

City v. CWA, 51 OCB 13 (BCB 1993) [Decision No. B-13-93 (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,

Decision No. B-13-93
Docket No. BCB-1428-91
(A-3863-91)

-and

COMMUNICATIONS WORKERS OF
AMERICA

Respondent.

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DECISION AND ORDER

On October 7, 1991, the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by the Communications Workers of America ("CWA" or "Union"). The Union filed an answer on April 3, 1992; the City filed a reply on April 9, 1992.

BACKGROUND

In a letter dated August 23, 1990, the Union requested a Step III hearing on behalf of Mr. Wilfred Jones, a former Sanitation Enforcement Agent. The Union alleges that the grievant was treated unfairly, as evidenced by the fact that the grievant, who served in a provisional title for six years, was never called for certification to a permanent position in the same title. The Union asserts that the grievant never received a letter regarding certification.

In a decision dated August 6,, 1991, the Office of Labor Relations rendered its determination. The Review Officer noted that the grievant was found not qualified for failing to appear

when called for certification. The Review officer denied the grievance, holding that appointment from an established list to a position in the competitive class is governed by the Rules and Regulations of the New York City Personnel Director, which are not subject to the grievance procedure or arbitration under the collective bargaining agreement between the parties.

On August 23, 1991, the Union requested arbitration of its grievance. The Union claimed a violation of Article VI, §1 of the agreement between the parties.¹

POSITIONS OF THE PARTIES

City's Position:

According to the City,, the grievant was employed by the Department of Sanitation as a provisional Sanitation Agent from

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The relevant provision of Article VI,, §1 states as follows:

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; provided, disputes involving the Rules and Regulations of the New York City Personnel Director ... shall not be subject to the grievance procedure or arbitration.

The grievance procedure was amended by a Letter Agreement, dated December 22, 1987 to add the following definition of a grievance:

(G) A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

August 3, 1981 until July 31, 1990. The City asserts that the grievant was not selected for appointment from a Civil Service list and accordingly, was terminated. The City contends that appointments from civil Service lists are governed by Rule V of the Rules and Regulations of the New York City Personnel Director ("DOP Rules").

The City notes that Article VI, §1(B) of the unit contract expressly excludes disputes involving the DOP Rules, from the definition of a "grievance" to claims of wrongful disciplinary action taken against provisional employees with two or more years of service. The City argues that the instant dispute may not be arbitrated because the grievant was terminated as a result of action taken pursuant to the DOP Rules, which are not subject to the grievance procedure or arbitration.

The City further argues that the parties expressly limited the definition of "grievance" to claims of wrongful disciplinary action taken against provisional employees with two or more years of service. The City argues that the grievant was not "disciplined" within the meaning of this term because the grievant's termination occurred as a result of operation of law. According to the City, as the grievant's conduct was not a factor in the termination, the grievant was not terminated for disciplinary reasons.

Finally,, the City argues there is no nexus between the contract provision allegedly violated and the grievance. The City asserts that there is no nexus between a provision which entitles

provisional employees with two or more years of service to grieve disciplinary action and a claim that the grievant was terminated because the City failed to certify the grievant to a Civil Service position.

In its reply, the City responds to the Union's argument that because a failure to notify is not addressed by the DOP Rules, the Union's claim is arbitrable. Citing DOP Rule 7.1.2., the City insists that the DOP Rules cover communications to persons on eligible lists. Moreover, the City argues, since the instant dispute involves an issue within the general scope of the DOP Rules, it is not arbitrable, even in the absence of a specific provision covering a failure to notify. Furthermore,, the City alleges there is no record indicating the grievant contacted the New York City Personnel Director, a remedy available under DOP Rule 8.2.1.

Countering the Union's argument that the instant dispute is arbitrable because it involves a misapplication of agency policy, the City asserts that the Union has not cited any written policy which was allegedly misapplied. In response to the Union's argument that removal from the payroll constitutes grievable discipline, the city contends that when a management right afforded to the City is challenged as a disciplinary matter, the Union must present a substantial issue under the collective bargaining agreement. Citing Decision No. B-54-91, a case which it claims is

analogous to the present one,, the City argues that there have been no facts alleged, such as verbal accusations of incompetence or the imposition of a penalty, from which it could be inferred that the action taken against the grievant was disciplinary In nature.

Resisting the Union's characterization of the instant dispute as a termination for failure to appear at an investigatory interview, the City contends that the grievant was terminated because Civil Service Law requires provisional employee be replaced with an employee from a Civil Service list if such a list exists for that employee's title. Furthermore, the City asserts that this claim is barred by the doctrine of laches. Contending that the grievant could not have been chosen from the Civil Service list once the list had expired on September 5, 1989, the City claims the grievant delayed in filing a claim, increasing the City's potential monetary liability.

Union's Position:

In response to the City's argument that the instant dispute is not arbitrable because it involves the DOP Rules, which are excluded from the definition of the term "grievance" contained in the collective bargaining agreement between the parties, the Union responds that the gravamen of the Union's claim dam not concern the DOP Rules. The Union asserts that the grievant was terminated for failing to appear for an interview for a permanent position as a Sanitation Enforcement Agent. The Union notes that this

interview was scheduled by the Department of Sanitation and not the Department of Personnel. The Union further notes that contact regarding scheduled interviews is made by the Department of Sanitation's Office of Personnel. The Union contends the grievant never received notice to report for an interview, there is no evidence in the grievant's personnel file indicating a letter was sent, and the grievant was not personally notified of the interview by a Department of Sanitation supervisor. According to the Union, the basis for the instant grievance is the Department of Sanitation's failure to notify the grievant of the Civil Service interview, which resulted in a designation as ineligible for a permanent position. The Union notes that the DOP Rules are silent as to the process to be used in notifying an eligible candidate to appear for an interview. The Union argues that since the basis of the instant dispute, the failure to notify, is not addressed by the DOP Rules, it is not excluded from arbitration.

Countering the City's argument that the instant dispute is not arbitrable because the grievant was not subject to "discipline," the Union responds that it has articulated a grievance under Article VI,, §I(B) of the collective bargaining agreement,, which defines a "grievance" as "[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." The Union claims that the grievant's termination, as a result of a misapplication of the notification policy of the Department of Sanitation, falls within this definition.

In response to the City's argument that there is no nexus between the grievant's dismissal and contractual right to arbitrate a wrongful disciplinary action, the Union asserts there is a nexus between the grievant's, discharge and contractual right to arbitrate a wrongful disciplinary action. The Union claims the City inaccurately insists that disciplinary action only applies to actions taken in response to an employee's conduct. The Union argues that removal from the payroll constitutes disciplinary action and is grievable. Moreover,, the Union argues that an arbitrator will decide who is correct after weighing the City's argument that the grievant was terminated by operation of Civil Service Law for failing to appear for an interview and the Union's argument that the grievant's failure to appear was the result of departmental failure and not the grievant's inaction.

DISCUSSION

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 contractual obligation is broad enough to include the act complained of by the Union.² When arbitrability is challenged, the

²Decision Nos. B-10-92; B-7-91; B-2-91.

burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.³

In the instant case, the Union claims a violation of Article VI §1 of the collective bargaining agreement between the parties. Article VI, §1(B) provides:

The term "Grievance" shall mean:

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; provided, disputes involving the Rules and Regulations of the New York City Personnel Director ... shall not be subject to the grievance procedure or arbitration.

In addition, the grievance procedure was amended by a Letter Agreement dated December 22, 1987 to add the following definition of a "grievance."

(G) A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

The Union seeks arbitration of its claim that the Department of Sanitation ("DOS") misapplied its notification policy,, resulting in the grievant's ineligibility for a permanent position and subsequent termination. The City claims that the instant dispute is not arbitrable under Article VI,, §1 of the collective bargaining agreement. The City notes that Article VI, §1(B) of the collective bargaining agreement expressly excludes disputes involving the

³Decision Nos. B-10-92; B-7-91; B-2-91.

Rules and Regulations of the New York City Personnel Director ("DOP Rules") from the definition of a "grievance." The City argues that as appointments from Civil Service lists are governed by Rule V of the DOP Rules, the instant dispute may not be arbitrated. The Union claims the instant dispute is arbitrable, pointing to the fact that the DOP Rules are silent as to the process to be used in notifying an eligible candidate to appear for an interview. The Union claims that it is not seeking to arbitrate a violation of the DOP Rules, but a violation of DOS policy,, since DOS handles the scheduling of interviews.

Although we are presented with a question as to whether the instant dispute is covered by the DOP Rules, we need not address that issue. Article VI, §I(B) defines a "grievance" as a claimed misapplication of the "rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant" and specifically excludes the DOP Rules from this definition. As noted by the City, the Union has not demonstrated an alleged misapplication of any rule or regulation,, written policy or order applicable to the Department of Sanitation. Although the Union claims that DOS misapplied its notification policy as to the grievant,, the Union never referenced the written policy allegedly misapplied. Nor may we find the Union's claim arbitrable as a claimed violation of past practice in the absence of contractual

language permitting such a claim.⁴

Further challenging the Union's claim of a violation of Article VI, §1,, the City argues that the termination of the grievant did not constitute "discipline." The City cites Decision No. B-54-91 in support of its argument that the Union has alleged no facts, such as verbal accusations of incompetence or the imposition of a penalty, from which it could be inferred that the action taken against the grievant was disciplinary in nature. The Union argues that removal from the payroll constitutes disciplinary action and is grievable.

According to the Letter Agreement dated December 22, 1987, the definition of a "grievance" was amended to add a claimed wrongful disciplinary action taken against a provisional employee with two or more years of service. As noted by the city,, we stated in Decision No. B-54-91 that when management's statutory right to "relieve its employees from duty because of lack of work or for other legitimate reasons"⁵ is challenged, the Union bears the burden of presenting a "substantial issue" under the collective bargaining agreement. In the instant case,, the Union alleges that removal from the payroll constitutes grievable disciplinary action. The Union makes no other allegations from which we could infer that

⁴Decision No. B-24-92 (holding not arbitrable a claimed violation of past practice as not within the scope of a contractual provision similar to Article VI, §I(B)).

⁵NYCCBL §12-307b.

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the grievant's termination was disciplinary in nature. in the absence of evidence supporting the Union's conclusory allegation that the action taken against the grievant was disciplinary in nature, we find the Union has not met its burden of presenting a "substantial issue" under the collective bargaining agreement.

ORDER

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

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ORDERED,, that the petition challenging arbitrability filed by the City of Now York is granted; and it is further,

ORDERED, that the request for arbitration filed by the Communications Workers of America is denied.

Dated: New York, NY
March 24, 1993

MALCOLM D. MacDONALD
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MEMBER

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CAROLYN GENTILE
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