City, DOP v. UPOA, 49 OCB 25 (BCB 1992) [Decision No. B-25-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

NEW YORK CITY DEPARTMENT OF
PROBATION and CITY OF NEW YORK,

Petitioners,

DECISION NO. B-25-92

-and-

DOCKET NO. BCB-1430-91
(A-3901-91)

UNITED PROBATION OFFICERS
ASSOCIATION,

Respondent.

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DECISION AND ORDER

On October 21, 1991, the City of New York (City") and the New York City Department of Probation ("Department"), filed a petition challenging the arbitrability of a group grievance that is the subject of a request for arbitration filed by the United Probation Officers Association ("UPOA" or "Union"). On November 25, 1991, UPOA filed an answer to the petition. No reply was submitted.

Background

On August 16, 1991, Dominic Coluccio, President of UPOA, filed a Step II grievance alleging that the Department, by unilaterally implementing Section 1127 (formerly 822) of the New York City Charter ("Charter"), violated the collective bargaining agreement between the parties. Section 1127 of the Charter, which was added by Local Law No. 2 for the year 1973, provides:

> **Condition precedent to employment.** a. Notwithstanding the provision of any local law, rule or regulation to the contrary, every person seeking employment with the city of New York or any of its agencies regardless of civil service classification or status shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual as that term is defined in section 11-1706 of the administrative code of the city of New York or any similar provision of such code, during employment by the city, such person will pay to the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual, as defined in such section, during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period....

Specifically, Coluccio complained that the Department was withholding City personal income tax from his paycheck as if he were a City resident, even though he is a non-City resident who was hired before the enactment of Section 1127 of the Charter. This reduction in pay, he alleged, "is a violation of the Unit Economic Agreement as far as my salary (net) is concerned."

The grievance was denied on August 23, 1991. According to the Department's Director of Labor Relations, because Coluccio did not identify the contract provision alleged to be violated, she was unable to process the complaint.

On August 29, 1991, the grievance was advanced to Step III. Therein, Coluccio alleged that in addition to the unlawful reduction in his net salary, the Department's action:

> violates my terms and conditions of employment in that when I was hired I was employed by the Judicial Conference State of N.Y. [Section 1127 of the Charter] did not apply then and does not apply now. This is a grievable issue according to Article VI, Section 1(A) and (B).[1]

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[1] Article VI, Section 1(A) and (B) of the 1990-91 Unit Economic Agreement between the parties, provides:

DEFINITION: The term "Grievance" shall mean:

(continued...)

On September 5, 1991, Coluccio amended his complaint to include as grievants all UPOA members that were hired between January 1, 1973 and January 1, 1974. Accordingly, he claimed, the matter now qualified as a "group" grievance.

By a letter dated September 12, 1991, the Office of Labor Relations dismissed the grievance without a Step III Conference. Because the issue raised concerns a matter of law rather than a matter of contract, the Review Officer stated, the dispute "fails to constitute an issue which may be adjudicated via the contractual grievance procedure."

No satisfactory resolution of the matter having been reached, UPOA filed the instant request for arbitration on September 27, 1991. As a remedy, the Union seeks an order directing that the Department "cease treating these non-resident employees as residents and stop deducting City withholding tax from these employees' paychecks."

Positions of the Parties

City's Position

The City contends that the Union has failed to identify a contract provision which has been misinterpreted or misapplied, pointing out that the only provision allegedly violated is that which defines the term "grievance."

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[1](...continued)
(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;...

Citing prior decisions of the Board of Collective Bargaining ("Board"), the City submits that such definitional sections do not create any substantive rights and do not, therefore, furnish an independent basis for a grievance.[2]

The City also argues that the Union has failed to identify a rule, regulation, written policy or order of the Department which has been violated, misinterpreted or misapplied. It is evident from the nature of the controversy, the City submits, that UPOA is really claiming that Section 1127 of the Charter has been misinterpreted or misapplied. To the extent that any portion of the request for arbitration is predicated on a claimed violation or misapplication of the New York City Charter or any other law, the City argues, it does not constitute a grievable matter as defined by the parties in their collective bargaining agreement.[3] Finally, the City contends that the Union has failed to establish a nexus between any contractual provision and the complained of act. In this regard, the City points out that the only provision in the parties' contract which is even remotely related to the instant matter is that which sets forth salaries in gross amounts, Article III of the Unit Economic Agreement. However, the City argues, "[t]he mere fact that the collective bargaining agreement contains a term which requires that the employer pay a certain salary is not sufficient to establish that the parties have agreed to arbitrate whether taxes have been appropriately withheld."

