City v. DC37, 47 OCB 60 (BCB 1991) [Decision No. B-60-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
-between-	
THE CITY OF NEW YORK,	DECISION NO. B-60-91
Petitioner,	DOCKET NO. BCB-1400-91 (A-3771-91)
-and-	
DISTRICT COUNCIL 37, AFSCME,	
Respondent.	

DECISION AND ORDER

On July 19, 1991, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance filed by Local 1549, District Council 37, AFL-CIO, AFSCME ("the Union" or "District Council 37"). The Union's request for arbitration was dated May 23, 1991. The grievance asserted that the Department of General Services ("DGS") repeatedly violated the Clerical-Administrative Titles contract by assigning clerical work to employees holding the Community Associate title. The Union filed an answer on October 11, 1991. The City filed a reply on October 16, 1991.

BACKGROUND

On October 31, 1986, District Council 37 filed a similar out-of-title work grievance on behalf of a large group of unit employees. In that grievance, the Union alleged that five City agencies[1] had been violating Article VI, Section 1(C), and Article VI, Section 13 of the Clerical-

[1] Department of Health; Department of Parks and Recreation; Comptroller's Office; Department of Law; and Department of General Services.

Administrative Titles contract[2] by "continually assign[ing] employees in the title of Community Service Aide (code #52406) to duties which are solely clerical administrative and which differ substantially from the duties described in the job specifications for the title of Community Service Aide."

On September 28, 1987, District Council 37 and its affiliate, Local 1549, entered into a Stipulation of Settlement with the City at Step III. In their Stipulation of Settlement, the parties agreed to the following:

> [A]s attrition creates vacancies in Community Associate, Community Assistant, Community Coordinator or Community Service Aide positions each vacancy will be evaluated to assess the need for a replacement and to determine the appropriate title for a position. Every effort will be made to fill positions which are solely clerical in nature with the appropriate clerical title.

With the Union's concurrence, the City now elaborates upon the Stipulation: "In other words, the parties agreed that until the incumbent left the Community line position, there would be no question as to the clerical duties performed by that person. Once the incumbent left the position, the agency would evaluate the position and determine what title it should bear." Both District Council 37 and Local 1549 were signatories to the Stipulation, as was the Department of General Services. Part of the settlement specified that the Union would withdraw with prejudice the underlying grievance.

In its May 23, 1991 request for arbitration of the present grievance, the Union defines the issue as: "Whether the Department of General Services is using Community Associates to work in clerical titles." It cites Article VI, Section 13 of the Clerical-Administrative Titles contract as the provision

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[2] Article VI, Section 1.(C), includes within the definition of the term "grievance": A claimed assignment of employees to duties substantially different from those stated in their job specifications.

Article VI, Section 13., provides that claims of unit employees who allegedly have been assigned to clerical-administrative duties substantially different from duties stated in their job specifications may take their grievances directly to the arbitration step of the parties' grievance procedure.

that the DGS allegedly has violated. As a remedy, the Union wants the Department to stop using Community Associates in clerical titles, and "reinstate only clerical-administrative employees to clerical duties."

POSITIONS OF THE PARTIES

City's Position

The City emphasizes that in 1987, as a condition of the Stipulation of Settlement of the identical grievance, the Union withdrew with prejudice its claim alleging that the DGS had violated Article VI, Section 13 of the Clerical-Administrative Titles contract. It argues the 1987 Stipulation remains a viable and an enforceable agreement, which sets up a framework for guiding the parties in the future with respect to issues concerning Community line assignments. According to the City, the existence of the Stipulation estops the Union from arbitrating this subsequent grievance because the matter has been resolved previously. It maintains that this Board should not permit the arbitration of an issue that the parties have settled already through a stipulation. In the City's view, doing so would damage the integrity of settlement agreements, and would discourage the peaceful resolution of labor disputes in the future.

The City alternately charges that what the Union really is attempting to arbitrate is whether the City has complied with the 1987 Stipulation. The City supports this assertion by pointing out that in two requests for a Step II hearing, and in a third request for a Step III hearing, the Union based its cause of action partly upon a "violation of stipulation dated September 28, 1987, regarding community titles serving in clerical positions." According to the City, this Board, in Decision No. B-29-91, held that stipulations of settlement are not arbitrable because they do not fall within any of the contractual definitions of the term "grievance." It contends that while the Union has adequate fora in which to seek relief, arbitration is not one of

them.

