City & DOC v. COBA, 61 OCB 26 (BCB 1998) [Decision No. B-26-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
THE CITY OF NEW YORK and the DEPARTMENT OF CORRECTION,	:	
	:	Decision No. B-26-98
Petitioners,	:	Docket No. BCB-1951-97
	:	(A-6876-97)
-and-	:	
	:	
CORRECTION OFFICERS BENEVOLENT ASSOCIATION,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On January 22, 1998, the Department of Correction and the City of New York (hereinafter referred to as "Department" or "City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Correction Officers Benevolent Association ("COBA" or "Union"). The Union filed its answer on March 4, 1998. At the request of the City, the answer was amended on April 21, 1998, as the original answer contained disclosures regarding settlement discussions between the parties. The City filed its reply on May 4, 1998.

BACKGROUND

Billy Jones, ("Grievant" or "CO Jones") is employed by the Department in the competitive civil service title of Correction Officer. On December 18, 1996, Andrew Phoenix, Acting Chief of

Administration issued Teletype Order No. 5752-0, transferring the grievant from the Special Operations Division/Riker's Island Security Unit to the Anna M. Kross Center effective December 19, 1996. On December 19, 1996, the grievant began reporting for duty at the Anna M. Kross Center.

On December 30, 1996, the grievant filed a Step I grievance. The grievance stated that he was "transferred arbitrarily and capriciously without reason . . . in direct violation of Directive 2257[1] and Article XXI, § 1B[2]." The City did not respond to the grievance at Step I. On January 13, 1997, the grievance was appealed to Step II, to which, again, the City did not respond. On January 21, 1997, a Step III appeal was filed. A Step III decision was issued by Review Officer Steven Latino, dismissing the grievance, on July 15, 1997. The decision stated that a conference was held on June 26, 1997, and at that conference,

> the Union alleged that the Department of Correction violated Directive 2257 and Article XXI, section (1)(b) of the Correction Officer's Agreement when the grievant was 'arbitrarily transferred from S.O.D./R.I.S.U. to A.M.K.C. without reason.' At the Step III conference the grievant also spoke extensively regarding alleged improper practices by the Department and disparate treatment because of his religious practices. The grievant requests as a remedy that his transfer be rescinded and he be returned to his previous command.
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> Directive 2257, cited by grievant, is inapplicable to the instant grievance. Inasmuch as Directive 2257 applies only to voluntary transfer requests and the grievant alleges that he was involuntarily transferred, the Directive 2257 has not been violated. Regarding the grievant's improper practice claims against the

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[1] The stated purpose of Directive 2257R is "to establish a standard operating procedure for the efficient and equitable processing of requests for a change of command made by members of the uniformed force." It then goes on to describe the transfer procedure.

[2] Article XXI, § 1(b) defines a grievance as "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in Section 1(a), the term "grievance" shall not include disciplinary matters."

> Department, the contractual grievance procedure is not the appropriate forum for such claims and the Review Officer has no authority to rule on them.

On July 29, 1997, a Request for Arbitration ("RFA") was filed. The Union stated the grievance to be arbitrated was a "Violation of Directive 2257 Officer Jones was transferred on Dec. 19, 1996 per teletype order no. 5752-0, arbitrarily and capriciously without reasoning." The RFA cited Directive 2257 and Article XXI, § 1(b) as having been violated. An amended RFA was sent by the Union on January 5, 1998. The section where the Union states the grievance to be arbitrated now read, "DOC has retaliated against CO Jones for filing a complaint of discrimination by, *inter alia*, transferring him on Dec. 19, 1996 and, therefore DOC has violated its own 'Discrimination Complaint Procedures' which specifically prohibit retaliation." The amended RFA cited Discrimination Complaint Procedure, p. 14 "Retaliation" as having been violated[3]. The City alleges that these claims were being made for the first time in the amended RFA.

