DOP & City v. UPOA, 49 OCB 10 (BCB 1992) [Decision No. B-10-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
----------X
In the Matter of the Arbitration

-between-

DECISION NO. B-10-92
DOCKET NO. BCB-1408-91
(A-3813-91)

DEPARTMENT OF PROBATION and
CITY OF NEW YORK,

Petitioners,

-and-

UNITED PROBATION OFFICERS
ASSOCIATION,

Respondent.
----------X

DECISION AND ORDER

On August 5, 1991, the Department of Probation ("DOP" or "the Department") and 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 the United Probation Officers Association ("UPOA" or "the Union"). On September 17, 1991, the Union submitted an answer to the petition and on September 26, 1991, the City filed a reply.

Background

On April 16, 1991, UPOA filed a Step II grievance with DOP alleging a violation of Article VI, Section 1(c), of the parties'

collective bargaining agreement[1]. The Union maintained that the Juvenile Intensive Supervision Program of the New York City Department of Probation, Family Court is currently under the alleged jurisdiction of an Associate Staff Analyst who is neither a member of the Probation Officer's bargaining unit nor a trained peace officer. The Union contended that the usual chain of command in the Department is as follows: Probation Officer Trainee, Probation Officer, Supervising Probation Officer, and Branch Chief. According to the Union, this Associate Staff Analyst not only supervises Probation Officers and Probation Officer Trainees, but also evaluates their performance as peace officers.

On April 26, 1991, the Department denied the Step II grievance stating, in relevant part:

> Article 1, Section 2 of the Probation Officers Unit Agreement defines the term "employees" as used in the agreement as only those persons in the titles of Probation Assistant, Probation Officer Trainee, Probation Officer, Senior Probation Officer or Supervising Probation Officer. Accordingly, persons in the title of Associate Staff Analyst are not "employees" under the terms of the agreement and consequently their assignments cannot be the subjects of grievances as defined in Article VI, Section 1(c).

In its Step III appeal of this decision, dated May 1, 1991, the Union alleged that the Department had violated Article I,

---

[1] Article VI, Section 1 (c), in relevant part, provides:
The term "grievance" shall mean:
(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications.

Section 1,[2] Article II[3] and Article III, Section 1(c)[4] of the

[2] Article I entitled "Union Recognition and Unit Designation", provides:

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, whether full-time, part-time per annum, hourly or perdiem, in the below listed title(s), and in any successor title(s) that may be certified by the Board of Certification of the Office of Collective Bargaining to be part of the unit herein for which the Union is the exclusive collective bargaining representative and in any positions in Restored Rule X titles of the Classified Service the duties of which are or shall be equated by the City Personnel Director and the Director of the Budget for salary purposes to any of the below listed title(s):

51800	Probation Assistant
51801	Probation Officer Trainee
51810	Probation Officer
51835	Senior Probation Officer
51860	Supervising Probation Officer

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.

[3] Article II, entitled "Dues Checkoff," provides:

Section 1.
(a) The Union shall have the exclusive right to the checkoff and transmittal of dues in behalf of each employee in accordance with the Mayor's Executive Order No. 98, dated May 15, 1969, entitled "Regulations Relating to the Checkoff of Union Dues" and in accordance with the Mayor's Executive Order No. 107, dated December 29, 1986 entitled "Procedures for Orderly Payroll Checkoff of Union Dues and Agency Shop Fees."

(b) Any employee may consent in writing to the

(continued...)

parties' agreement by allowing employees in classifications outside the recognized titles to perform the work of bargaining unit employees. The Step III Review Officer stated that his review of the contract "[did] not reveal the inclusion of any contractual provision therein which permits the Union to grieve the assignment of any employee in a title outside of those noted in the cited unit contract to duties performed by employees in titles covered under said contract." The Review Officer noted that the Union had improperly raised alleged violations of Article I, Section 1, Article II and Article III, Section 1(c) for the first time in the Step III appeal but found that, in any

---

[3](...continued)
authorization of the deduction of dues from the employee's wages and to the designation of the Union as the recipient thereof. Such consent, if given, shall be in a proper form acceptable to the City, which bears the signature of the employee.

Section 2.
The parties agree to an agency shop to the extent permitted by applicable law, as described in a supplemental agreement hereby incorporated by reference into this Agreement.

