DOC & City v. COBA, 57 OCB 50 (BCB 1996) [Decision No. B-50-96 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
-between-	
	DECISION NO. B-50-96
THE DEPARTMENT OF CORRECTIONS AND THE CITY OF NEW YORK,	DOCKET NO. BCB-1720-95
Petitioner,	(A-5642-94 through A-5656-94; A-5779-94 through A-5785-94; A-5787-94 through A-5797-94;
-and-	A-5825-95 through A-5827-95;
THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION,	A-5874-95 through A-5879-95; A-6257-96; and A-6259-96)
Respondent.	

DECISION AND ORDER

On January 23, 1995, the Department of Corrections (the "Department") and the City of New York, appearing by the City's Office of Labor Relations, filed a petition challenging thirty-three requests for the arbitration of a set of group grievances that were submitted by the Correction Officers Benevolent Association ("COBA"). The initial set of requests for arbitration were filed between July 28, 1994 and December 6, 1994 (Dockets A-5642-94 through A-5656-94; A-5779-94 through A-5785-94; and A-5787-94 through A-5797-94). The grievances involve the reduction in staffing of various posts during various shifts throughout the City's jail system. In its petition, the City asks that the requests for arbitration be consolidated for the limited purpose of deciding arbitrability.

On March 23, 1995, the City moved to amend its petition so as to challenge two additional requests for arbitration filed by the Union on January 13, 1995, involving the same subject matter (A-5826-95 and A-5827-95). On September 20, 1995, the City again moved to re-amend its petition so as to challenge six additional requests for arbitration filed between January 13, 1995 and February 14, 1995, on the same subject (A-5825-95 and A-5874-95 through A-5879-95). On April 15, 1996, the City moved to re-amend its petition a third time, so as to challenge another request for arbitration

filed on March 28, 1996, on the same subject (A-6259-96). Finally, on June 10, 1996, the City moved to re-amend its petition a fourth time, so as to challenge another request for arbitration that also had been filed on March 28, 1996, on the same subject (A-6257-96). The Union has not opposed consolidation.

Meanwhile, between February 8, 1995 and July 11, 1995, then-counsel for COBA requested and was granted a series of adjournments for filing its answer, "due to the complexity of the dispute and its need to obtain affidavits from witnesses." By letter dated September 19, 1995, counsel advised the Office of Collective Bargaining that COBA had obtained a new labor attorney, and that he no longer would be representing the Union in this matter. By letter dated February 2, 1996, the Trial Examiner informed the Union's new counsel of the pendency of this case and the necessity of either filing an answer without further delay or of allowing it to be moved it to the OCB's inactive docket. On March 12, 1996, the Union filed a "reply brief" in lieu of an answer. The City filed a reply on March 22, 1996. By letter dated July 3, 1996, the Union sought to bring two decisions by Arbitrator Douglas in Docket No. A-4377-92 to the Board's attention.

BACKGROUND

In August of 1990, Correction Officers staged a work stoppage and demonstration on the bridge leading to the Riker's Island detention center. In an attempt to resolve the situation, the City and COBA representatives discussed a number of issues raised by the Union. Then First Deputy Commissioner of Labor Relations James F. Hanley made a verbal commitment to allow the Union to arbitrate grievances concerning post cuts or post reductions. After that, an eight page draft document was prepared on COBA stationery covering a wide range of labor relations issues. The lead

paragraph reads as follows:

> Agreement, entered into on the 14th day of August, 1990, between the City of New York as represented by Norman Steisel, First Deputy Mayor, Eric Schmertz, Commissioner of Labor, Allyn Sielaff, Commissioner of Correction and the Correction Officers Benevolent Association (C.O.B.A.) as represented by Phil Seelig, President and Stan Israel, Vice President, is set forth as follows:

The second numbered paragraph, which relates to this dispute, reads as follows:

> 2. POST RESTORATION. There shall be a restoration of one hundred ninety five (195) posts. Prospectively, the Correction Department may make future post reductions only after discussion and consultation with the C.O.B.A. only to the extent that said post reductions do not impact on the safety or security of Correction Officers. Should a question of safety and security arise upon which both parties cannot agree then an impartial arbitrator shall be immediately called in to settle the issue on an expedited basis.

Paragraph 2. was initialled by then COBA President Seelig and Frank E. Leslie, the Department's Assistant Commissioner for Labor Relations. A subsequent version of the full document was signed on November 8, 1990, by President Seelig for the Union and by Joseph J. Burriel, the Department's then Deputy Commissioner for Human Resources. The "Post Restoration" paragraph remained as it was written in the original draft. The entire document became commonly known as the "Riker's Island Agreement."

By letters to the COBA President dated July 15, 1994 and August 19, 1994, the City, by its then Commissioner of Labor Relations Randy Levine, repudiated the agreement. His July 15th letter reads, in part, as follows:

> As you are aware this office is in receipt of approximately [140] requests for arbitration which have been brought under Article XXI, Section 2 of your unit agreement due to the alleged violations of an "August 14, 1990 Agreement para. 2" which, I understand, is otherwise referred to as the "Riker's Island Agreement." As I have advised you previously,

> this office views the aforesaid agreement as void *ab initio* in that it was not signed by the Commissioner of Labor Relations nor negotiated with this office as required by Executive Order 13 which delegates to the Commissioner of Labor Relations the sole authority to represent the Mayor in the conduct of all labor relations between the City of New York and its labor unions.

The Commissioner reiterated the City's position in his letter of August 19th, which reads in part as follows:

> This office will not arbitrate post reduction grievances or any other grievances on the basis of an "agreement" which lacks the signature of the Commissioner of Labor Relations, such as the "Riker's Island Agreement." However, as stated in my July 15 letter, this office will permit COBA's post reduction grievances to proceed to arbitration based upon a commitment made by James F. Hanley in 1990.

Executive Order No. 13, dated July 24, 1990, grants the authority to negotiate and to bind the City on all matters concerning labor relations between the City and its unions exclusively to the Commissioner of Labor Relations, unless the Commissioner delegates the performance and exercise of these duties to a deputy or other officer of the Office of Labor Relations. Section 3.(a) of the Order provides that

> No agreement, contract or understanding . . . shall be made except by the Commissioner of Labor Relations, nor shall any agreement, contract or understanding be enforceable unless in writing and signed by the required parties.

Section 3.(c) of the Executive Order authorizes the Commissioner "to take other lawful and reasonable steps to foster cooperation between the City and its employees." Section 7.(c) requires department and agency heads to consult with the Office of Labor Relations before consummating any proposed verbal or written agreement, contract or understanding with a union or labor organization.

During this period, the parties entered into two successor collective bargaining agreements. The first, covering the term July 1, 1990 to September

30, 1991, was signed January 1, 1994. It makes no reference to the Riker's Island Agreement, but predates the Levine letters by some six months. The second, covering the term October 1, 1991 to March 31, 1995, was signed June 28, 1995, and postdates the Levine letters by almost one year. This contract remains in effect under the status quo provisions of Section 12-311d. of the New York City Collective Bargaining Law ("NYCCBL").

Article XXI (Grievance and Arbitration Procedure) of the collective bargaining agreement includes within the definition of the term grievance, "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." The definition also includes "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment . . . .."

POSITIONS OF THE PARTIES

City's Position

According to the City, the August 14, 1990 draft of the Riker's Island Agreement, which the Union cites as its basis for arbitration, is not a valid contract or agreement of any kind. It notes that the August 14th draft was replaced by a later version, signed on November 8th, and argues that preliminary agreements do not constitute contracts. In the City's view, the document that the Union claims as the source of its right to arbitrate is "a mere fragment of a nullity."

The City further asserts that, in any event, neither the August 14th draft nor the November 8th version of the Riker's Island Agreement are valid labor contracts because the Commissioner of Labor Relations did not negotiate or sign them. According to the City, Section 3.(a) of Executive Order No. 13 invalidates the Agreement because it was not executed by the Commissioner or

by one of his deputies or other officers.

The City also points out that the parties negotiated their current collective bargaining agreement in August and September of 1993, and signed it on January 21, 1994.[1] This contract makes no reference to the Riker's Island Agreement, and the Union allegedly made no demands during negotiations concerning post reductions. The City argues that because the subsequently executed collective bargaining agreement neither includes nor refers to the Riker's Island Agreement, any of its provisions that once may have been enforceable are extinguished.

The City acknowledges having participated in several earlier arbitration cases involving alleged violations of the Riker's Island Agreement, but it emphasizes that COBA filed all these arbitration requests before the Commissioner issued his letter of July 15th. In addition, the City assertedly prefaced each of its appearances with a caveat concerning the validity of the Agreement, and it insists that it has consistently reserved its right to challenge the Agreement at an appropriate time. The City maintains that such participation does not act as a waiver or estoppel of its present right to challenge arbitrability.

The City also makes a distinction between post reductions and shift reductions. It explains that prior to July 15, 1994, the Union filed approximately 140 cases pursuant to the Riker's Island Agreement. According to the City, the vast majority of these cases do not concern the reduction or elimination of "posts," but instead concern "shift reduction," which is a decision by management not to fill a post on a particular shift.

Finally, the City argues that even if this Board should find that the

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[1] The City raised this argument in its original petition challenging arbitrability, which it filed in January 1995. A successor agreement was signed six months later, in June 1995.

Riker's Island Agreement constituted a valid contract for some period of time, the City terminated it unilaterally on July 15, 1994, the date that Commissioner Levine notified the Union president that he considered the agreement as void *ab initio*. In the City's view, a labor contract of indefinite duration, or one that does not specify a time or manner of termination, is terminable at the will of either party upon reasonable notice to the other party. Because the Riker's Island Agreement lacks fixed duration, the Commissioner's letter of July 15th assertedly provides a reasonable and enforceable notice for its termination.

Union's Position

The Union contends that the City's repudiation of the Riker's Island Agreement could create chaos. It points out that at the time of its origin, a serious work stoppage existed, which the Agreement helped resolve. COBA terms the City's current position as technical, and not relating to the substance of whether employees were hurt by the Department's actions under the Agreement. The Union notes that arbitration is the proper means of resolving disputes that arise in labor relations, and it characterizes this case as an attempt by the City to prevent a dispute "that relates to a central core of labor relations: the right of a union to challenge an act of management resulting in a loss of work," from being arbitrated.

With respect to the constraints in Executive Order No. 13, the Union points out that the Office of Labor Relations participated in the negotiation of the Riker's Island Agreement. It notes that a Department of Correction official studied, evaluated, edited, approved and signed drafts of the Agreement. In the Union's view, if there were additional requirements for approval, the City had a duty to warn COBA of this fact, and nowhere was there such a recital. In these circumstances, according to the Union, the City's

failure to warn that the Agreement must be approved elsewhere constitutes acquiescence to it. The Union claims that the Department acted as though it was a proper contract, and that once made, an agreement properly takes on the "aura of a significant document, binding on the parties." It concludes that the City should not use an executive order as a trap to deny a party the right to present a position to a neutral.

In addition, the Union argues that once having participated in arbitrations brought through the Riker's Island Agreement, the City cannot now deny its existence. It points out that some of these arbitrations occurred months after Commissioner Levine attempted to repudiate it. The Union allows that perhaps on notice, the City might terminate the Agreement, but it is inconsistent to say that it was void from the beginning, and then simultaneously be willing to arbitrate claims brought under it. According to the Union, a party's participation in arbitration, after declaring an underlying contract void, is contradictory and discrepant. Participation in arbitration assertedly represents acceptance of the validity of the document; the City's argument that the Agreement was void or voidable allegedly is estopped once acquiescence has occurred.

The Union also asserts that the City lacked the right to terminate the Agreement unilaterally, and that the content of Commissioner Levine's 1994 letters violates the rules of contract. Where there has been a bilateral agreement, contract law allegedly frowns upon unilateral action.

COBA dismisses the City's argument that the Union made no effort to include provisions of the Riker's Island Agreement in the successor collective bargaining agreement during 1993 contract negotiations. In the Union's view, it was under no obligation to do so, for that would mean that COBA would be forced to renegotiate provisions that it had already gotten.

Finally, the Union observes that the City apparently did not anticipate

that an issue would arise over the meaning of "post reduction," as distinguished from "shift reduction." While disputing the City's interpretation of the Agreement, the Union contends that the merits of the two views is a matter of contract interpretation, which is what arbitrators are retained to decide.

DISCUSSION

It is public policy, expressed in the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[2] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[3]

In the matter of post reductions or shift reductions, there are two potential sources by which COBA can seek to arbitrate unresolved grievances: the parties' collective bargaining agreement, as it defines an arbitral grievance; and the independent arbitration provision that exists in paragraph 2. of the Riker's Island Agreement. With respect to the collective bargaining agreement, this dispute does not appear to fall within the contractual definition of a grievance, since it is neither "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement," nor is it "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." Thus, the validity and

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[2] Decision Nos. B-14-94; B-5-94; B-33-93; B-8-92; B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[3] Decision Nos. B-14-94; B-5-94; B-33-93; B-8-92; B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-31-90; B-11-90; B-41-82 and B-15-82.

enforceability of the arbitration clause in the Riker's Island Agreement is all that remains for us to decide.

We need not reach the issue of whether the Riker's Island Agreement was void *ab initio*, as the Department argues. The City had a right, regardless of whether the Agreement was void *ab initio*, to terminate this Agreement unilaterally, as it did when it unequivocally declared that it did not consider itself bound by the Agreement as of July 15, 1994. Both the August 14th draft and the November 8th final copy are completely silent on the Agreement's duration, and there is nothing in the record from which it might reasonably be inferred that the silence was the result of an oversight or a mistake. The general rule is that when a contract calls for continuing performance and contains no provision for its duration, it is ordinarily terminable at will.[4]

By letters dated July 15 and August 19, 1994, the Commissioner of the Office of Labor Relations gave putative notice that he was repudiating the post restoration section of the Riker's Island Agreement. It does not matter whether his letters represented a partial or complete repudiation -- they clearly served to put COBA on notice that the City considered the Agreement a nullity.

One way in which the Union could have countervailed the City's notice of repudiation would have been to incorporate by reference or by extraneous letter agreement the terms of the Riker's Island Agreement into the parties' successor collective bargaining agreement, executed on June 29, 1995. This would not have been without precedent. We note that the 1991-1995 contract incorporated ten extraneous provisions covering such diverse subjects as

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[4] Watson v. Gugino, 204 N.Y. 535, 542, 98 N.E. 18 (1912); Martin v. New York Life Ins. Co, 148 N.Y. 117, 121, 42 N.E. 416 (1895). See also, Williston on Contracts, § 38.

travel time, home confinement during sick leave, vacation time, support for legislation, direct pay deposit, transfer rights, and legal representation funding. In the circumstance where the parties have reduced an agreement to a writing, which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement, unless it is established by other evidence that the writing did not constitute a final expression.[5] In other words, the 1991-1995 COBA/City of New York collective bargaining agreement is presumed to embody the entire bargaining negotiated by the parties. The terms and obligations that the parties did not include should be deemed to be deliberately excluded.[6]

This result is consistent with our analysis in two previous cases arising under similar circumstances. In 1977, a union sought to arbitrate an alleged seniority violation brought under a 1967 memorandum of understanding covering seniority. We held that because the parties never incorporated the memorandum into a contract, it was not enforceable.[7] In 1991, the Health and Hospitals Corporation opposed the arbitration of an alleged violation of a 1984 "minimum staffing agreement" covering stationary engineers and plant maintainers, on the ground that it had not been incorporated into any of the collective bargaining agreements executed after 1984. Again we held that because the basic contract, which made no reference to minimum staffing, postdated the minimum staffing agreement by three years, we could not conclude that the parties intended to incorporate the terms of the minimum staffing

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[5] Restatement (Second) of Contracts, § 209.(3).

[6] See: Hill and Sinicropi, Evidence in Arbitration, 2nd Ed., citing and quoting Arbitrator Nathan Lipson in Hoover Universal, Inc., 77 LA 107, 112 (1981), relying on Corbin on Contracts, § 552.

[7] Decision No. B-14-77.

agreement in their collective bargaining agreement.[8] We note that there was no prior notice of repudiation by the employer in either of these earlier cases.[9] Here, once the City gave notice of its intent to repudiate the Riker's Island Agreement, if anything, there was a heightened obligation on COBA's part to incorporate the Agreement into the basic labor contract.

We have considered the Union's other arguments, including its assertion of estoppel, and found them to be without merit. Accordingly, we find that the Union has not established a sufficient nexus concerning its post or shift reduction grievances to support the conclusion that the dispute is within the scope of the parties' agreement to arbitrate under Article XXI of their collective bargaining agreement. We also find that the Riker's Island Agreement has been terminated by the City's repudiation of it in 1994, and by the Union's failure to reaffirm or incorporate it in 1995, when the parties entered into their current collective bargaining agreement.

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[8] Decision No. B-2-92. We found the dispute arbitrable on other grounds, however.

[9] Compare these two cases with Decision No. B-17-71, where we allowed a dispute to go to arbitration based on a "memorandum of understanding" that coexisted with an expired collective bargaining agreement. In that case, however, we found that neither party had given notice of the termination of the memorandum, and that the parties continued to conduct themselves as if the memorandum continued beyond the contract's expiration date.

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 of multiple requests for arbitration filed by the City of New York, and docketed as BCB-1720-95, be, and the same hereby is, granted; and it is further

ORDERED, that the multiple requests for arbitration filed by the Correction Officers Benevolent Association in Docket No. BCB-1720-95 be, and the same hereby are, denied.

DATED: New York, N.Y.
December 2, 1996

STEVEN C. DECOSTA
CHAIRMAN

GEORGE NICOLAU
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DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
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