City & DOP v. UPOA, 53 OCB 4 (BCB 1994) [Decision No. B-4-94 (Arb)]

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

Department of Probation and City of New York,

Petitioners,

- and -

United Probation Officers Association,

Respondent.
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Decision No. B-4-94

Docket No. BCB-1606-93 (A-5047-93)

DECISION AND ORDER

On October 8, 1993, the New York City Department of Probation ("the Department"), by the New York City Office of Labor Relations, filed a petition challenging the arbitrability of a grievance brought by the United Probation Officers Association ("the Union"). The issue sought to be arbitrated is whether the Department "violated the collective bargaining agreement in that employees of the Department are required to sign a tax waiver as a prerequisite to promotion." As a remedy, the Union seeks that the Department "cease requiring employees to sign a tax waiver as a prerequisite for promotion."

The Union requested, and was granted, an extension of time in which to file an answer, which was filed on December 3, 1993. The City filed a reply on December 13, 1993.

Background

The Union is the certified bargaining representative of probation officers, supervisory probation officers and probation officer trainees employed by the Department. The "tax waiver" referred to by the Union refers to § 1127 of the City Charter, which provides that every person seeking employment with the City shall agree, as a condition precedent to employment, to pay the equivalent of the City resident income tax in the event that he or she becomes a non-resident.[1] The Department requires all non-

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[1] Section 1127 of the City Charter was enacted as § 822 of the City Charter, Local Law 1973, No. 2. Section 822 was recodified as § 1127 of the City Charter in November 1988.

Section 1127 of the City Charter 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.
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> b. Whenever any provision of this charter, the administrative code of the city of New York or any rule and regulation promulgated pursuant to such charter or administrative code employs the term "salary," "compensation," or any other word or words having a similar meaning, such terms shall be deemed and

resident employees to sign an agreement by which they consent, as a condition of employment, to having deducted from their wages a sum of money equal to the amount required to be withheld from resident employees for purposes of the City personal income tax.

In September 1991, the Union filed a request for arbitration, claiming that the Department "has been and is violating the Probation Officers Agreement by deducting City withholding tax from non-City residents who were hired by the Department between January 1, 1973 and January 1, 1974." The City challenged the request, claiming that the Union had failed to demonstrate a nexus with a contract provision or a rule or policy of the Department; that a claimed violation or misapplication of the City Charter is not an appropriate basis for a grievance; and that the dispute was not a wage dispute of the type previously found arbitrable by the Board of Collective Bargaining.

> construed to mean the scheduled salary or compensation of any employee of the city of New York, undiminished by any amount payable pursuant to subdivision a of this section.

* Although § 1127a refers to § 11-1706 of the Administrative Code ("Credits against tax") for a definition of a nonresident individual, the definition is actually provided in § 11-1705 of the Administrative Code ("General provisions and definitions"). Section 11-1705 provides, in relevant part:

> 2. City nonresident individual. A city nonresident individual means an individual who is not a city resident.

In Decision No. B-25-92, issued in May 1992, this Board found "at least an arguable relationship between the subject matter of the grievance and the salary provision (Article III) of the Unit Economic Agreement." The decision defined the issue in dispute as the question of whether the City had a "right to withhold portions of the contractual wages payable to Respondent Dominic Coluccio and others similarly situated." The Board held that the relevance or applicability of § 1127 to the dispute goes to the merits of the case and is a matter for an arbitrator to decide.

The City brought an appeal of the Board's decision[2] under Article 78 of the Civil Practice Laws and Rules. In March 1993, the City's petition was dismissed in State Supreme Court.[3]

In March 1993, the Union signed an agreement with the City whereby it agreed to be covered by the terms of the collective bargaining agreement ("the contract") negotiated between the City and the Coalition of Municipal Unions, including "all economic

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[2] New York City Dept. of Probation and City of New York v. Malcolm D. MacDonald, New York City Board of Collective Bargaining and United Probation Officers Association, N.Y. Sup. Ct., Index No. 42861/92 (1993).

[3] The City subsequently filed a notice of appeal. The appeal was perfected on January 31, 1994, and is currently on the calender for the May Term of the Appellate Division, First Department.

matters."[4] The 1993 Municipal Coalition Agreement does not include a provision concerning the city tax waiver.

The Union brought a scope of bargaining petition against the Department in August 1993, claiming that the Department refused to bargain on the economic impact of the provision of the City Charter which requires that every person seeking employment with the City shall agree, as a condition precedent to employment, to pay the equivalent of the City resident income tax in the event that he or she becomes a non-resident (hereinafter "city tax waiver".) As a remedy, the Union requested that the Board of

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[4] The "Election to be covered by the terms of the Municipal Coalition Agreement" provides:

WHEREAS, the undersigned union ("the Union") has not elected to be a member of the Coalition of Municipal Unions but desires to enter into collective bargaining agreements, including the agreement affixed hereto (the "Municipal Coalition Agreement") and an agreement ("Separate Unit Agreement") successor to the existing separate unit agreement terminating on the date indicated below covering the employees represented in the Union; and

WHEREAS, the Union intends by the affixed Municipal Coalition Agreement to cover all economic matters and to incorporate the terms of said Municipal Coalition Agreement into the Union's Separate Unit Agreement,

NOW, THEREFORE, the Union hereby elects to be covered by all terms and conditions set forth in the affixed Municipal Coalition Agreement on behalf of the employees in the bargaining unit described below.

Name of Union: United Probation Officers Association ("UPOA")

Name of Bargaining Unit: Probation Officers

Termination date of existing separate unit agreement: September 30, 1991

Collective Bargaining determine that its bargaining demand was within the scope of collective bargaining. In Decision No. B-48-93, the Board dismissed the Union's petition, finding that the Union's demand concerning taxes on non-resident employees had been fully negotiated and was outside the scope of mid-term bargaining.

In June 1993, the Union brought the instant grievance at Step III of the grievance and arbitration procedure,[5] claiming that the Department is violating Article VI, §§ 1A and 1B[6] of the collective bargaining agreement because employees of the Department are required to sign a tax waiver as a prerequisite to

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[5] Article VI, § 6 of the collective bargaining agreement provides:

> A grievance concerning a large number of employees and which concerns a claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement may be filed directly at STEP II of the grievance procedure. All other individual grievances in process concerning the same issue shall be consolidated with the "group" grievance.

[6] Article VI, Section 1 of the collective bargaining agreement provides, in relevant part:

> DEFINITION: The term "Grievance" shall mean:
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> (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 of 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....

promotion. The grievance was denied by the City's Office of Labor Relations in August 1993, on the grounds that the Union did not appear for the grievance hearing. After the City filed its petition challenging the arbitrability of the grievance, the Union, in its answer to the petition, cited Article V, § 2(a) of the collective bargaining agreement[7] as providing another basis for arbitrability.

Positions of the Parties

City's Position

The City contends that the Union, in both its grievance and its request for arbitration, has failed to identify a contract provision which has been misinterpreted or misapplied. It notes that the only provision alleged to have been violated is that which defines the term "grievance." Citing Decision No.

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[7] Article V, § 2 of the collective bargaining agreement provides, in relevant part:

Supervisory Responsibility

(a) The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employees for employees in supervisory positions listed in Article 1, Section 1 of this Agreement. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility hereunder.

B-28-82, the City submits that such definitional sections do not create substantive rights or furnish an independent basis for a grievance.

The City argues that the Union has also failed to identify a rule, regulation, written policy or order of the Department which has been violated, misinterpreted or misapplied. It maintains that the Union's grievance claims that § 1127 of the New York City Charter has been misinterpreted or misapplied. The definition of a grievance in the collective bargaining agreement, the City contends, does not include a claimed violation of the City Charter. The City maintains that § 1127 mandates that the Department require employees under consideration for promotion to agree to pay the non-resident tax.

In its reply, the City notes that the Union raised in its answer, for the first time, arguments concerning Article V, § 2, the Unit Economic Agreement, and a unilateral change in terms and conditions of employment without negotiation. It argues that, in any case, the Union has failed to identify a contractual nexus to the act in dispute. The City maintains that nothing in the application of the city tax waiver statute creates a nexus to rights set forth in Article V, § 2 regarding responsibilities of supervisors in performing their supervisory functions. Because a candidate for promotion has not yet been promoted, the City argues, he or she has no supervisory responsibilities and the cited contractual provision is inapplicable.

The City notes that the Union, in its answer, claims that "a threat that an employee may not receive a promotion violates the salary provision of an agreement" without citing a specific section of the contract. The City contends that because the Union has failed to identify any employee who refused to sign a city tax waiver and was denied promotion, no actual case or controversy has been presented and the issue is not yet ripe.

