City v. L.371, SSEU, 53 OCB 3 (BCB 1994) [Decision No. B-3-94 (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--

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.

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DECISION NO. B-3-94

DOCKET NO. BCB-1585-93
(A-4631-93)

DECISION AND ORDER

On March 1, 1993, the Social Service Employees Union, Local 371 ("L. 371" and "the Union") filed a request for arbitration, concerning an alleged improper denial of annual leave time. On June 2, 1993, the City of New York, appearing by its Office of Labor Relations ("the City"), filed a petition challenging the arbitrability of the grievance. After two requests for an extension of time were granted, the Union filed its answer on July 23, 1993. On July 27, 1993 the City filed a reply.

BACKGROUND

On June 18, 1992, Gertrude Wright ("Grievant"), an Institutional Aide employed by the Human Resources Administration ("HRA") at the Greenpoint Men's Shelter, sought permission to take one day of annual leave on June 20, 1992. She was told by an administrative officer that her request would not be granted before it could be determined whether another employee would request time off. Her request was ultimately denied.

Notwithstanding the denial, she took the day off and was docked a day's pay in accordance with HRA Procedure No. 83-4 ("agency procedure"). Entitled "Supervision of Employee Attendance and Punctuality," Procedure No. 83-4 provides, in pertinent part, as follows:

> Annual leave ... should be used on a planned basis with prior approval. Unplanned annual leave ... is to be used only for personal emergencies ... and must be fully explained and appropriately documented. Unsatisfactory explanations will result in disapproval of the leave, and loss of pay ....[1]

On June 23, 1992, Grievant appealed the denial of her leave request. A Step II hearing was held on July 31, 1992, pursuant to Article VI ("Grievance Procedure") of the 1987-90 Executed Agreement relating to Social Services and Related Titles ("unit agreement") between L.371, et al., and the City.[2] Specifically, Grievant alleged violation of Article V ("Time and

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[1] Dated March 31, 1983, effective May 8, 1983.

[2] The unit agreement, dated March 3, 1992, for the term of July 1, 1987, to September 30, 1990, provides, in pertinent part, as follows:

ARTICLE VI ("Grievance Procedure") Section I ("Definition"): The term "Grievance" shall mean:

> a. A dispute concerning the application or interpretation of the terms of this Agreement.
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> 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 ....

Leave"), Section 2, of the Citywide Supplement between the City and District Council 37, AFSCME ("D.C. 37").[3] That section provides, in pertinent part:

> Decisions on requests for annual leave ... shall be made within seven (7) working days of submission except for requests which cannot be approved at the local level or requests for leave during the summer peak vacation period or other such periods for which the Employer has established and promulgated a schedule for submission and decision of leave requests ...
>
> If any agency head ... calls upon an employee to forego the employee's requested annual leave or any part therefore any year, it must be in writing and that portion shall be carried over until such time as it can be liquidated ....

This Article also provides that employee requests for annual leave are to be made pursuant to collective bargaining agreement or agency policy. The unit agreement applicable to the Grievant's title provides further that all authorized vacation picks for employees shall be by seniority in the employees' Civil Service title[4] and that leave requests for employees assigned to work units which require broader coverage shall be determined by title seniority among affected employees.[5]

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[3] Dated September 4, 1991,, supplementing and modifying, effective October 1, 1990, the 1985-87 Citywide Agreement of May 23, 1989.

[4] Article X ("Holidays and Leave"), Section 1.

[5] Id.

Agency procedure defines "unauthorized leave" as "leave actually taken, which was requested and denied prior to being taken."[6] Unauthorized leave renders the employee subject to disciplinary action for misconduct. Upon submission of an acceptable written explanation detailing the circumstances causing the failure to follow procedure, the location or program head may approve the request for leave.[7] Agency procedure also provides that annual leave should be used on a planned basis with prior approval; unplanned annual leave is to be used only for personal emergencies and must be explained and documented.[8] Requests for unplanned leave may be granted if the employee provides a reasonable and justifiable written explanation[9];however, if an employee returns from an unplanned absence and does not submit a leave request that day, the leave is disapproved.[10] Disapproval for this reason or for failure to

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[6]HRA Procedure No. 83-4, Article II ("Definitions"), Section "H" ("Unauthorized Leave"), Subsection 2.

[7]Id., Article III ("General Instructions"), Section "C" ("Unauthorized Leave").

[8]Id., Article IV ("Absence and Lateness Policy"), Section "B" ("Annual Leave/Compensatory Time").

[9]Id., Article V ("Supervision of Attendance and Lateness"), Section B ("Supervisory Actions for Enforcement of Absence Policy"), Subsection 4 ("Review and Processing of Leave Requests"), Paragraph "a" ("Leave Request Policy: Annual Leave/Compensatory Time"), Subparagraph 4.

