HRA & City v. L.371, SSEU, 55 OCB 5 (BCB 1995) [Decision No. B-5-95 (Arb)]

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

HUMAN RESOURCES ADMINISTRATION and CITY OF NEW YORK
Petitioners,

Decision No. B-5-95

Docket No. BCB-1487-92 (A-4073-92)

-and-

SOCIAL SERVICES EMPLOYEES
LOCAL 371, S.S.E.U.
Respondent.
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DECISION AND ORDER

On April 13, 1992, the Human Resources Administration ("the Agency") and the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by Local 371, Social Services Employees Union ("Union"). The grievance alleged that the Agency violated Article VIII, section 11[1] of the collective bargaining agreement ("CBA") and Executive Order #510[2] allowed an employee, acting as agent for management of the Agency, to use profane language towards another employee. The Union filed an answer to the petition on July 10, 1992. The City filed a reply on September 4, 1992.

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[1] Article VIII, section 11 states as follows:
"The parties agree that the relationship between Employer and employee shall be dignified and professional at all times. This means that the Employer and employee shall not use indecent, abusive, profane language and/or behavior. Claimed violations of this provision are limited to such language and/or behavior."

[2] In its answer to the City's petition the Union abandoned its claim based on Executive Order #510 and limited its request for arbitration to the alleged violation of Article VIII, section 11.

BACKGROUND

On July 9, 1991, Glenda Lee ("Grievant"), who was employed as a caseworker, went to discuss the Agency's summer hour schedule with Murry Gewritz, who was a supervisor, in his office. Also present at the meeting were Desiree Chislom, an employee on the same level as the grievant who was employed as a Principal Administrative Associate I, and David Steiniger, the grievant's immediate supervisor.

It is undisputed that during the July 9, 1991 meeting, Chislom repeatedly interrupted the grievant and addressed her using profane language. The grievant requested that Mr. Gewritz order Chislom to refrain from the use of profanity, which he refused to do.

On July 9, 1991, the Union filed a Step I grievance on behalf of the grievant. The grievance alleged violations of Article VIII, Section 11, of the collective bargaining agreement("CBA") and Executive Order #510. This grievance was denied. The Union proceeded to file Step II and III grievances on behalf of the grievant, both of which were denied. On January 27, 1992, the Union filed the instant Request for Arbitration.

POSITIONS OF THE PARTIES

City's Position

The City argues that the decision of whether to take disciplinary action against an employee is a right guaranteed to management by section 12-307(b), of the New York City Collective

Bargaining Law ("NYCCBL")[3] and that the parties to the instant dispute have not limited that right in their collective bargaining agreement.

The City maintains that the Union is attempting to gain the right to decide when an employee's behavior is improper and to order the City to take disciplinary actions against that employee. According to the City, this is an improper attempt by the Union to acquire rights which it does not have under the collective bargaining agreement.

The City argues further that it did, in fact, investigate the incident to ensure that the Agency's management did not violate the collective bargaining agreement. The City asserts that Article VIII, section 11 of the contract clearly and unambiguously defines a standard of behavior for the relationship between the employer and the employees, but does not refer to relationships between employees. In addition, the City asserts, the contract does not provide for arbitration of a dispute that arises between employees, and that this Board may not create a duty to arbitrate which has not been created by the parties in their CBA.

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[3] Section 12-307(b) of the NYCCBL provides in relevant part:

"It is the right of the city, or any public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action... "

For these reasons, the City maintains, the Union has failed to establish a nexus between the act complained of and the section of the CBA alleged to have been violated.

Union's Position

The Union argues that the grievant's co-worker was invited to attend the meeting by the supervisor and, therefore, was acting as an agent of the supervisor and the Agency. The Union does not deny that the contract provision allegedly violated refers to relations between employer and employee. Rather, it claims, the arbitrable issue here is whether the co-worker was acting as an agent of the employer when she addressed the grievant using profane language.

The Union argues further that the grievant asked her supervisor to put an end to Chislom's use of profanity, and that the supervisor refused to do so. Although the supervisor did not instigate the conduct, the Union maintains, his refusal to stop the conduct constituted approval, adoption or ratification of the conduct by the employer. The Union contends that the issue of whether Chislom acted as an agent of the employer is for an arbitrator to decide and, therefore, the petition challenging arbitrability should be denied.

Discussion

When a public employer challenges the arbitrability of a grievance, the Board must first determine whether the parties have obligated themselves to arbitrate grievances and, if they have, whether that contractual obligation is broad enough to include the act complained of by the Union.[4] Here the parties do not dispute that they have agreed to arbitrate grievances. The issue is whether the Union has demonstrated an arguable relationship between the City's actions and the contract provision it claims has been violated.[5]

As the basis for arbitrability of the instant grievance, the Union cites Article VIII, section 11 of the contract which provides that the employer and employee may not use "indecent, abusive, profane language" toward each other. The Union asserts that Chislom, an employee at the same level as the grievant, was acting as an agent of the employer when she used profane language towards the grievant. In order to determine whether there is a nexus between the instant dispute and the contract provisions alleged to have been violated, we must determine, as a threshold matter, whether the Union has alleged sufficient facts which, if proven, would establish its claim that Chislom was an agent of the employer under these circumstances. This is necessary because, under Article VIII, section 11, the parties have agreed

[4] See, e.g., Decisions Nos. B-40-93; B-55-91; B-20-89.

[5] Decision Nos. B-40-93; B-55-91 ; B-58-90; B-1-89.

to arbitrate only disputes concerning language exchanged between management and an employee, and not language exchanged between fellow employees.

Assuming the facts alleged by the Union to be true, we nevertheless find that insufficient facts have been asserted to establish a legal basis for the claim of an agency relationship. The only relevant facts alleged are that a supervisor "invited" the co-worker, Chislom, to attend the meeting, and that the supervisor refused to order Chislom to refrain from using profanity. Applying accepted principles of agency,[6] we find that these facts would not, without more, establish that Chislom was acting as an agent of management. Accordingly, we find that no nexus exists upon which the Union may claim arbitrability of the grievance. Accordingly, the instant petition challenging arbitrability is granted.

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[6] The Restatement (Second) of Agency § 26, provides:

1. Liability of Principal to Third Party. A principal becomes liable to a third party as a result of an act of the principal's agent if the agent had actual, apparent, or inherent authority...

b. Apparent Authority. An agent has apparent authority to act in a given way on the principal's behalf in relation to a third party, if the words or conduct of the principal would cause a reasonable person in that third party's position to believe that the principal had authorized the agent to so act." Emphasis added.

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 filed by the City of New York be, and the same hereby is, granted, and it is further,

ORDERED, that the instant Request for Arbitration by Local 371 of the Social Service Employees Union be, and the same hereby is, denied.

Dated: New York, New York
March 29, 1995

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

RICHARD WILSKER
MEMBER

JEROME JOSEPH
MEMBER

THOMAS GIBLIN
MEMBER