[4] Article III is entitled "Salaries" and Section 1(c) provides:
Employees who work on a perdiem or hourly basis and who are eligible for any salary adjustment provided in this Agreement shall receive the appropriate pro-rata portion of such salary adjustment computed as follows, unless otherwise specified:

Per diem rate - 1/261 of the appropriate minimum basic salary.

Hourly Rate - 37 1/2 hour week basis - 1/1957.5 of the appropriate minimum basic salary.

event, these provisions were irrelevant since they cover only employees represented by the bargaining unit.

With no satisfactory resolution of the grievance having been reached, on July 12, 1991, the Union filed a request for arbitration reiterating the grievance as it was stated at Step III and citing the same contract provisions.

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City points out that the term "grievance" is defined in the parties' collective bargaining agreement as including the "claimed assignment of employees to duties substantially different from those stated in their job specifications" and that the term "employees" is defined as including only members of the bargaining unit. The City argues that because the allegation that an employee is performing out-of-title duties is only arbitrable if that employee is a unit member, the instant matter is not within the scope of the parties' obligation to arbitrate. While the City acknowledges that prior Board decisions have concluded that similar provisions are broad enough to permit a "reverse out of title" claim, it argues that the definition of "employees" is not so broad in this case as in those previously

before the Board. In this case, the City argues, the term "employees" is specifically defined in the parties' collective bargaining agreement.

The City argues that the Union has failed to establish a nexus between its claim and Article I, the recognition clause, inasmuch as it has alleged no facts which could even arguably suggest that the City has not recognized the Union as the sole bargaining representative of its members. The City maintains that the recognition clause contained in the parties' collective bargaining agreement contains no language which would purport to be either a job description or a grant of exclusive jurisdiction to the Union over the work performed by the titles which it represents. Furthermore, the City argues, it is a management right to assign supervisory personnel as it sees fit.

Finally, the City contends that there is no nexus between the claim and either Article II or Article III, Section 1(c). With respect to Article II, the City argues that the Union has failed to establish how the alleged assignment of a non-unit member to a supervisory position in the Department in any way interferes with the right of the Union to receive dues from its members. In this regard, the City maintains that if the Department were to remove an Associate Staff Analyst from a position of supervision over Probation Officers, there is no requirement that the Department replace that employee by hiring a new employee who would be a union member. Similarly, the City

argues that the Union has failed to allege that any member has not received the contractual salary adjustment in violation of Article III, Section 1(c).

Union's Position

According to the Union, it is not precluded from arbitrating a claimed assignment of unit work to a non-unit employee. The Union notes that the collective bargaining agreement defines a "grievance" as including a "claimed assignment of employees to duties substantially different from those stated in their job specifications"(emphasis added). The Union maintains that the Board has previously held that where the term grievance is so broadly defined, a complaint alleging that other employees are doing the work of the grievant is arbitrable.

The Union also argues that the deliberate transfer of work to a non-unit member, that has traditionally been assigned to unit members, clearly undermines the Union's bargaining position and thereby violates the recognition clause of the agreement. While the Union agrees that pursuant to §12-307b of the NYCCBL, management has the right to assign supervisory personnel, it argues that this right may not be used either in an arbitrary way or in a manner that effectively erodes the Union's position as bargaining representative and takes work away from members. The Union asserts that many arbitrators have ruled that the right to assign work outside of the bargaining unit is not included within

management's rights since the recognition clause would be violated by such an action.[5] Furthermore, the Union argues, this Board reasoned in Decision No. B-35-89 that when an action falls within the rights of management but also infringes employees' rights under the contract, the decision may be reviewed regardless of the management rights clause.

Additionally, the Union argues that there is a nexus between Article II of the contract and its claim because the Union does not receive the dues it would normally receive from an employee when unit work is illegally assigned to non-unit employees. And finally, the Union contends that the transfer of unit work constitutes a violation of Article III, Section 1(c); a Supervising Probation Officer properly placed in the position now being held by an Associate Staff Analyst, would have received a salary adjusted pursuant to the terms of the agreement.

DISCUSSION

We have long held that the function of this Board in deciding questions of arbitrability is to determine whether the parties are obligated to resolve their controversies through arbitration and, if so, whether the particular dispute before the

[5] The Union cites American Bakeries Co., 46 LA 769 (1966), a private sector arbitration award, in support of this proposition.