[10]Id., at Subparagraph 6.

provide a reasonable and justifiable written explanation for the request for unplanned leave will result in loss of pay.[11] In addition, if an agency head calls upon an employee to forego the employee's requested annual leave or any part of it in a given year, the request must be in writing and the time can be carried over until it can be liquidated.[12]

The Step II hearing officer found that the Grievant had been told prior to the requested day off that her request would not be approved because a co-worker had not returned from sick leave and Grievant's absence would leave the unit where she worked, preparing client meals, without adequate coverage. The grievance was denied at Step II, and the denial was upheld at Step III.

POSITIONS OF THE PARTIES

City's Position

The City states that, while it has agreed to submit to arbitration matters such as ministerial procedures with regard to annual leave requests, certain levels of annual leave hours for employees, and action to be taken if an employee is not permitted

[11] Id., Article IV ("Absence and Lateness Policy"), Section "B" ("Annual Leave/Compensatory Time").

[12] Id., Article V ("Supervision of Attendance and Lateness") . Section "B" ("Supervisory Actions for Enforcement of Absence Policy"), Subsection 4 ("Review and Processing of Leave Requests"), Part "a" ("Leave Request Policy").

to use all of his or her annual leave in a given year, it has never agreed to submit to arbitration disputes concerning the exercise of management's substantive right to approve or deny the scheduling of annual leave.

In addition, the City challenges the arbitrability of the Union's grievance on the ground that there is no nexus between the denial by the Grievant's supervisor of the annual leave request and either Article V, Section 2, of the Citywide agreement or HRA Procedure No. 83-4. According to the City, the cited agency procedure and contract section merely provide procedures by which employees may request leave and by which the employer may advise as to whether a leave request is approved or denied; the City contends that they do not grant a substantive right to the approval of leave requests nor do they set forth conditions under which requests must be granted. The City states that HRA's right to approve or deny a leave request springs from its management right under Section 12-307b of the NYCCBL,[13] which, in the City's view, has not been modified by agreement of the parties. Moreover, the City contends that, inasmuch as the Union challenges agency action which implicates management

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[13]Section 12-307b of the NYCCBL provides, in relevant part:

> It is the right of the city, or any other public employer, acting through its agencies, to ... direct its employees; take disciplinary action ... maintain the efficiency of governmental operations ... and exercise complete control and discretion over its organization ....

prerogative, the Union has failed to establish the existence of a substantial issue under the contract.

Finally, the City argues that L. 371 lacks standing to arbitrate the grievance concerning an alleged violation of the Citywide agreement, because D.C. 37, and not L. 371, holds the Citywide bargaining certificate. The City concludes that only D.C. 37 may rightfully invoke arbitration of matters covered by the Citywide contract. The City asks that the Union's request for arbitration be denied in its entirety.

Union's Position

The Union notes that the hearing officers at Step II and Step III raised no question as to whether the grievance herein constituted a proper subject for determination under the dispute resolution procedure which the unit agreement requires the parties to utilize.

Moreover, the Union argues that sufficient nexus exists between the agency's rejection of the Grievant's leave request, and Article V, Section 2, of the Citywide agreement and HRA Procedure No. 83-4. The Union states that both the contractual clause and the agency procedure govern the Grievant's application for annual leave. It also argues that implicit in these provisions is the requirement that each must be applied in a non-arbitrary manner. The Union contends that the scope of the

agency's discretion under the agreement and its written policy and the issue of whether a violation actually occurred go to the merits of the case and are matters for an arbitrator to decide.

Further, the Union states that, by letter to the OCB dated July 22, 1993, D.C. 37 memorializes its specific authorization and designation of L. 371 to represent the Grievant herein under the Citywide agreement. The Union asks that the City's petition challenging arbitrability be denied and that the Union's request for arbitration be granted.

DISCUSSION

In determining the arbitrability of disputes, we must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue.[14] Here, the parties have included a grievance procedure in their collective bargaining agreement. That procedure culminates in the arbitration of a claimed violation, misinterpretation or misapplication of provisions of the agreement and of rules, regulation, written policy or orders of the agency which employs the grievant affecting terms and conditions of employment. Leave benefits fall within the general

[14]Decision Nos. B-14-93, B-13-93 B-12-93 and B-33-90.

subject of hours.[15] Leave benefits are the subject of the written agency policy described in HRA Procedure No. 83-4 as well as in Article V, Section 2, of the Citywide Supplement and Article X of the unit agreement. Therefore, it is clear that the claimed misapplication of the sections cited by the Union is expressly within the contractual definition of an arbitrable grievance.

It is well-settled that when challenged, a union must establish a nexus between the act complained of and the contract provision it claims to have been breached.[16] The Union herein has shown an arguable relationship between specific annual leave provisions of the contract and agency procedure which are alleged to have been violated and the act complained of, i.e., the alleged denial of a request for annual leave. We therefore find the requisite nexus and are not dissuaded by the City's argument that HRA Procedure No. 83-4 provides no substantive right to

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[15]Section 12-307a of the NYCCBL provides, in pertinent part, as follows:

> **Scope of collective bargaining.**
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> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on ... hours (including but not limited to overtime and time and leave benefits) ....

See, also, B-45-92 and B-59-89.

[16] Decision Nos. B-27-93, B-24-92, B-29-91 and B-59-90.

leave requests. We have never hold that a substantive right is a prerequisite to finding a nexus. The City's arguments — -(i) that its agreement to arbitrate disputes about leave requests is limited to ministerial matters, levels of annual leave, and procedures for granting unused leave and (ii) that HRA Procedure No. 83-4 grants no substantive rights -- require interpretation of both the contract and agency policy and therefore go to the merits of the case. Such matters are for an arbitrator -- not for us -- to decide.[17]

Our inquiry, however, does not end there. Where, as here, it is alleged that the disputed action is within the scope of statutory management rights,[18] we have been careful to fashion a test of arbitrability which strikes a balance between often conflicting considerations and which accommodates both the City's management prerogatives and the contractual rights asserted by the Union.[19] When the City asserts a management rights defense, the burden will be on the union not only to prove the allegation ultimately, but also to establish initially to the satisfaction of the Board that a substantial issue is presented as to whether the City's discretion has been exercised in a manner inconsistent

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[17]Decision Nos. B-27-93, B-24-92, B-30-92 and B-21-91.

[18]Decision Nos. B-12-93, B-52-89, B-33-88, B-28-87 and B-40-86.

[19]Decision Nos. B-12-93, B-52-89, B-33-88, B-5-87, B-4-87 and B-40-86.

with the collective bargaining agreement.[20] We have long held that a union meets its burden in this regard when it presents evidence supporting its allegation that the action complained of was inconsistent with the applicable contract.[21] The union's showing demands close scrutiny by the Board.[22]

Contrary to the Union's assertion herein, the scope of agency discretion, the exercise of which is at issue, falls within this scrutiny and is not a matter for an arbitrator to decide. In that regard, we have held that a limitation on a public employer's right to determine staffing levels would have to be expressly stated in order to restrict the employer's

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[20]Decision Nos. B-14-93, B-12-93, B-19-92, B-52-91, B-59-90, B-74-89, B-16-87 and B-40-86.

See, also, Decision No. B-46-86, in which we stated:

> We are concerned here to formulate a rule that will strike a balance between the City's right to exercise discretion and the employee's right to fair and reasonable treatment ... We will require, in cases such as this, that the union allege more than the mere conclusion that discretion has been exercised in any arbitrary manner. In any case in which the City's discretionary action is challenged on a basis that the discretion has been exercised in an improper manner, the burden will be on the union to establish initially, to the satisfaction of the Board, that a substantial issue exists in this regard, (Emphasis added.)

[21]Decision Nos. B-12-93, B-50-92, B-19-92 and B-75-90.

[22]Decision Nos. B-14-93, B-12-93, B-19-92, B-52-91 and B-40-86.

exercise of its management prerogative in this area.[23] We find no such statement within the contract or the agency procedure under review here. Moreover, the Union has cited no authority to substantiate its claim that management's prerogative regarding the scheduling of annual leave is restricted by an implicit requirement that the contractual provision and agency procedure at issue be applied in a non-arbitrary manner.

Since we require a union to offer more than a merely conclusory allegation that management discretion has been exercised in an arbitrary manner in order for it to overcome a defense of management prerogative,[24] we look for facts which, if proven, would substantiate allegations of arbitrariness.[25] The Union's pleadings in the instant matter are devoid of such facts and therefore fail to overcome management's defense.

Parenthetically, we find no merit in the City's argument that its petition challenging arbitrability must be granted on the grounds that L. 371 allegedly lacks standing to arbitrate a grievance under the Citywide contract. The record

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[23]Decision No. B-2-92 (Health and Hospitals Corporation versus Local 30, Int'l Union Of Operating Engineers: Alleged violation of work chart is not arbitrable because the chart, which resulted after bilateral discussions, does not compel a finding that the parties mutually assented to be bound by its terms or that the parties agreed to submit disputes about deviation from staffing levels to arbitration.)

[24]Decision Nos. B-75-90 and B-46-86.

[25]Id. and B-46-86.

shows that D.C. 37 has given written authorization to its affiliate L. 371 to prosecute the instant grievance as the parent organization's duly appointed representative in this matter.

Accordingly, we grant the City's petition challenging arbitrability and deny the Union's request for arbitration of the claims alleged herein.

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 of the City of New York, docketed as BCB-1585-93 (A-4631-93) be, and the same hereby is, granted; and it is further

ORDERED, that the request of the Social Service Employees Union, Local 371, for arbitration of the claims

asserted herein, and the same hereby is, denied.

DATED: New York, New York
February 28,1994

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

DENNISON YOUNG, Jr.
MEMBER

ANTHONY P. COLES
MEMBER

CAROLYN GENTILE
MEMBER