City v. L.237, IBT, 57 OCB 13 (BCB 1996) [Decision No. B-13-96 (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-

Decision No. B-13-96
Docket No. BCB-1765-95
(A-5998-95)

City Employees Union Local 237, International Brotherhood of Teamsters,

Respondent.
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DECISION AND ORDER

On July 14, 1995, the City of New York ("City") filed a verified petition challenging the arbitrability of a grievance submitted by City Employees Union Local 237 of the International Brotherhood of Teamsters ("Union") on behalf of Arlene Gingold ("grievant"). On August 18, 1995, the Union filed a verified answer to the petition challenging arbitrability and on November 30, 1995, the City filed a verified reply.

Background

On July 1, 1994, all Department of Transportation ("DOT") employees assigned to the Parking Violations Bureau were transferred to the Department of Finance ("DOF") to perform the same duties they had performed at the DOT. Included in the group

of affected employees was Arlene Gingold, a Provisional Associate Attorney whose office title is Administrative Law Judge.

While Ms. Gingold was assigned to the DOT, she had an alternate work schedule with a three-hour flex band. This schedule gave her a three-hour window for which her arrival at work was considered timely, with departure from work eight hours after arrival. On August 2, 1994, Ms. Gingold was notified by Bruce Ribakove, the Director of Adjudications at DOF, that employees at DOF had a one-hour flex band, which would be applied to her schedule. In response, by letter dated August 4, 1994, the grievant requested from Ribakove a two-hour flex band. By letter dated August 5, 1994, her request was denied. In response to this change in her flexible schedule, Ms. Gingold filed a grievance claiming a violation of Article I, Section 2 of the Citywide contract, which provides:

> Whenever practicable, the normal work week shall consist of five (5) consecutive working days separated by two (2) consecutive days off. This shall not, however, constitute a bar to the investigation and implementation by the employer with the union's participation and consent of flexible work days or other alternative work schedules.

The record contains only the April 25, 1995 Step III denial of the grievance. There is no other history presented concerning the initiation or outcome of the other steps in the grievance procedure. The record does contain a letter, dated July 25, 1995, from the General Counsel of District Council 37, authorizing Local 237 of the Teamsters Union to take the

grievance to arbitration through the procedures established in the Citywide contract.

## Positions of the Parties

### City's Position

The City challenges arbitrability on the grounds that there is no nexus between the act complained of and the provisions cited in the request for arbitration. It submits that the Union has failed to allege facts and circumstances which establish an arguable relationship between Article I, Section 2 of the contract and the act of changing the grievant's flex band. The City contends that scheduling employees is within the scope of its management rights under Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL"). [1]

The City cites previous decisions for the proposition that management has the right to determine and change work schedules as long as the change does not affect mandatory subjects of bargaining.[2] The City also cites decisions for the proposition

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

> It is the right of the city . . . to determine the standards of services 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.

[2]Decision Nos. B-1-95; B-24-75; B-10-75.

that setting starting and finishing times of a tour are within management's prerogative.[3]

While conceding that parties may reach a voluntary agreement limiting management's statutory rights, the City denies there was any such agreement in this case that guaranteed employees the right to work flextime or any other particular schedule. The City contends that the only limitation established by Article I, Section 2 of the contract is that "whenever practicable" the normal work week shall be five days on, two days off, and that this is not at issue in the grievance. The City argues that in the meeting with the Union, no statement or assurances were made which rose to the level of limiting its management rights.[4] The City contends that even if any oral assurances were made in the meeting, it would not matter because the Board has held that a grievance cannot be based on an oral agreement.[5]

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[3]Decision Nos. B-1-95; B-21-87; B-24-75; B-10-75.

[4]The City is referring to the Union's claim that, at meetings to facilitate the transfers, City representatives assured the Union that there would be no changes in working conditions as a result of the transfers. The City denies that any statement or assurances were made, but claims that if assurances were made they did not reach the level established as "limiting" by the Board in Decision No. B-1-95 ("any claim that management has agreed to limit the exercise of its prerogative must be supported by reference to an express statement of such limitation in the collective bargaining agreement.")

[5]Decision Nos. B-20-82; B-31-86; B-52-87.

The City maintains that the Union lacks standing to demand arbitration pursuant to the Citywide Contract. It contends that Section IV of the Citywide grievance procedure unequivocally provides that an appeal from the Step III decision can be brought before OCB solely by District Council 37. It claims to be unaware of any evidence in the record that reveals that the Union sought to cure its lack of standing by seeking authorization from the Citywide representative to process such a request, and it asserts that there is no indication that such permission was granted.