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[2] The City cites Decision Nos. B-30-84; B-28-82.

[3] The City cites Decision Nos. B-7-91; B-14-87; B-28-85.

Moreover, the City contends, this dispute is not a wage dispute of the type previously found arbitrable by the Board. Citing several of the Board's prior decisions, the City claims that the dispute in those cases involved the calculation of a grievant's gross salary, a question which is not at issue in the instant matter.[4] Here, the City submits, UPOA cannot allege that the gross salary of any of its members has been diminished in any manner.

UPOA's Position

UPOA claims that implementation of Section 1127 of the Charter has the effect of reducing the net pay of members who, because they were employed by the Department prior to its enactment, arguably are not subject to the statutory requirement. The Union maintains that it is not alleging a violation of the Charter or the applicability of its provisions; rather, it is grieving the effect of its implementation on the terms and conditions of certain of its members' employment. In this connection, the Union submits that the relevance of the requirements of Section 1127 of the Charter to the contract goes to the merits of the dispute and is a matter for the arbitrator.[5]

The Union submits further that conditioning payment of contractually guaranteed wages upon a member's acceptance of the requirements of Section 1127 of the Charter arguably violates the Unit Economic Agreement between the parties. According to the Union, since a non-City resident member's refusal

[4] Decision Nos. B-2-91; B-20-82; B-3-79.

[5] The Union cites Decision No. B-1-84.

to agree and consent to a deduction from their wages of an amount required to be withheld for a City resident would result in the Department's failure to pay wages due and owing, the threat that a member may not receive the contractual wage violates the salary provision of the contract.

In support of these arguments, the Union claims that the mere failure to pay the contractual wage provides a basis for arbitration.[6] The Union also relies upon a recent decision of the Board, wherein it stated that "the expectation that earned wages will be paid promptly and in full is a quintessential quid pro quo of the employment relationship. ... [T]he fact that an employee may not receive wages arguably violates the salary provision of the agreement and thus, is a matter for arbitration [Decision No. B-2-91, at 13]."

Finally, the Union claims that the imposition of a new condition of employment on its members without bargaining states an arbitrable matter. According to UPOA, in or about February 1991, the Department unilaterally implemented Section 1127 of the Charter as a new condition of employment. The Union alleges that until that time, "the requirements of [Section 1127] were not always or immediately applied to Probation Officers."[7] UPOA claims that because the employer suddenly and unilaterally reversed itself and established

[6] The Union cites Decision No. B-25-72.

[7] UPOA claims that on March 4, 1991, it requested that the Department cease implementation of the non-resident tax "without first bargaining over the effect of this condition."

a new condition of employment on incumbent employees, the Union has a right to bargain over the effect of such change.[8]

Discussion

It is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of disputes.[9] We cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[10] In determining questions of arbitrability, it is the function of this Board to decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the controversy at issue is within the scope of that obligation.[11]

In the instant matter, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement. The City alleges, however, that because the Union has failed to demonstrate the necessary nexus between any contractual provision and the City's actions in withholding taxes from its' employees salaries, the subject of UPOA's claim is not within any of the broad categories that the parties

[8] The Union cites Decision No. B-25-85.

[9] See NYCCBL §12-302.

[10] Decision Nos. B-60-91; B-31-90; B-11-90; B-10-90; B-49-89; B-35-89; B-41-82; B-15-82.

[11] E.g., Decision Nos. B-31-90; B-6-88.

have agreed to submit to arbitration.[12] The City also argues that inasmuch as the gravamen of this dispute concerns the interpretation and enforcement of a local law (Section 1127 of the New York City Charter), clearly it is not a matter within the scope of the parties' agreement to arbitrate.

It is well-settled that when challenged, a union must establish a nexus between the act complained of and the contract provisions it claims have been breached.[13] Here, the Union claims, and we agree, that there is at least an arguable relationship between the subject matter of the grievance and the salary provision (Article III) of the Unit Economic Agreement.[14] That is, we find that inasmuch as the requirements of Section 1127 of the Charter affect and are intimately related to the subject of wages, the contractual salary

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[12] We note that while the City has characterized its actions in this matter as an exercise of the right to withhold "taxes" from its employees' salaries, the New York State Court of Appeals, in Matter of Legum v. Goldin, 55 N.Y.2d 104, 447 N.Y.S.2d 900 (1982), construe the payments due under §1127 of the New York City Charter as a debt incurred pursuant to an employment contract. "The mere fact that the debt ... is owed to the City of New York," the Court held, "does not transform it into a tax."

[13] E.g., Decision Nos. B-29-91; B-2-91; B-41-90; B-10-90; B-27-89; B-4-88: B-31-85.

[14] While we note that the Union failed to specifically cite Article III in its request for arbitration, there can be no serious question that the dispute concerns salaries. Furthermore, the City may not claim that the omission impaired its ability to respond to the request for arbitration inasmuch as the City itself pointed out, in its petition challenging arbitrability, that the only provision which is even remotely related to the dispute is Article III of the Unit Economic Agreement. It is well-settled that we will not deny a request for arbitration because of a technical omission when significant issues are clearly raised despite the oversight. See e.g., Decision Nos. B-73-89; B-63-89; B-29-89; B-20-89.

provision arguably affords the basis for an arbitrable claim. We have long held that disputes over wages are arbitrable generally,[15] as are issues related to the payment of wages.[16]

Accordingly, we find that UPOA has presented all of the elements appropriate to the limited scope of our inquiry in matters of substantive arbitrability. The City's arguments relating to gross salary and the Union's arguments concerning diminished wages and improper withholding go to the merits of the dispute and are, therefore, questions for the arbitrator.

With respect to the City's argument that a grievance predicated on a claimed violation of the New York City Charter may not be submitted to arbitration, it is clear that an alleged violation of the Charter does not come within the definition of the term "grievance" as set forth in Article VI, Section 1(A) and (B) of the Unit Economic Agreement. As the City points out, an alleged violation of law does not present an arbitrable issue where the parties have not included such a dispute within the range of matters that they have agreed to arbitrate.[17] However, it is well settled that the relevance or applicability of cited law to the circumstances of a case (i.e., the relevance of Section 1127 of the Charter to Article III of the Unit Economic Agreement),

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[15] Decision Nos. B-31-90; B-14-88; B-20-82; B-3-79; B-26-72.

[16] See e.g., Decision No. B-2-91 (the question whether the contract permits or prohibits conditioning payment of salaries upon completion of an address verification form was found arbitrable); Decision No. B-19-83 (a dispute as to when, how or in what form salary is to be paid was found arbitrable).

[17] Decision Nos. B-14-87; B-28-85; B-28-82.

is a question going to the merits of a dispute and, hence, one for an arbitrator to determine.[18]

Finally, we turn to UPOA's assertion that the unilateral imposition of a new condition of employment on incumbent employees without bargaining states an arbitrable claim. In support of its argument, the Union refers to Committee of Interns and Residents v. New York City Health and Hospitals Corporation, Decision No. B-25-85, in which we found that unilateral imposition by HHC of the wage deduction at issue in the instant matter, purportedly in compliance with Section 1127 (formerly 822) of the Charter, constituted a refusal to bargain in good faith and a violation of Section 12-306a of the NYCCBL.[19]

In the instant matter, although we find that UPOA is mistaken in concluding that allegations which may form the basis of an improper practice under the NYCCBL automatically present an arbitrable claim, we note that a controversy arising out of the same set of facts may involve related but separate and distinct rights. That is, a particular controversy may encompass rights which derive from both the NYCCBL and the collective bargaining

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[18] Decision Nos. B-1-84; B-25-72.