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[3] The Discrimination Complaint Procedure provides, in pertinent part,

> The purpose of this procedure is to handle all complaints of discrimination promptly and fairly. Employees are urged to follow this procedure immediately whenever they have a complaint or are aware of a problem within the Department possibly involving discrimination . . .
>
> . . . RETALIATION: It is unlawful to retaliate against or harass any person for filing an EEO complaint or for cooperating in the investigation of an EEO complaint. Any employee who engages in such retaliation or harassment shall be disciplined.
>
> . . . WHERE TO FILE A COMPLAINT: 1)THE EEO OFFICER: The EEO officer is responsible for the handling of all EEO complaints. She/he reports directly to the Commissioner about EEO matters. 2) THE EEO COUNSELORS: DOC employees who have been trained to act as EEO counselors and to serve as liaisons between their facilities and the EEO officer. A list of EEO Counselors is provided in the Affirmative Employment Plan of each facility.

POSITIONS OF THE PARTIES

City's Position

The City contends that its actions are governed by the management rights provisions of the New York City Collective Bargaining Law ("NYCCBL") § 12-307 (b).[4] It states that, in the instant matter, the Department merely exercised its right to determine the means and personnel with which to staff its operations when it transferred the grievant. In support of this contention, the City cites several cases where the Board has recognized management's right to take action that is appropriate and necessary to manage an efficient and effective operation, which includes the transfer of employees.[5]

The City further contends that the instant grievance must be dismissed since it fails to allege any nexus between the act complained of and the provision of the agreement cited by the Union in its RFA as having been violated. The City asserts that the contract provision that the Union claims has been violated in its original RFA, and all through the grievance process, Directive 2257, merely details the procedure that must be followed when a correction officer requests a voluntary transfer. They state that the Directive does not establish any procedure that the Department must follow when effectuating an involuntary transfer. They argue that the allegation that a transfer is arbitrary and capricious is not arbitrable as a violation of any contract provision. As the grievant has failed to demonstrate the requisite nexus between the act complained of and the source of the alleged right,

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[4] NYCCBL § 12-307(b) grants management the right to, *inter alia*,

> . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; . . .

[5] The City cites Decision Nos. B-20-91; B-57-90; B-25-83; B-9-81; B-21-79.

redress of which is sought through arbitration, grievant has failed to state a claim grievable under the applicable collective bargaining agreement.

Finally, the City contends that the claim raised in the Union's amended RFA is not arbitrable, as the grievant had raised a new issue, claiming a violation of the Discrimination Complaint Procedure, p. 14, "Retaliation." They state that this claimed violation of the Discrimination Complaint Procedure is advanced for the first time in the Union's amended RFA, and that it was not raised during any of the previous steps of the grievance procedure. Also, it was not raised in the original RFA. The City cites previous Board decisions that hold that we have consistently denied arbitration of claims raised for the first time after the RFA has been filed, because it would frustrate the purpose of the multi-level grievance procedure.[6]

Union's Position

The Union argues the grievance is arbitrable because Article XXI, § 1(b) of the COBA contract defines a grievance as a "claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." They state that the DOC has written Discrimination Complaint Procedures which specifically proscribe retaliation against officers for filing an EEO complaint, and by transferring grievant, DOC violated this anti-retaliation provision of its procedures. Thus, the Union argues that it has met its burden in providing a nexus between the alleged wrong and the relevant contract provision.

The Union responds to the City's management rights argument by stating that § 12-307 of the NYCCBL does not confer "upon management unbridled discretion to do as it pleases" with

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[6] The City cites Decision Nos. B-2-95; B-30-94; B-29-91; B-40-88.

respect to the methods, means, and personnel by which governmental operations are to be conducted. The Union contends that the Board, in the past, has held that a grievance contesting an involuntary transfer of a firefighter was arbitrable because it violated agency policy and regulations.[7] The Union states that "DOC's attempt to cloak its transfer of CO Jones with legitimacy consists of a bare and unsubstantiated assertion of administrative need," and the Department has not discussed with the Union what those administrative needs were or the process by which CO Jones was selected for transfer. The Union urges the Board to reject the management rights argument because § 120-307(b) does not allow transfers to be made for retaliatory reasons.

