City v. OSA, 57 OCB 12 (BCB 1996) [Decision No. B-12-96 (Arb)]

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

between

City of New York,

Petitioner,

Decision No. B-12-96
Docket No. BCB-1642-94
(A-5364-94)

and

Organization of Staff Analysts,

Respondent.
----------X

DECISION AND ORDER

On March 28, 1994, the City of New York ("the City"), by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Organization of Staff Analysts ("the Union"). In the Union's request for arbitration, it claimed that the City had violated § 10(c) of the Municipal Coalition Agreement by "demoting two employees as a result of a restructuring without making any effort to prevent the demotions."

By letter dated May 11, 1994, the Union advised the Office of Collective Bargaining ("OCB") that it was "re-submitting" the request for arbitration under § 16(a) of the Municipal Coalition Agreement("MCA").[1] By letter dated May 19, 1994, the Union advised the OCB that it was, in fact, withdrawing the original

[1] That section of the Agreement provides for an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining.

request for arbitration and replacing it with the request for arbitration filed on May 11, 1994.

By letter dated May 23, 1994, the City objected, on the grounds that the Union had not received authorization from District Council 37 ("DC 37") to file the amended grievance, and to what it characterized as the Union's attempt to repair the grievance by filing it again. The City also advised the OCB that its petition remained on record, and requested that, if the Union's second request for arbitration were entertained, the petition challenging arbitrability be deemed to apply thereto.

By letter dated May 31, 1994, the Union argued that it was not required to submit the authorization of DC 37 in order to file a grievance under the MCA but that, in any event, it had done so. It also claimed that it had the right to withdraw a petition at any time. The Union acknowledged the City's request that the petition be made applicable to its second request for arbitration, and stated that it did not object to that request. By letter to the OCB dated July 7, 1994, the Union asked for a response to its letter of May 31, 1994. The Union was informed by the OCB, by telephone, that the City's petition would be deemed to apply to the May 11th request for arbitration, and that it should file an answer thereto.

By letter dated September 22, 1995, the Union informed the OCB that it had received a Request for Designation of Arbitration Panel in the instant case in October, 1994, and that it was

waiting for an arbitrator to be appointed. On November 30, 1995, the General Counsel of the OCB reiterated to the parties that the City's original petition challenging arbitrability was deemed to apply to the Union's second request for arbitration. The Union filed an answer on December 28, 1995. The City did not file a reply.

On April 29, 1996, the Union submitted a document that it characterized as a "supplemental answer to petition challenging arbitrability." By letter dated May 7, 1996, the City objected to the admission of the Union's "supplemental answer."

Background

The grievants, Angela Holloway and Bonnie McCoy, were appointed provisionally to the position of Training Development Specialists. Thereafter, a Civil Service list for the position of Training Development Specialist was certified and promulgated. The grievants were removed from the provisional appointments and returned to their permanent appointments.[2] According to the City, this action was taken pursuant to Section 65 of the Civil Service Law.[3]

---

[2] The record does not specify to which positions the grievants returned. Both parties refer to the personnel action as a "demotion."

[3] Section 65 of the Civil Service Law provides, in relevant part:

> Termination of provisional appointments. A provisional appointment to any position shall be terminated within

(continued...)

On February 23, 1994, the Union filed a request for arbitration, alleging that the City violated Section 10(c)[4] of the MCA by demoting the grievants without making an effort to prevent its action. The record contains no information about the outcome of the grievance at the lower steps of the procedure.

Positions of the Parties

City's Position

The City contends that the demotions resulted from promulgation of a Civil Service list under Section 65 of the Civil Service Law, not a lay-off or curtailment of services. Consequently, it argues, this case involves only the Civil Service Law, which arbitrators have no authority to interpret, and the Union has failed to establish the requisite nexus between the action in question and a provision in the contract. It maintains that section 10(c) applies to lay offs or terminations due to economic reasons or as a result of restructuring due to changes in the delivery of City services or as a result of work

---

[3](...continued)
two months following the establishment of an appropriate eligible list for filling vacancies in such positions...

[4]Section 10(c) of the MCA provides:
The City agrees to make every practicable effort during the term of this Municipal Coalition Agreement not to lay off or terminate employees for economic reasons or as a result of restructuring due to changes in the level, methods, means, personnel, organization and technology of City services or as a result of work being shifted to an outside contractor.

being shifted to an outside contractor. It claims that Section 10(c) does not address the loss of a provisional appointment because of compliance with the Civil Service Law. As a result, it asserts, there is no connection between the dispute and the contract language cited.