The City further addresses the Union's argument concerning "the salary provision of an agreement," maintaining that the salary provisions apply only to employees serving in the designated title. The City contends that the Union has failed to identify a contractual provision guaranteeing promotion, and the commensurate higher salary, to any employee. The City argues, further, that the Union has also failed to identify any specific contractual limitation on the City's right to promote that has been agreed upon by the parties

In Decision No. B-48-93, the City maintains, the Board determined the question of whether the Department unilaterally changed a term and condition of employment without negotiation by requiring employees to sign a city tax waiver. For this reason, the City argues, the Union is estopped from raising the issue in the instant case. Assuming, however, that the Department had effected a unilateral change in a term or condition of employment, the City adds, the Union has failed to identify a substantive provision, rule or regulation which would preclude

the Department from requiring employees to sign city tax waiver. While such an action might constitute a separate cause of action, the City asserts, the Union has failed to identify an arbitrable claim.

Union's Position

The Union argues that the Department's requirement that employees considered for promotion execute a city tax waiver changes the terms and conditions of employment of affected employees without bargaining or negotiation, and is in violation of the contract. The Union submits it that does not seek arbitration of a violation of the provisions or the applicability of § 1127; rather, it contends, it seeks to arbitrate a claimed unilateral change in terms and conditions of employment.

The Union maintains that it is challenging a requirement of the Department which was not contemplated by the parties during negotiations. According to the Union, the city tax waiver "affects the terms of Article V, § 2 of the contract regarding promotions, as well as the Unit Economic Agreement and the relevance of § 1127 to these portions of the contract." It asserts that a violation of the Unit Economic Agreement arguably affects terms and conditions of employment.

The Union disputes what it characterizes as the City's "claim that this matter merely involves the withholding of taxes." It contends that implicit in the requirement is a threat

that promotion and wages will be withheld. It argues that such a threat would violate the salary provision of an agreement and is a matter for arbitration.

Discussion

When a public employer challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.[8] Here, the parties have included a grievance procedure in their collective bargaining agreement which culminates in binding arbitration. The dispute is whether there arguably is a nexus between the alleged act of the Department and a contract provision that the Union claims has been violated.

In its answer the Union raised, for the first time, the arguments that a nexus exists between the disputed action and Article V, § 2 of the contract (concerning supervisory responsibility) and the "salary provision" of the Unit Economic Agreement. It also claimed that the Department had effected a change in a term and condition of employment without bargaining or negotiation. We have consistently denied arbitration of claims alleged for the first time after the request for

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[8] See e.g., Decision Nos. B-49-92; B-B-54-91; B-74-89; B-52-88; B-35-88.

arbitration has been filed.[9] Permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion and possible resolution of the dispute at each step of the procedure. Since the Union deprived the City of an opportunity to respond to its theories at the appropriate time, we will not consider these arguments now.[10]

In the request for arbitration, the only provisions alleged to have been violated are Article VI, §§ 1(A) and 1(B), which define the term "grievance." We have held previously that the alleged violation, misinterpretation or misapplication of the definitional provision of a contract does not, by itself, furnish the basis of a grievance.[11] It is entirely appropriate to cite the definition of a grievance in a request for arbitration. However, such a citation must be made together with citation of a specific substantive provision, the alleged breach of which the

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[9] We note that a similar situation existed in Decision No. B-25-92, wherein the Board found a nexus between the disputed action and the salary provision of the contract. That case is distinguishable, however, since it appeared therein that the City was on notice of the Union's claim of a nexus between the Department's alleged action and the salary provision. In the instant case, there is no indication that the City was on notice of the new claims set forth in the Union's answer before the City received that document.

[10] Decision Nos. B-40-88; B-1-86; B-14-84; B-11-81; B-12-77; B-20-74.

[11] Decision Nos. B-30-84; B-41-82; B-7-81; B-21-80.

parties have agreed would form the basis of an arbitrable claim.
In the instant dispute, the alleged violation of a substantive

provision of the contract other than Article VI, § 1 may constitute a grievance. However, there can be no nexus between the disputed management action and the definitional section, which is the only contract provision cited in the request for arbitration. Accordingly, we find that the matter is not arbitrable, and we shall grant the instant petition.

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 challenging arbitrability in Docket No. BCB-1606-93 filed by the City of New York be, and the same hereby is, granted; and it is further,

ORDERED, that the request for arbitration filed by the United Probation Officers Association be, 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 COLES
MEMBER

CAROLYN GENTILE
MEMBER