The Union next contends that the City's arguments regarding the original RFA and Directive 2257 are moot since the original request for arbitration was superseded in its entirety by the amended RFA, and that OLR did not object to the filing of the amended request. The Union also argues that the amended RFA does not raise new issues as the City contends, but merely sets forth the grievance with greater specificity than the original RFA. Furthermore, the Union contends that, at the Step III hearing, the "first opportunity for a discussion between the parties as to the details of CO Jones' grievance," the Union argued that the transfer complained of in the grievance was an act of retaliation against CO Jones for attempting to exercise his religious beliefs. They argue that the hearing and settlement discussions held after the original RFA was filed put the City on notice of the nature of the claim.

DISCUSSION

When a request for arbitration is challenged by the City, initially, this Board must determine

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[7] The Union cites Decision No. B-57-90.

whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related to the cited provision of the parties' agreement.[8] It is well established that it is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[9] 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.[10]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement, nor is it denied that alleged violations of departmental rules, regulations or procedures affecting terms and conditions of employment are within the scope to arbitrate. However, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the substantive provision of the parties' collective bargaining agreement.

The Board has long held that an attempt to amend the grievance at the penultimate moment, i.e., the arbitration step (or thereafter), is improper since this would deny the parties an opportunity to fully consider and attempt to resolve the issue at the lower steps of the grievance procedure.[11] Even if we were to find that the City was made aware of the nature of the claim at the Step III hearing that the grievant's claim included an allegation of retaliation, the provision cited in the

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[8] Decision Nos. B-7-98; B-19-89; B-65-88; B-28-82.

[9] *See, e.g.*, Decision Nos. B-35-89; B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

[10] Decision Nos. B-41-82; B-15-82.

[11] *See* Decision Nos. B-55-89; B-1-86; B-20-74.

amended request for arbitration, the Discrimination Complaint Procedure ("DCP"), does not provide a substantive right, redress of which is available through arbitration. The DCP so closely mirrors a provision that was determined not to establish an independent substantive right in a recently decided case, B-7-98, as to be indistinguishable. The provision in B-7-98, HRA Procedure No. 96-10, states:

> **RETALIATION**
> It is unlawful to retaliate against or harass any person filing an EEO complaint, seeking a reasonable accommodation for a disability or a religious observance, or for cooperating in the investigation on an EEO complaint. HRA will not tolerate any such retaliation. Any person who believes that he/she is or has been retaliated against for having made a complaint, or for cooperating in an investigation, is urged to file a complaint of retaliation with the EEOC Office. Any employee who engages in such retaliation or harassment shall be subject to disciplinary action.

In B-7-98, the Board recited past holdings, stating that a written pronouncement by the employer will not be considered granting substantive rights unless it

> [G]enerally consists in a course of action, method or plan, procedure or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with the requirements of law, or otherwise to effectuate the mission of an agency. The agreement of the union may be sought but it is not required. Nevertheless, a policy must be communicated to the union and/or to the employees who are governed thereby.[12]

In B-7-98, the Board found that the language, again, a near duplicate of the language in the instant matter, was couched in "general and precatory" terms, merely advising individuals of rights guaranteed under federal law, and affording explicit avenues of redress in the event of any alleged violation. The purpose of the wording of the DCP provision, as in the HRA provision, is to inform employees of their rights, and to urge them to follow the methods of redress provided therein; it does

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[12] Decision Nos. B-7-98; B-27-93; B-2-92; B-74-90; B-55-90.

not serve to maintain compliance with the law, create independent substantive rights, or establish a departmental course of action. We do not find the factual differences between the cases to be substantial enough to warrant a different finding. Therefore, we do not find an arguable relationship between any alleged violation of the DCP provision and the parties' collective bargaining agreement.

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 request for arbitration filed by the Correction Officers Benevolent Association be, and the same hereby is denied.

Dated: New York, New York
July 30, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

JEROME JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER