City & DOC v. COBA & Maldonado, 61 OCB 35 (BCB 1998) [Decision No. B-35-98 (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-35-98
Petitioners,	:	Docket No. BCB-1954-98
	:	(A-6434-96)
-and-	:	
	:	
CORRECTION OFFICERS' BENEVOLENT ASSOCIATION and MIGUEL MALDONADO on behalf of 38 CORRECTION OFFICERS,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On February 6, 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 17, 1998. The City filed its reply on March 24, 1998.

BACKGROUND

The 38 grievants are Correction Officers ("C.O.'s") who are employed by the Department of Correction at various facilities throughout the City. On April 26, 1996, the Department posted

a job notice for twelve positions at various posts with the Supreme Courts of the State of New York.[1] By May 31, 1996, 38 C.O.'s had submitted applications for the twelve positions. Of those 38 applicants, twelve C.O.'s were chosen for the posts. On June 26, 1996, the grievants filed their grievance at Step II. On July 8, 1996, C.O. Miguel Maldonado submitted an intra-departmental memorandum to the Warden of Bronx House of Detention for Men, concerning this grievance. It stated,

> ...Of the twelve officers appointed to the positions, many had questionable records and most had less seniority than the officers that were not chosen. The majority of the officers that were not chosen for the various positions had more seniority, excellent records, have demonstrated good job performance and have proven to be extremely competent...

On September 30, 1996, the grievants filed a request for arbitration. The contract provision identified as having been violated is "Operation Order 14/91." The remedy sought was that "the appointments be rescinded, so that the Dept. can explain the criteria used in filling these positions and that the positions be reopened in order to give all officers the opportunity to apply." The Step II grievance was denied on October 1, 1996. The Assistant Commissioner wrote that "[n]o grievable claim is cited."

POSITIONS OF THE PARTIES

City's Position

The City argues that COBA has failed to establish a nexus between the act complained of and

---

[1] The posting lists the criteria for selection as "job performance, record, seniority and competency for the assignment." There is also a section on the special skills (continued...) required for the position. They are: "1) Knowledge of the court paperwork, 2) Interview may be required and 3) Departmental policy on security procedures."

the right alleged to have been violated. It states that, when requesting arbitration, the union carries the burden of establishing that the clause cited as the basis for the arbitration is arguably related to the grievance sought to be arbitrated.[2] The City further states that, as COBA has based its claim on Article XV of the parties' collective bargaining agreement ("agreement"), COBA has failed to establish a nexus between this section and the right alleged to have been violated because Article XV mandates that the final decision of the Department is not subject to the grievance procedure.[3] The City then concludes that inasmuch as no nexus has been established between the claimed wrongful action and Article XV of the agreement, the instant petition must be dismissed.

Union's Position

The Union states that it is not disputing the final decision on awarding the posts, which it agrees is not arbitrable. However, the Union argues that it is disputing the "criteria" used to award the posts. It contends that Article XV mandates that the department is permitted to consider only "ability and qualifications to perform the work involved" and agreed to "make every effort" to fill vacancies according to seniority. Thus, the contractual criteria is limited to seniority and ability, removing from the Department the discretion to award posts using criteria other than the ability to perform the work and seniority. The Union states that "a qualified officer with the most seniority

---

[2] The City cites Decision Nos. B-12-94; B-28-93; B-29-92; and B-19-89.

[3] Article XV of the parties' agreement reads, in pertinent part:
"The Department recognizes the importance of seniority in filling vacancies within a command and shall make every effort to adhere to this policy, providing the senior applicant has the ability and qualifications to perform the work involved. While consultation on such matters is permissible, the final decision of the Department shall not be subject to the grievance procedure."

should always get the post," as "seniority is to be given overriding significance, second only to an employee's ability to do the job, bearing in mind that qualified, not 'best' qualified, is all that is required."

The Union states that the job posting indicates that an employee's "record" is taken into account, and there is no provision in the contract which allows for the consideration of an employee's "record." It urges that since the "record" was included as a criteria, this raises a dispute as to whether the Department exceeded the criteria allowed under the contract and that the dispute is "ripe" for an arbitrator to decide since it concerns the process of awarding the post as opposed to the final decision of the Department. It implores that "Article XV imposes obligations on the Department which may not be flouted," and the petition challenging arbitrability must be denied.

DISCUSSION

When a request for arbitration is challenged by the City, initially, this Board must determine 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.[4] 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.[5] 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.[6]

---

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

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

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

First, although the Union cites Operation Order 14/91 as the contract provision which it claims has been violated in its request for arbitration, nothing is mentioned of the Order in either of the parties' pleadings. Both parties proceed as if Article XV of the agreement were the provision in dispute. Accordingly, this Board will focus on Article XV in deciding this matter.

We concur with the Union that the City's right to make decisions regarding the filling of vacancies may be tempered by a limitation which the parties themselves may have promulgated in their collective bargaining agreement.[7] We have found, in previous decisions, that where a contract provision arguably limits a statutory management right, its interpretation is left to the arbitrator.[8] However, in prior decisions, we have also found that a clause may simply reaffirm the City's management rights under §12-307(b) of the New York City Collective Bargaining Law ("NYCCBL").[9] The clause in the instant matter states, "While consultation on [filling vacancies] is permissible, the final decision of the Department shall not be subject to the grievance procedure.[10]" In our opinion, rather than limit management's statutory rights under §12-307(b) of the NYCCBL,

---

[7] Decision Nos. B-50-92; B-24-91; B-76-90.

[8] Decision Nos. B-13-96; B-53-88.

[9] In Decision No. B-11-81, this Board found that a clause recognizing the employer's right to establish and/or revise performance standards or norms notwithstanding the existence of prior performance levels, norms or standards, reaffirmed the management's statutory right to establish and/or revise standards for supervisory responsibility. *See also* Decision No. B-74-89.

[10] The City asserted a similar argument based upon this same contract clause in Decision No. B-20-98, involving the transfer of a Correction Officer who alleged that his former post had been filled by a civilian, making the transfer "spurious" rather than for a legitimate reason. In granting the petition challenging arbitrability, we held that "if Article XV is alleged to apply to the post held by [the grievant], there can be no arbitration in the present matter."

this clause reaffirms their rights. Although the provision lists criteria on which the decision to promote may be based, the final sentence serves as a clear reminder of the rights which are accorded to management.

Though the Union argues that it simply wishes to examine the "criteria" utilized at times, it is apparent by the phrase "seeks to have the posts re-awarded using the specified contractual criteria" in the final part of its answer, that the Union truly desires to have the posts re-awarded. This would clearly interfere with management's "final decision," and is therefore not grievable, as affirmed in the parties' agreement. Accordingly, the instant petition challenging arbitrability is granted in its entirety.

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 COBA be, and the same hereby is denied.

Dated: New York, New York
September 25, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER