City & DOC v. COBA, 61 OCB 41 (BCB 1998) [Decision No. B-41-98 (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-41-98
Petitioners,	:	Docket No. BCB-1956-98
	:	(A-7028-97)
-and-	:	
	:	
CORRECTION OFFICERS BENEVOLENT ASSOCIATION,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On February 13, 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 April 1, 1998. The City filed its reply on May 20, 1998.

BACKGROUND

On January 23, 1997, the Department directed that grievant Frances Enoch be transferred to a new post. On May 5, 1997, the Department directed that grievants Carmen Estrada, Bruce Stucko, Christopher Bayer, Tracy Edwards, Andrew Burrows and Antonio Soto be transferred to various new posts. On July 15, 1997, the Department directed that grievants Gail Aikens, Karen Cotton, Kevin

Durante, Matthew Ellis, Robert Dudley, Joyce Harris, Yvette Walsh, Gail Thomas, Dorris Villegas and Robert Morales be transferred to various new posts.

On July 18, 1997, the Respondents filed their grievance as a group grievance at Step III. The Union alleged that the grievants were inappropriately transferred in conflict with Directive 2258R[1], and it requested that the grievants be returned to their previous command. In addition, the Union states in their answer that the requested remedy included a "declaratory judgment whereby the department would be instructed as to its misapplication of Directive 2258R and ordered to disseminate corrective notices to all commands to prevent a repetition of such transfers in the future." On October 30, 1997, the Department responded to the grievance in a letter, stating that the grievants had been returned to their commands and since the Department provided the the remedy requested, the grievance has been resolved. The letter stated that the file would be closed.

On or about November 5, 1997, the Union submitted this grievance to arbitration before the Office of Collective Bargaining ("OCB"). The contract provision, rule or regulation which the Union claimed to have been violated was Directive 2258R § III C (6)[2]. The remedy sought was that

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[1] Directive 2258R is titled "Absence Control/Uniformed Sick Leave Program."

[2] Directive 2258R, § III(C) reads:

DISCRETIONARY BENEFITS AND PRIVILEGES

Discretionary benefits and privileges include:

1. Assignment to a steady tour;
2. Assignment to a specified post or duties;
3. Access to voluntary overtime;
4. Promotions;
5. Secondary employment (continued...)
6. Transfers
7. Authorization to leave residence while on sick leave except in accordance with contractual agreement or Rule #3.10.080(d).

all officers identified "or added in the future" who were improperly transferred "because they were in a category" be transferred back to their previous command immediately. Furthermore, "COBA requests that the DOC be required to distribute notices to all commands clarifying that Officers may not be involuntarily transferred because they are in a Category."

POSITIONS OF THE PARTIES

City's Position

The City argues that the grievance should be denied since it falls within management's statutory right to direct its employees under § 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL"),[3] and the Department merely exercised its right to determine the personnel by which its operation is to be conducted when it transferred the grievants to other posts. The City cites Decision No. B-25-83 in support of this contention.[4] The City argues that in the instant matter, the Union has failed to present any claim that these transfers were disciplinary in nature, nor has it cited any guide, provision, rule or procedure that restricts the Department's right to transfer its employees. Accordingly, the transfer of the 17 grievants was within the Department's managerial rights.

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[3] § 12-307(b) of the NYCCBL grants management the right to, *inter alia*, "direct its employees; . . . maintain efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . .

[4] In B-25-83, the City argues, management transferred a police officer due to the public policy of prohibiting police officers from being assigned to precincts in which they reside. The Board found that the Union failed to satisfy the requirements of the test of arbitrability because the Union did not claim that the grievant was subject to disciplinary action nor did the Union cite any guide, provision, rule or regulation or procedure which restricted management's right to transfer. The Board, therefore, found that the action taken by management was entirely within the scope of the City's statutory management.

The City also argues that the instant grievance should be denied since the Respondents have effectively achieved the remedy it sought, the transfer of the grievants back to their prior posts, and the grievance is now moot.[5] They state that the continuance of the matter would be economically wasteful for all parties involved. Moreover, the City urges, it would result in the needless expenditure of time of all included parties. Since there exists no remedy for grievants, it would be unnecessary and wasteful for an arbitrator to engage in an academic exercise to interpret the meaning of Directive 2258R. The City states that what the Union really seeks is in the nature of a declaratory judgement.

In its reply, the City responds to the Union's contention that it seeks an "interpretation" of Directive 2258R from an arbitrator by stating that merely seeking an "interpretation" without a ripe controversy is not arbitrable. They also state that a request for an interpretation does not deem a City action as a "misinterpretation," and that such a request would best be addressed in a Labor-Management forum, which would promote sound labor relations.

The City states that in paragraph 19 of its answer, the Union attempts to add another grievant to its request for arbitration. They argue that the Board has held that a Union may not, in its answer to a petition challenging arbitrability, expand the list of grievants even though the nature of the additional claim may be the same as originally pleaded. They state that the Board does not permit a party to interpose, prior to arbitration, a claim based on a hitherto unpleaded grievance, for to do so would deprive the parties of the benefit of a multi-level grievance procedure and foreclose the

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[5] The City cites Decision Nos. B-37-90 and B-22-79.

possibility of voluntary settlement.[6]

Union's Position

The Union states that the Department admits that the grievants were transferred pursuant to Directive 2258R, and that the admission confirms that the transfer decision was based not on § 12-307 of the NYCCBL, rather, it was a decision made under Directive 2258R. As such, COBA asserts that it does not deny the City's right to manage its workforce, but it asserts that that right is limited by Directive 2258R. It argues that Directive 2258R does not allow for the transfer of employees as petitioner contends, that it merely allows the Department, in its discretion, to deny a discretionary transfer, as provided for in Directive 2257RR[7] for those employees in a certain category. The Union states that COBA "will show" that the transfers were disciplinary in nature, as it is evident from the fact that Directive 2258R uses the withholding of discretionary benefits as a penalty and punishment for placement in a category. It states that this is precisely the type of dispute that must be resolved by an arbitrator, since a claim of misapplication and misinterpretation of the Directive is alleged, and a grievance is defined as a violation, misinterpretation or misapplication of the rules, regulations or procedures of the agency.

The Union also states that the City's reliance on Decision No. B-25-83 is misplaced, because here, the Union is able to cite Directive 2258R as having been violated, and their interpretation of

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[6] The City cites Decision No. B-14-84, wherein the union attempted to add grievants in its answer to a petition challenging arbitrability and the Board found that the addition of the grievants to the proceeding was improper.

[7] The stated purpose of Directive 2257RR 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."

the Directive does not empower respondents to transfer grievants because of their placement in a category. COBA argues that the alleged administrative transfers were "tainted by disciplinary motivations" and, further, were unauthorized acts under the "Discretionary Benefits" section of Directive 2258R.

Finally, the Union argues that the City is "disingenuous" in claiming that its decision to transfer the grievants back to their prior posts provided the Union with the remedy sought in its request for arbitration, and that the request for arbitration clearly shows that the Union seeks relief beyond mere transfers.

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.[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

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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.

departmental rules, regulations or procedures affecting terms and conditions of employment, such as Directive 2258R, are within the scope of the parties' agreement to arbitrate.

We have recognized that it is clearly not in the interest of sound relations to order the arbitration of a particular dispute when the remedy sought no longer exists.[11] This matter became moot the moment the grievants were transferred back to their original posts, and if the Union wishes to have an interpretation of this issue, it must wait until a live controversy presents itself.

We also find that, if the Union attempted to add another grievant in its answer, it is prohibited. The decision cited by the City, B-14-84, wherein the Union attempted to add another grievant in its answer, is germane to the instant matter. In the decision, the Board applied its well-settled precedent that states that a party may not interpose, prior to arbitration, a claim based on a hitherto unpleaded grievance, for to do so would deprive the parties of the benefit of a multi-level grievance procedure and foreclose the possibility of voluntary settlement.[12] Accordingly, the petition challenging arbitrability is granted in its entirety.

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[11] Decision Nos. B-37-90; B-22-79.

[12] Decision No. B-14-84.

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
September 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

ROBERT H. BOGUCKI
MEMBER

THOMAS J. GIBLIN
MEMBER