City v. OSA, 49 OCB 47 (BCB 1992) [Decision No. B-47-92 (Arb)]

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

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS,

Respondent.
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DECISION NO. B-47-92
DOCKET NO. BCB-1481-92
(A-4148-92)

DECISION AND ORDER

On March 30, 1992, the City of New York ("the City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance submitted by the Organization of Staff Analysts ("the Union") on behalf of Michele P. Brown ("the grievant"). On April 16, 1992, the Union submitted an answer and on May 1, 1992, the City filed a reply.

Background

The grievant is employed by the Human Resources Administration ("HRA") as an Associate Staff Analyst. According to the Step III decision rendered by OLR on January 15, 1992, the Union alleges that since September of 1990 the grievant has been performing out-of-title work. Specifically, the Union claims that on September 20, 1990 the grievant began serving in the

capacity of Director of Support Services. In this capacity, the Union alleges, the grievant has been doing work commensurate with the job description of the title Administrative Staff Analyst. However, the Union claims, she is not being paid as an Administrative Staff Analyst. According to the Union, despite the fact that the grievant's duties have changed, she continues to receive the same salary she had been receiving when she was performing the duties of an Associate Staff Analyst.

The Step III decision noted that HRA did not deny that the grievant was doing out-of-title work. However, OLR denied the grievance, stating that the grievant's salary rate already exceeds the minimum salary rate for the title of Administrative Staff Analyst. Under these circumstance, OLR held, HRA is under no contractual obligation to grant the remedy requested by the Union, i.e., a 10% increase in the grievant's salary retroactive to September 20, 1992.[1]

No satisfactory resolution of the dispute having been found, on March 19, 1992, the Union filed a request for arbitration pursuant to Article VI, Section 2 of the parties' collective bargaining agreement. The grievance to be arbitrated was set forth as follows:

[1] It should be noted that the Union also requested that the grievant be upgraded to the title of Administrative Staff Analyst. As to this request, the Step III Hearing Officer stated that he was not empowered to rule on the issue of upgrading.

> Whether the Agency violated the Organization of Staff Analysts contract, Article VI, Section 1c[2] when it promoted the grievant to Administrative Staff Analyst without paying her the 10% increase that had been agreed to by HRA.

As a remedy, the Union seeks "[t]he 10% increase which had been promised, retroactive to 9/20/90."

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City argues that the Union is essentially trying to arbitrate an alleged oral agreement between the grievant and HRA. The City contends that since there is no specific contractual right to the 10% increase being sought, it follows that the entire claim rests upon an oral agreement. According to the City, verbal agreements do not fall within the scope of the parties' contractual grievance procedure; the definition of a grievance found in Article VI, Section 1 does not include claimed violations of verbal agreements. Moreover, the City argues, prior Board decisions have held that an oral agreement may not constitute an independent basis for the filing of a grievance.

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[2] Article VI, Section 1c, provides:

> The term "grievance" shall mean:
>
> c. A claimed assignment of employees to duties substantially different from those stated in their job specifications.

The City further argues that the Union has failed to establish a nexus between the out-of-title provision, and its claim that HRA violated an oral agreement which allegedly provided for an increase in salary. In any event, the City asserts, since "the promotion the grievant alleges she received has not yet occurred," the claim is premature.

Finally, the City challenges the Union's statement that its demand for arbitration is being made pursuant to Article VI, Section 2 of the Agreement. The City argues that this Section merely provides for a multi-step procedure for the processing of grievances; it does not set forth independent bases for the submission of grievances nor does it supplement the catalog of grievances set forth in Article VI, Section 1.

In its reply, the City concedes that if the Union is bringing a "pure" out-of-title grievance, "there is no issue regarding arbitrability." However, the City reiterates, if the Union is attempting to arbitrate an oral promise, that issue is not arbitrable.

The Union's Position

The Union argues that this dispute is clearly arbitrable. According to the Union, the allegation that an Associate Staff Analyst has been assigned to function as an Administrative Staff Analyst states a grievance within the meaning Article VI, Section 1c of the parties' collective bargaining agreement. In fact, the

Union contends, the City conceded that the grievant was doing out-of-title work in the Step III decision.

As for the promised 10% increase, the Union contends that "the [Board] has repeatedly held that the question of appropriateness of remedy is up to the arbitrator to decide." Regarding City's argument that the claim is premature, the Union contends that the grievant has been doing out-of-title work since September of 1990.

DISCUSSION

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[3] Thus, when challenged to do so, a party requesting arbitration has the burden of showing that the provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[4]

Throughout the lower steps of the grievance procedure this grievance was framed as an out-of-title claim wherein the remedy sought was a salary increase.[5] In the Request for Arbitration

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[3] E.g., Decision No. B-15-90.

[4] E.g., Decision No. B-29-91.

[5] According to OLR's Step III decision, at the Step III
(continued...)

the Union continued to phrase the grievance as an out-of-title claim, but also made reference to a "10% increase that had been agreed to by HRA." The addition of this phrase led the City to believe that the Union might be attempting to arbitrate an oral agreement. While the City does not challenge the arbitrability of the out-of-title claim, it argues that verbal agreements do not fall within the scope of the parties' contractual grievance procedure.

Based on the Union's answer, it appears to us that its intent is to arbitrate an out-of-title claim and to request a salary increase as the remedy. If this is in fact the Union's intent, then the claim is arbitrable; the City does not contest the arbitrability of the out-of-title claim. Furthermore, it is well-settled that once we find that a matter is arbitrable, the dispute is to be submitted to an arbitrator, including the question of whether the requested remedy, or any other remedy, is appropriate.[6]

Alternatively, if the Union's intent is to arbitrate an oral agreement between HRA and the grievant, we find that oral

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[5](...continued)
hearing the Union "cit[ed] a memorandum dated October 16, 1990 to the Department's Executive Deputy Commissioner, Adult Services Administration, from the Acting Deputy Commissioner, Community Care and Senior Services citing a recommendation from the Office of Protective Services for Adults on the grievant's behalf regarding the cited title/salary change."

[6] Decision Nos. B-72-89; B-39-89; B-65-88; B-33-82.

agreements are a subject clearly not within the scope of Article VI, Section 1c. Moreover, as the City correctly points out, the Board has repeatedly determined that verbal agreements may not constitute an independent basis for the filing of a grievance.[7]

For the reasons stated above, we shall order that the request for arbitration in this matter be granted to the extent that it complains of a violation of Article VI, Section 1c of the parties' agreement. However, we shall deny the request for arbitration to the extent that it alleges a violation of an oral agreement.

[7] Decision Nos. B-9-92; B-5-88; B-52-87; B-31-86; B-28-84.

ORDER

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

ORDERED that the request for arbitration filed by the Organization of Staff Analysts be, and the same hereby is, granted to the extent set forth above; and it is further

ORDERED that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, denied to the extent set forth above.

DATED: New York, New York
November 18, 1992

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Steven H. Wright
MEMBER