City & DEP v. DC 37, 59 OCB 45 (BCB 1997) [Decision No. B-45-97 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
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between	:	
	:	
CITY OF NEW YORK and the DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	
Petitioners,	:	Decision No. B-45-97
	:	Docket No. BCB-1855-96
and	:	(A-6337-96)
	:	
DISTRICT COUNCIL 37,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On September 18 1996, the Department of Environmental Protection ("DEP") and the City of New York (hereinafter collectively referred to as "City"), appearing by its Office of Labor Relations (OLR), filed a petition challenging the arbitrability of a grievance filed by District Council 37 ("DC 37" or "Union"). The Union filed an answer on January 13, 1997.

Background

On July 26, 1995, Karl Spar ("Grievant"), who was employed by the City as an Air Pollution Inspector, was served with disciplinary charges for "agency related criminal conduct." It was agreed that the Agency would refrain from instituting disciplinary actions against the grievant, pending the outcome of his criminal case, provided he remain on unpaid suspension. During that time, on September 12, 1995, the Grievant submitted his retirement papers, selecting October 12, 1995 as his retirement date. By letter dated October 13, 1995, the Grievant requested that the DEP

pay him for six weeks of annual leave that he had accrued prior to his suspension. By letter dated October 30, 1995, Louis Tazzi, Director of Human Resources at the DEP, denied the request.

On March 20, 1996, the Union filed Step I, II and III grievance forms with the OLR, grieving the non-payment of Karl Spar's accrued annual leave. On May 13, 1996, the Review Officer dismissed the grievances.

On July 1, 1996, the Union filed a request for arbitration, seeking resolution as to,

> [w]hether the employer has violated the applicable leave regulations and collective bargaining agreements by failing to pay terminal leave (accumulated annual leave and sick time) to the grievant and, if so, what shall be the remedy.

The Union cites violations of the Citywide Agreement, Article V, §§1 & 2,[1] the

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[1] Article V ("Time and Leave"), §§1 & 2 of the Citywide Agreement provides, in relevant part:

> §1a. All provisions of the Resolution approved by the Board of Estimate on June 5, 1956, on "Leave Regulations for Employees Who are Under the Career and Salary Plan" ... and amendments, and official interpretations relating thereto, in effect on the effective date of this Agreement and amendments which may be required to reflect the provisions of this Agreement shall apply to all employees covered by the Agreement.
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> §2c. When an employee has an entitlement to accrued annual leave and/or compensatory time ... the Employer shall provide the monetary value of accumulated and unused annual leave and/or compensatory time allowances standing to the employee's credit in a lump sum.

Engineering/Scientific Agreement, Article VI, §§1(a) & (b)[2] and Leave Regulations for Employees Who are Under the Career and Salary Plan ("Regulations"), §2.9.[3]

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City states that the Union has not cited any violation of the provisions of the parties' Agreements, but has merely alleged that "management has refused to grant the grievant's post-retirement request to be paid his accrued annual and sick leave." The City claims that retirees such as the Grievant are not entitled to payment for leave benefits since §2.6(b) of the Regulations provides that:

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[2] Article VI, §1 of the Engineering/Scientific Agreement provides, in relevant part:

> The term *"Grievance"* shall mean:
>
> 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 or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment.

[3] Section 2.9 of the Regulations states, in relevant part:

> Terminal Leave with pay shall be granted prior to final separation to employees who have completed at least ten (10) years of service on the basis of one (1) day terminal leave for each two (2) days of accumulated sick leave up to a maximum of one hundred twenty (120) days of sick leave.

An employee who plans to retire or otherwise terminate service with the City should arrange with the agency, in advance of retirement or termination, for the use of any outstanding annual leave balances. The City contends that there is nothing in the parties' Agreements or the Regulations which requires payment to an employee subsequent to the date of retirement. The City further alleges that "[p]ayment of a salary to one no longer rendering services 'is an unconstitutional gift of public monies.'"[4]

The City asserts that the Grievant has no standing to grieve pursuant to the existing Agreements because, at the time the grievance was raised, the Grievant was no longer an "employee", but was a "retiree," and that he did not request payment for accumulated leave benefits until after the effective date of his retirement. The City states that retired city employees are not "employees" within the meaning of the New York City Collective Bargaining Law (NYCCBL) §12-303e., and therefore should not benefit from grievance procedures established for the benefit of municipal employees.

Union's Position

The Union claims that there is indeed a nexus between the grievance and the relevant provision of the Citywide Agreement. It asserts that the Citywide Agreement incorporates, by reference, the Regulations, and that it further provides for the arbitration of disputes "concerning the application or interpretation" of the Citywide Agreement. The Union states that the failure on the part of the City to grant the grievant his accumulated leave benefits bears a direct relationship on the Regulations, thus establishing an arguable nexus to the parties' Agreements.

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[4] The City cites the Official Interpretation of §2.9(S) of the Regulations.