Board is within the scope of that obligation.[6] We have characterized this function as a threshold inquiry which requires us to ascertain whether there is an arguable relationship between the acts complained of and the source of the right which is sought to be redressed in arbitration.[7]

In the instant case, the Union has alleged a "reverse out-of-title" claim, i.e., a claim that the work of unit members has been assigned to non-unit employees. We note that we have previously held that where the collective bargaining agreement defines a "grievance" as including a "claimed assignment of employees to duties substantially different from those stated in their job specifications," (emphasis added) we have permitted "reverse out-of-title" claims to be brought.[8] On the other hand, where the contract defines a "grievance" as including a "claimed assignment of a grievant to duties substantially different from those stated in his or her job specification," (emphasis added) we have precluded the union from arbitrating a "reverse out-of-title" claim.[9] The Board has reasoned that while the former language is broad enough to encompass a claim that employees in a different title have been improperly assigned work within the

---

[6] Decision Nos. B-13-87; B-1-86; B-4-83.

[7] Decision No. B-13-87

[8] Decision Nos. B-35-89; B-13-87; B-37-80; B-1-71; B-7-70; B-2-70.

[9] Decision Nos. B-11-88; B-12-77.

grievants' duties and functions, the latter language is more narrow, requiring the person bringing the grievance to show that he or she has been assigned to out-of-title work.

The City argues that although the term "employees" is used in Article VI, §1(c), the definition of the term is not so broad in this case as in those previously before the Board. Rather, the City contends, the term has been specifically defined in the collective bargaining agreement to include only bargaining unit members. The City maintains that under this agreement the Union may not bring a reverse out-of-title claim to arbitration; rather, the Union must show that bargaining unit members have been assigned to out-of-title work. We agree with this argument.

Several of the cases in which this Board addressed "reverse out-of-title" claims involved Executive Order No. 52, which does not contain a definition of the term "employees."[10] Two more recent decisions allowing "reverse out-of-title" claims, Decision Nos. B-13-87 and B-37-80, involved contractual definitions of an out-of-title grievance. Both of the contracts involved also define the term "employees" as including only bargaining unit members. However, an important distinction exists between those contracts and the contract involved in the instant dispute - both of those contracts contain the following provision:

> Notwithstanding any other provisions of this Agreement, the parties agree that Section 1(c) of this Grievance

[10] Decision Nos. B-1-71; B-7-70; B-2-70.

> Procedure shall be available to any person in the unit designated in Section 1 of Article I herein who claims to be aggrieved by an alleged assignment of any City employee, whether within or without such unit, to clerical-administrative duties that are substantially different from the duties stated in the job specification for the title held by such employee...

In the instant case, this language is absent from the parties' collective bargaining agreement. Given this omission and the narrow definition of the term "employees" in the parties' contract, we conclude that a "reverse out-of-title" claim does not fall within the parties' agreement to arbitrate.

We also find no merit in the Union's argument that the acts complained of violate Article I of the Agreement. Article I of the Agreement contains the Union recognition clause which states that the employer recognizes the Union as the exclusive bargaining representative and sets out the titles to be covered by the agreement. As this Board has previously held, union recognition clauses, such as the one set forth in Article I in this case, cannot be construed as grants of exclusive work jurisdiction.[11] Accordingly, the Union's allegation that an Associate Staff Analyst is serving in a supervisory position in the Department does not state an arguable violation of the recognition clause.

The Union has also failed to establish an arguable nexus between the alleged assignment of unit work to non-unit members

[11] Decision Nos. B-35-89; B-6-81.

and Article II or Article III, Section 1(c) of the Agreement. The Union has alleged neither that the Department has interfered with its right to receive dues from its members in violation of the dues check-off clause nor that any member has been denied the contractual salary adjustment in violation of the salary clause. The Union cannot establish the requisite nexus merely by alleging that had a unit member been put in the supervisory position, the Union would be receiving dues and the member would be receiving an adjusted salary.

As we have often stated, while it is our policy to favor arbitration of grievances, we cannot create a duty to arbitrate where none exists, nor enlarge a duty to arbitrate beyond the scope established by the parties in their agreement.[12] In this case, the Union has failed to establish the requisite nexus between the complained of act and cited contract provisions. Accordingly, we must deny the Union request for arbitration.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[12] Decision Nos. B-20-90; B-49-89; B-53-88; B-20-79.

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the United Probation Officers Association's request for arbitration be, and the same hereby is, denied.

DATED: New York, New York
March 26,1992

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

George B. Daniels
MEMBER