The City argues that the contract between the parties excludes this dispute from its definition of a grievance. It contends that guidelines for provisional appointments are contained in the Rules and Regulations of the Personnel Director ("DOP Rules"), which mirror the Civil Service Law. According to the City, the definition of a grievance in its collective bargaining agreement excludes all disputes concerning the DOP. Consequently, the City claims, the parties have agreed to exclude from arbitration a provisional appointment in a case where a Civil Service list exists, because this circumstance is covered in the DOP Rules.

Finally, the City claims that this personnel action is within the scope of its management rights as provided in Section 12-307b.[5] of the New York Collective Bargaining Law ("NYCCBL"). The City contends that the Board has repeatedly construed Section

[5]Section 12-307b. of the NYCCBL provides, in relevant part: It is the right of the city . . . to determine the standards of service to be offered by its agencies;. . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . and exercise complete control and discretion over its organization and technology of performing its work.

12-307b. to guarantee the City the right to determine the methods, means and personnel by which governmental operations are to be conducted, unless this right has been limited by the parties in their collective bargaining agreement.[6]

According to the City, the provision in question only curtails the City's right to lay off employees to the extent that the City agrees to attempt to make every effort to avert such an action. Thus, it argues, only the making of an attempt has been negotiated; the right to lay off employees has been preserved as a management right and cannot be the subject of an arbitrable grievance. Even if the dispute herein fell within the MCA as a layoff, it contends, the only issue for arbitration is whether the City made efforts not to lay off the grievants.

Union's Position

The Union contends that the grievants may have been demoted as a result of a restructuring, thus falling under the purview of Section 10(c). The Union argues that the issue of whether the grievants' demotions were caused by a restructuring and/or within the scope of Section 10(c), of the MCA requires a determination of fact as well as an interpretation of Section 10. Consequently, the Union argues, the dispute should be resolved by an arbitrator, not the OCB.

---

[6]Decision Nos. B-68-90 (assignment of new equipment is non-mandatory and non-arbitrable; B-4-71 (layoff of employees is a management right).

Discussion

We will first address the question of whether to admit and consider the union's supplemental pleading. It is the Board's policy not to encourage the filing of pleadings subsequent to the reply, and the OCB Rules do not provide for filing such pleadings. Unless special circumstances warrant, therefore, we will not consider such submissions.[7] The Union has not provided us with an explanation, compelling or otherwise, as to why we should consider its supplemental pleading; therefore, we will not admit it.

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[8] In such cases, a union requesting arbitration has the burden of showing that an arguable relationship exists between the act complained of and the source of the alleged right.[9] In other words, the Union must show that the contract provision invoked is arguably related to the

[7]Decision Nos. B-63-91; B-16-90; B-16-83; B-14-83.

[8]Decision Nos. B-2-95; B-12-93.

[9]Decision No. B-9-89.

grievance to be arbitrated.[10] Applying this standard to the present case, we find that the Union has failed to demonstrate the required nexus between the demotions and Section 10(c) of the MCA.

The Union contends that the grievants' removal from the provisional position of Training Development Specialist arguably violated Section 10(c). Since the grievants may have been demoted as a result of a restructuring, it argues, the City could have had an obligation pursuant to Section 10(c) to use its best efforts to avoid taking this personnel action. In response, the City maintains that the personnel action was not the result of a restructuring but was in compliance with the mandated Section 65 of the Civil Service Law and, therefore, is not covered by Section 10(c). The City contends that the Civil Service Law requires that a provisional appointment be terminated within two months of the establishment of a Civil Service list for a position and that it was complying with the law.

The Union fails to allege any specific facts that would indicate that the personnel action was caused by anything but a need to comply with Section 65 of the Civil Service Law. It only speculates that the demotions may have been caused by a restructuring but offers no proof to substantiate its claim. In a

[10]Decision Nos. B-2-95; B-9-89; B-4-88; B-35-86.

similar case where a provisional appointment was terminated,[11] the Union presented a letter from the City which stated that the grievant was terminated from the provisional position because of a reorganization. This provided evidence that Section 10(c) arguably could apply. In this case, no such evidence has been presented, there is no allegation that such evidence exists, and there is no showing of an arguable link between a demotion in compliance with Section 65 of the Civil Service Law and the provision of the MCA concerning economic layoffs, restructuring and contracting out of services.

For the reasons stated above, we find that the Union has failed to establish a nexus between the Grievants' demotion and Section 10(c) of the MCA. Accordingly, the petition challenging arbitrability is granted.

[11] Decision No. B-28-94.

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 challenge to arbitrability raised herein by the City be, and the same hereby is, granted in all respects; and it is further

ORDERED, that the Request for Arbitration filed herein by the Organization of Staff Analysts in all respects be, and same hereby is, denied.

Dated: New York, N.Y.
May 21, 1996

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Richard Wilsker
MEMBER

Saul G. Kramer
MEMBER

I dissent. Jerome E. Joseph
MEMBER

I dissent. Thomas J.Giblin
MEMBER