City v. DC37, 49 OCB 9 (BCB 1992) [Decision No. B-9-92 (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-

DISTRICT COUNCIL 37, AFSCME,

Respondent.
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DECISION NO. B-9-92
DOCKET NO. BCB-1373-91
(A-3681-91)

**DECISION AND ORDER**

On February 25, 1991, 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 District Council 37, AFSCME ("the Union") on behalf of Marcel Cohn ("the grievant"). On March 8, 1991, the Union amended its request for arbitration. On March 13, 1991, the City filed an amended petition challenging arbitrability and on March 26, 1991, the Union submitted an answer. The City requested, with the consent of the Union, and was granted an extension of time to submit a reply. However, on September 24, 1991, the City

informed the Office of Collective Bargaining that it would not be filing a reply.

**Background**

The grievant is employed by the City's Department of Parks and Recreation ("the Department" or "Parks") in the position of Assistant Superintendent of Construction. On August 23, 1990, a grievance was filed at Step II of the grievance procedure on behalf of the grievant alleging violations of Article VI Sections 1(B) & (C) of the parties' Unit Bargaining Agreement.[1] The Union maintained that the grievant was hired as an Assistant Superintendent of Construction "based upon a promise made by several Parks administrative personnel that [he] would be promoted to the title of General Supervisor of Construction as a condition of his acceptance of this position in Parks after

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[1] Article VI, Sections 1(B) & (C) of the Unit Bargaining Agreement provide, in relevant part:

Section 1.

The term "Grievance" shall mean:

* * *

(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; . . . .

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

transferring from NYC HPD." According to the Union, the Grievant has been doing the work of a General Supervisor of Construction. The grievance was denied at Step II, and a Step III hearing was not held.

No satisfactory resolution of the dispute having been reached, on February 11, 1991, the Union filed a request for arbitration on behalf of the grievant. In its request for arbitration, the Union states the following two grievances:

> (A) Whether the grievant is performing work that is substantially different from that of his title, Assistant Superintendent of Construction, and if so, what shall the remedy be. (B) Whether the grievant accepted his present position based upon an agreement that he would be hired as a General Supervisor of Building Maintenance (Construction); and if so, what shall the remedy be.

The Union characterizes the grievances as violations of Article VI Section 1(C) of the Unit Contract. As a remedy, the grievant seeks "backpay; immediate cessation of out-of-title work; appointment as General Supervisor of Building Maintenance (Construction); and any other remedy needed to make the grievant whole." By letter dated March 7, 1991, the Union amended its request for arbitration to include a violation of Section 1(B) of the Unit Contract as an additional basis for the grievance.

## Positions of the Parties

### City's Position

### The Original Petition Challenging Arbitrability

The City's original petition challenging arbitrability, as well as its amended petition, is devoid of any arguments pertaining to Grievance (A). The City argues that the Union's request for arbitration should be denied as to Grievance (B) because it is beyond the scope of the claims which the parties agreed to submit to arbitration. The City asserts that the grievant is attempting to arbitrate an oral agreement he allegedly had with the Department, and that under Board precedent, an oral agreement is not a valid basis for the filing of a grievance.

The City also argues that the Union has failed to establish a nexus between Grievance (B) and the contract provision it claims was violated. According to the City, there is no connection between Article VI Section 1(C), which addresses out-of-title work, and "the claim in Grievance (B) that Parks violated an oral contract which allegedly provided for certain inducements to the grievant for accepting employment."

**Amended Petition Challenging Arbitrability**

In its amended petition challenging arbitrability, the City reiterates the arguments made it its original petition, and further contends that there is no nexus between Grievance (B) and Article VI, Section 1(B) of the contract, which relates to

claimed violations of rules, regulations, written policies, or orders of the employer.

The City argues that, even if an employment agreement existed between the grievant and the Department, it would not be arbitrable under Section 1(B). The City claims that written policy, as interpreted by the Board, only addresses the unilateral directives of an employer which relate to matters of general application to all of its employees. Since Grievance (B) claims a violation of an alleged bilateral employment agreement between the Department and the grievant, the City argues, Section 1(B) is inapplicable.

**The Union's Position**

The Union argues, in its answer to the City's petition challenging arbitrability, that the Department unambiguously hired the grievant as a General Supervisor of Construction. According to the Union, upon receipt of his first paycheck the grievant noticed that the department had erroneously given him the title of Assistant Superintendent of Construction. The Union asserts that the grievant complained to his supervisors about this error and was assured that his case would be reviewed and corrective action taken. Despite these assurances, the Union maintains, the grievant is still in the Assistant Superintendent

title although he is doing the work of the higher title. The Union contends that the Department is obligated to correct this error and reinstate the grievant to his proper title.

The Union also alleges, for the first time in its answer, "upon information and belief," that documentation exists in the Department's files which establishes that the grievant was placed in the incorrect title. The Union asserts that this documentation constitutes a "rule or regulation and/or a written policy or order of the agency. . . "[2] According to the Union, there is no requirement that a grievant do any more than allege a contractual violation within the definition of a grievance; documentation need not be presented to the Board because "such proof is to be put before the arbitrator who must decide the grievance." Furthermore, the Union argues, the existence of a policy or practice is a question which goes to the merits of a grievance, and thus is a matter for an arbitrator, not the Board, to decide.

Finally, the Union argues that if the Board declines to find the instant dispute arbitrable, it will be allowing the City to place a newly hired or transferred employee in an incorrect title while leaving the employee without a remedy.

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[2] We note that this definition contains four distinct items: rules, regulations, written policies and orders. The Union does not specify which of these four items it is referring to. The City assumed, in its amended petition challenging arbitrability, that the Union was arguing that the documentation constituted a written policy. The Union did not dispute this assumption in its answer.

**DISCUSSION**

As a preliminary matter, we note that the Union, in its answer to the amended petition challenging arbitrability, does not mention Article VI, Section (C) of the contract. This is the definition of an out-of-title grievance and, as the City contends, it is clear that there is no nexus between this provision and Grievance B, which relates to the alleged agreement to hire the grievant in a higher title. Therefore, we will assume that the Union's citation to Section (C) in its request for arbitration only relates to Grievance A, its out-of-title claim, while its reference to Section (B) relates to Grievance B.

In the instant dispute, the parties do not dispute that they are obligated to arbitrate their controversies; nor do they deny that the claim alleged in Grievance (A) is a matter within the scope of their agreement to arbitrate. The issue we must address, therefore, is limited to the arbitrability of Grievance (B), and the City's contention that the Union has failed to demonstrate a nexus between the right claimed to have been violated and Article VI, Section (B) of the parties' contract. In circumstances such as these, the Union has the duty to show the existence of an arguable relationship between the provision invoked and the grievance to be arbitrated.[3] Once an arguable

[3] Decisions Nos. B-46-91; B-45-91; B-73-90; B-25-90;
(continued...)

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.

Article VI, Section 1(B) of the agreement defines the term "grievance", in relevant part, as "a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer. . ." Even assuming that the Union can produce documentation of an agreement between the Department and the grievant regarding his title, such an agreement would not rise to the level of a rule, regulation, written policy or order. This Board has held that a written statement by the department will not be accorded the status of a "written policy or rule" unless it is addressed generally to the Department and sets forth a general policy applicable to the affected employees.[4] It is clear that an agreement between the Department and the grievant concerning his title, if it exists, would not constitute a rule, regulation, written policy or order according to the criteria established by the Board.

Alternatively, assuming that the Union is unable to produce documentation of a written agreement between the grievant and the Department, arbitration of this claim would amount to arbitration of a verbal agreement, a matter not within the scope of the

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[3](...continued)
B-11-90; B-68-89; B-35-86.

[4] Decision Nos. B-29-91; B-74-90; B-59-90.

parties' contractual grievance procedure. The definition of a grievance contained in Article VI, Section 1(B) includes neither claimed violations of verbal agreements between the agency and its employees, nor violations of unwritten policies of the agency. Moreover, the Board has repeatedly determined that verbal agreements may not constitute an independent basis for the filing of a grievance.[5]

For the above stated reasons, we find that the Union has failed to establish a nexus between Grievance (B) and any source of a right to submit the dispute to arbitration. The Union's request for arbitration of the grievance, accordingly, is denied. However, Grievance (A) as set forth in the request for arbitration may proceed to arbitration.

## **ORDER**

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

ORDERED that the request for arbitration as to Grievance (B) filed by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied; and it is further

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[5] Decisions Nos. B-5-88; B-52-87; B-31-86; B-28-84; B-22-81.

ORDERED that the petition challenging arbitrability as to Grievance (B) filed by the City of New York be, and the same hereby is, granted; and it is further

ORDERED that the request for arbitration as to Grievance (A) be, and the same hereby is, granted.

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