[19] In that case, we held that the facts established an improper public employer practice as defined by Section 12-306a(4) of the NYCCBL, to wit:

> It shall be an improper practice for a public employer or its agencies:
>
> > ... to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

agreement.[20] Although we need not decide whether the facts alleged in the instant request for arbitration present a claim of improper practice as well as an arguable violation of contract, we note that when it appears that arbitration may resolve both an improper practice charge and a contract interpretation issue, we have deferred our authority to decide and remedy improper practice claims to the arbitration process.[21] This is consistent with the declared policy of NYCCBL §12-302, "to favor and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

In connection with the dissent of Alternate City Members Daniels and Wright, infra, we do not agree that "the issue for arbitration is solely the interpretation of Section 1127 of the Charter." At issue here is whether the City had any right to withhold portions of the contractual wages payable to Respondent Dominic Coluccio and others similarly situated. The City offers as justification of this action the provisions of New York City Charter Section 1127. That section expressly states that it creates a "Condition precedent to employment," which requires that "any person seeking employment with the city of New York ... shall sign an agreement as a condition precedent to such employment to the effect that ... during employment by the city, such person will pay to the city an amount by which a city personal income tax on residents ... exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same period."

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[20] See e.g., Decision Nos. B-38-91; B-68-90.

[21] Decision Nos. B-31-85; B-10-85; B-10-80.

Respondent Coluccio states, without refutation by the City on the record before us, that he was employed prior to enactment of Section 1127 and that he never signed - and, in fact, clearly could not have signed - any such agreement as is provided for in Section 1127 as a condition precedent to his employment. Thus, Respondent Coluccio seeks to submit to arbitration his grievance that he has not been paid wages as provided for by the applicable collective bargaining agreement and the City in opposing submission of the matter to arbitration has submitted to us justification which on its face cannot be said to have applicability to the unrefuted facts of the case. In any event, the relevance or applicability of Section 1127 to the situation herein goes to the merits of the case and, hence, is a matter for the arbitrator.

In an analogous case (Decision No. B-1-84), there was no dispute that Chapter 941 of the New York City Administrative Code, which allowed for the transfer to the fire and police pension funds of credit for prior service in other uniformed services of the City, was not being applied in the same manner by the police and fire departments (i.e., the Fire Department recognized the transfer of such credit for pension purposes only; the Police Department recognized such credit for determining entitlement to compensation and promotion, as well as for pension purposes). Although the City conceded the disparity, it nevertheless challenged the grievance brought by the Uniformed Firefighters' Association on the ground that a claimed violation or misapplication of law does not constitute a grievable matter. The City also argued that because the method of crediting prior service for purposes of determining longevity increments was not expressly provided for in the

contract provision dealing with salary rates and longevity increments (Article VI), that provision could not serve as the source of the alleged right with respect to which arbitration was being sought. In that case, we held:

> ... where the union cites a contract provision which arguably deals with the subject matter at issue, it has presented all of the elements appropriate to the limited scope of the Board's inquiry in matters of substantive arbitrability. Arguments advanced by the parties herein, relating to the past practice of the Fire Department, present practice of the Police Department, and the relevance of Chapter 941 of the Administrative Code to Article VI, are matters for the arbitrator."[22]

Accordingly, we dismiss the City's petition challenging arbitrability and grant UPOA's request for arbitration of this dispute.

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 filed by the City of New York and the New York City Department of Probation be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the United Probation Officers Association be, and the same hereby is, granted.

DATED: New York, New York
May 19, 1992

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS

[22] Decision No. B-1-84, at 6-7.

MEMBER

JEROME E. JOSEPH
MEMBER

THOMAS J. GIBLIN
MEMBER

I dissent GEORGE B. DANIELS
MEMBER

I dissent STEVEN H. WRIGHT
MEMBER

NOTE: See dissent which is appended hereto.