It addresses neither the situation in which a preventive unit employee is required to continue working on protective cases after being transferred from a protective unit to a preventive unit, nor the situation in which a preventive unit supervisor is required to supervise such work. The Union argues that the differential was intended to compensate employees performing protective work. The Union's claim is not patently unreasonable and represents an arguable interpretation of the term "assignment differential," the merits of which must be judged by an arbitrator. The City's arguments that the letter agreement explicitly excludes preventive unit employees and implicitly acknowledges the possibility that some employees doing protective work will not receive the differential, address the merits of the grievance and present questions for an arbitrator, rather than this Board, to decide. We therefore find that there is an arguable relationship between the Union's claim and the letter agreement.

The City's reliance on this Board's decision in B-68-89 is misplaced. In that decision the Board found that the union had

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[6] Decision Nos. B-30-89; B-5-89; B-24-88; B-9-83.

[7] Decision Nos. B-35-90; B-65-88; B-15-80.

failed to establish an arguable relationship between the grievance and an Operations Order which did not cover the grievant's unit. However, that case did not involve an allegation that the grievant was performing the work of covered employees.

The City also contends that the Union should not be allowed to achieve through arbitration what it failed to achieve through collective bargaining. While this is accurate, it is for an arbitrator to decide what the parties intended to achieve at the bargaining table. If, for example, the arbitrator were to decide that the parties intended to compensate protective work, it could not be said that the Union had gained through arbitration what it failed to achieve through collective bargaining.

Once we have found that a nexus exists, our inquiry ends. Whether the grievant is entitled to the assignment differential, 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 provisions of the Agreement and its claim, we deny the City's petition challenging arbitrability.

ORDER

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, and the same is granted.

DATED: New York, New York
October 23,1991

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Elsie A. Crum
MEMBER