According to the Union, the City's argument "is obviously premised upon the mistaken assumption that the grievant made no request for his accumulated leave until after his effective date of retirement ....", and, as this presents a disputed question of fact, it should be decided by an arbitrator.[5] *Assuming arguendo*, that the Grievant's request was presented after his retirement date, the Union maintains that, since the propriety of such a request is dependent upon an interpretation of the applicable Regulations, the issue should be put before an arbitrator.

The Union further claims that the Grievant has standing to grieve the City's failure to pay him his accumulated leave benefits and that he made his initial request for payment of his accumulated leave time prior to retirement. It asserts that, although the Grievant was not an employee at the time he filed his grievance, the parties' Agreements define "grievance" as a "dispute concerning the application or interpretation of the terms" of said Agreements. Therefore, the statement that an "employee" may discuss or present a grievance is not a limiting factor precluding the filing of a grievance by a retired employee. Moreover, the Union argues that the City's position is grossly inequitable and inconsistent with sound labor relations.

Discussion

[5] We note that the Union's answer to the petition challenging arbitrability does not affirmatively state that the Grievant did request his accumulated leave prior to his effective date of retirement.

In determining the question of arbitrability raised by the City herein, the Board of Collective Bargaining ("Board") must initially determine whether the Grievant has standing to assert his claim. We find that he does.

We have held that an employee who has resigned may grieve matters, subsequent to the effective date of resignation, which allegedly took place during employment.[6] In the instant case, the Union claims violations of the parties' Agreements and Regulations relating to leave benefits, asserting that said claim accrued while the Grievant was in the employ of the Agency. The Union further alleges that the City has mistakenly assumed that the Grievant failed to request payment of the accumulated leave time prior to the effective date of his retirement. Nonetheless, the City seeks to bar this claim, asserting that the Grievant did not request payment for accumulated leave time, nor raise this grievance, prior to his retirement date. This presents a disputed question of fact which, we believe, should be resolved by an arbitrator. Further, we agree with the Union that, even if the claim was first asserted after the date of retirement, the question whether there can be a remedy for a failure to pay for a benefit which arguably accrued prior to retirement involves a question of contract interpretation which must be determined by an arbitrator.

In support of the claim of lack of standing, the City relies on Decision No. B-21-72. In that case, we concluded that retired New York City employees were not "employees" within the meaning of NYCCBL §12-303e., since they are not "employed by municipal agencies whose salary is paid in whole or in part from the City treasury ..." However, our conclusion had a

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[6] *See,* Decision Nos. B-55-91; B-7-88; B-10-83.

limited application in that case. We merely held that the Union could not bargain on behalf of retired employees.

> The NYCCBL grants the right to bargain collectively solely to active employees and not retired employees. Therefore, only active employees are includable in a bargaining unit. Conversely, retired City employees cannot appropriately be included in a unit with active employees for collective bargaining purposes.[7]

We did not preclude retired employees from seeking redress for contract grievances accruing during the course of their employment, and find Decision No. B-21-72 inapplicable in the instant case. Rather, we have held that a vested right is not forfeited merely because the employment relationship had ended.[8]

We next turn to the question of whether a nexus exists between the grievance and the relevant provision of the Citywide Agreement. The Board has a responsibility to ascertain whether an arguable relationship exists between the act complained of and the source of the alleged right in the parties' Agreements.[9] Where arbitrability is challenged, the Union must show that the contract provision involved is arguably related to the grievance to be arbitrated.[10] Applying these standards to the present case, we find that the Union has demonstrated the required nexus between the subject of the grievance and the Agreements.

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[7] Decision No. B-21-72 at 3.

[8] Decision No. B-10-83.

[9] Decision Nos. B-9-89; B-35-86.

[10] Decision Nos. B-53-96; B-10-90; B-35-89.

The request for arbitration states that provisions of the parties' Agreements and the Regulations have been violated in that the City has failed to pay for accumulated leave benefits. The Citywide Agreement, incorporating by reference the Regulations, provides that "[a]ll provisions of the ... Regulations ... shall apply to all employees covered by the Agreement." Section 2.9(a) of the Regulations states, in relevant part that, "[t]erminal leave with pay shall be granted prior to final separation ..." Absent from the Regulations is any definition of the term, "terminal leave," leaving open the question of whether the parties intended to incorporate accrued leave into that term.

We find that the parties' Agreements and the Regulations are ambiguous as to the scope and breadth of the rights of the grievant with respect to the entitlement to payment of terminal and accrued leave. Hence, the Union's claim, that the denial of accrued leave bears directly on the Citywide Agreement, Article V, §§1 & 2, the Engineering/Scientific Agreement, Article VI, §§1(a) & (b) and §2.9 of the Regulations, is not patently unreasonable. We therefore find that there is an arguable relationship between the Union's claim and the parties' Agreements, and that it is an issue, the merits of which should be decided by an arbitrator. Accordingly, the petition challenging arbitrability is denied.

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 City's petition challenging arbitrability be, and the same hereby is, denied.

DATED: October 28, 1997
New York, New York

Steven C, DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER

Carolyn Gentile
MEMBER

Robert H. Bogucki
MEMBER