Union's Position

The Union submits that the City has expressly agreed to limit its prerogative to set starting and finishing times. The Union alleges that the second sentence of Article I, Section 2 of the Citywide contract limits the City's prerogative when it (1) implements flexible work days or other alternative work schedules (2) with union participation and consent. Consequently, the Union argues, because the grievant worked a three-hour flexible schedule at DOT, presumably with consent of both the Union and the City, her schedule may not be changed upon her transfer without the participation and consent of the Union. The Union further contends that the City acknowledged the limitations placed on its statutory rights by making assurances, at meetings

held before the transfer took place, that transferred employees' working conditions would not change.

Regarding the City's alternate ground for challenging arbitrability, the Union submits that it has received authorization from District Council 37, the representative for the Citywide contract, to proceed in this matter.

## Discussion

We first note that the Union cured a procedural defect in its request for arbitration after the instant petition was filed. The record contains a letter from District Council 37, the City-wide representative, authorizing the Union to take the instant grievance to arbitration under the City-wide contract. The letter demonstrates that the Union had the requisite authorization from District Council 37.

The City contends that the Union has not established a nexus between the act complained of and the provision cited in the request for arbitration. When a public employer makes such a challenge to the arbitrability of a grievance, the Union must show an arguable relationship between the act complained of and the provision allegedly violated.[6]

The Union maintains that Article I, Section 2 of the contract arguably obligates the City to seek its participation and consent before implementing flexible work days or other

[6]Decision Nos. B-27-93; B-24-92; B-29-91; B-2-91.

alternative work schedules. The Union claims that the City violated the contract by changing the grievant's schedule without consulting with the Union. It alleges, too, that the City acknowledged its obligation by assuring the Union, during meetings which took place before the transfer, that the terms and conditions of employment of these transferred employees would be unaffected.

The City submits that scheduling is within the scope of management's rights under Section 12-307b of the NYCCBL. While it admits that these rights can be limited by an agreement between the parties, it contends that neither Article I, Section 2 of the contract nor any statements made during meetings with the Union limit the exercise of its management prerogative by requiring it to obtain the Union's participation or consent before making this kind of change in a work schedule.

The City is correct when it states that management generally is within its statutory rights to set starting and finishing times.[7] We have determined that such decisions are a matter of scheduling, which is a management prerogative, not subject to mandatory collective bargaining.[8] However, scheduling is still a lawful subject of bargaining and may be negotiated on a

[7]Decision Nos. B-1-95 (as long as the change does not affect a mandatory term of bargaining); B-24-75; B-10-75.

[8]Decision Nos. B-1-95; B-21-87.

permissive basis.[9] Consequently, the parties may negotiate and agree to embody in the collective bargaining agreement an express limitation on management's right to schedule employees.[10] If this occurs, management's prerogative is limited and its right to take unilateral action has been waived for the length of the collective bargaining agreement.[11]

The City asserts, correctly, that oral assurances made to the Union do not, by themselves, constitute the basis of a valid grievance under this contract. A grievance based on such statements would fall outside the contractual definition of a grievance, which is confined to disputes concerning the application and interpretation of the terms of the collective bargaining agreement.[12] This, however, is only an issue if the contract provision cannot also serve as the subject of the arbitration.

Article I, Section 2 is a written provision of the collective bargaining agreement. The grievance involves a change in the grievant's flexible schedule. Whether or not Article I, Section 2 expressly limits management's prerogative to change the grievant's schedule is for the arbitrator to determine. Where a

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[9]Decision Nos. B-1-95; B-21-87; B-11-68.

[10]Decision Nos. B-76-90; B-21-87; B-16-74.

[11]Decision Nos. B-76-90; B-21-87; B-16-74.

[12]Article XV, Section 1 provides: "The term 'grievance' shall mean a dispute concerning the application or the interpretation of the terms of this Agreement."

contract provision arguably limits a statutory management right, its interpretation is left to the arbitrator.[13] Determining whether the contested contract provision constitutes such an express limitation is a matter of contract interpretation, which is for an arbitrator to decide.[14] When deciding the question, the arbitrator may consider whether the statement allegedly made at a meeting prior to the transfer constitutes a clear and unequivocal waiver of the City's management prerogatives.

For the reasons stated above, we find the grievance in the instant case to be arbitrable. Accordingly, the City's petition challenging arbitrability is dismissed.

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[13] Decision No. B-53-88.

[14] Decision Nos. B-12-94; B-40-93; B-27-93; B-24-92; B-53-88.

**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-1765-95 be, and same hereby is denied; and it is further

ORDERED, that the request for arbitration filed by The City Employees Union Local 237 of the International Brotherhood of Teamsters on behalf of its member Arlene Gingold be, and the same hereby is, granted.

Dated: New York, New York
May 21, 1996

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Richard Wilsker
MEMBER

Saul G. Kramer
MEMBER

Jerome E. Joseph
MEMBER

Thomas J. Giblin
MEMBER