Union's Position

The Union stresses that its arbitration request arises out of years of new grievances that post-date the 1987 Stipulation of Settlement. In the Union's view, the Stipulation is not controlling because the City has continued to use Community titles to fill positions that are clerical in nature. According to the Union, this amounts to new and independent contractual violations that qualify for arbitration.

The Union contends that it has satisfied all necessary conditions precedent for arbitration: the City had clear notice of its claim at the earliest appropriate step of the grievance procedure; and there is an arguable nexus between the acts complained of and a related contractual provision. The Union concludes by pointing to this Board's long-standing policy favoring arbitration as the preferred means of resolving employment disputes.

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.[3] 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.[4]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement. The City does not deny that disputes concerning Community-titled employees allegedly working in out-of-title clerical positions ordinarily fall

[3] Decision Nos. B-24-91; 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.

[4] Decision No. B-24-91; B-11-90; B-41-82 and B-15-82.

within the scope of the parties' agreement to arbitrate. Relying upon one of our more recent decisions, however, the City argues that the existence of the 1987 Stipulation of Settlement causes this otherwise arbitrable grievance to become non-arbitrable.

Decision No. B-29-91 does not stand for the proposition that the City attributes to it. In challenging arbitrability in that case, the City carefully documented and reiterated that the original settlement stipulation covered "an individual grievance in which several specified individuals were named, not a group grievance identifying a specific group within the bargaining unit." The City opposed arbitration of the second grievance because the union filed it on behalf of five additional people not part of the original grievance and not named in the settlement agreement. It was upon this basis that the City argued, and we agreed, that the stipulation of settlement covering the original grievants could not be used as a vehicle for arbitrating a new grievance by a new group of people who had not themselves exhausted the lower steps of the grievance procedure. The reason we gave for this was two-fold: First, settlement agreements that are of limited scope fall outside the contractual definition of the term grievance, because they are not equivalent to a written rule or policy setting forth a general departmental practice. Second, the stipulation in that case, by its own terms, specified that it could not be used in any proceeding, except one seeking to enforce the terms of the stipulation itself. At the end of Decision No. B-29-91, we noted that since the alleged out-of-title violation may still exist, the denial of arbitration based upon the stipulation did not prevent the union from filing another grievance on behalf of the new group of grievants.

Key aspects of the case now before us differ significantly from those presented in Decision No. B-29-91: Both the 1987 grievance and the present grievance are group grievances covering large numbers of unnamed employees

throughout an entire agency, and in both instances the Union exhausted, or attempted to exhaust, the lower steps of the grievance procedure. In spite of these distinctions, the City interprets Decision No. B-29-91 to mean that once a contract dispute has been settled by stipulation, that settlement agreement automatically creates an estoppel to every future dispute involving the same contract claim, regardless of whether the future dispute involves new grievants and/or subsequent violations. Only by declining to enter into settlement agreements in the first place could far-sighted parties prevent this eventuality -- a strategy that totally contradicts sound labor policy, and one that we do not countenance.

Having distinguished the facts in the case now before us from those in Decision No. B-29-91, we nevertheless find, in this case, that the terms of the stipulation evidence the fact that the parties mutually expected their 1987 Stipulation of Settlement to be binding upon them prospectively, and to be conclusive of the issue decided. The underlying grievance filed by District Council 37 in 1986 pertained to all Community Service Aides working in five major City agencies, including the DGS. The Stipulation of Settlement, signed a year later, covered not only the entire group of Community Service Aides, but was broadened to include Community Associates, Community Assistants and Community Coordinators as well. The parties agree that one purpose behind the 1987 Stipulation was to foreclose the Union from objecting to incumbents performing clerical duties. Concerning future appointees, the Stipulation contained an adjustment mechanism: "Once the incumbent left the position, the agency would evaluate the position and determine what title it should bear." There is no allegation that management is not making the evaluations as prescribed. Finally, the Union agreed to withdraw its 1986 grievance "with prejudice."

In these circumstances, we find that the existing Stipulation forecloses the Union from taking its present grievance to arbitration. The parties

stipulated that incumbent Community-titled employees may continue to perform clerical duties in the Department of General Services. They also stipulated to a mechanism for determining the title that vacancies should bear as they occur. If the Union has concluded that the mechanism to which it agreed has proved unsatisfactory, the bargaining table seems an appropriate place for adjustment.

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-1400-91, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Local 1549, District Council 37, AFL-CIO, AFSCME is denied.

DATED: New York, N.Y.
December 27, 1991

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER