District Council 37, Locals 420 and 1549, 63 OCB 1 (BCB 1999) [Decision No. B-1-99 (Arb)], aff'd, Saunders v. DeCosta, No. 103467/99 (Sup. Ct. N.Y. Co. July 7, 1999).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
THE CITY OF NEW YORK and the HEALTH AND HOSPITALS CORPORATION,	:	
	:	Decision No. B-1-1999
Petitioners,	:	Docket No. BCB-1961-98 (A-7186-98)
	:	
-and-	:	BCB-1962-98 (A-7187-98)
	:	
DISTRICT COUNCIL 37, LOCAL 420, AFSCME, AFL-CIO and DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On March 17, 1998, the Health and Hospitals Corporation and the City of New York (hereinafter referred to as "HHC" or "City"), appearing by the Mayor's Office of Labor Relations ("OLR"), filed two petitions challenging the arbitrability of two related grievances that are the subject of two requests for arbitration filed by District Council 37, Locals 420 and 1549, AFSCME, AFL-CIO ("Unions"). The Unions filed their answers on April 17, 1998. The City filed its replies on May 13, 1998.

BACKGROUND

On August 28, 1997, Donna Lynne, then Senior Vice President of Corporate Affairs for the HHC, sent a memorandum to Senior Network Vice Presidents and Executive Directors, asking them

to provide her with a summary of employees at their facilities on union release time, indicating the union and local, whether it is full or part-time and whether it was with or without pay. On December 4, 1997, Lynne sent to James Hanley, Commissioner of the OLR, a list of the individuals who are being released to perform union duties by HHC facilities who did not appear to have been granted release time by the OLR pursuant to Executive Order 75 ("EO 75"). The list identifies the facility, the individual, the union represented, and whether the release is full-time or part-time with pay or without pay.

EO 75, titled "Time Spent on the Conduct of Labor Relations Between the City and its Employees and on Union Activity" reads, in part,

> **General Provisions**
>
> a. The head of the agency in which the affected union representative is employed shall continue to make the necessary administrative determinations, subject to the approval of the City Director of Labor Relations, under both Sections 2 and 3, including but not limited to those set forth below. The agency head:
>
> (1) Shall make all full and part-time individual assignments and grant leaves-without-pay as authorized in writing by the City Director of Labor Relations and shall grant ad hoc assignments pursuant to this Order.
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> ***
>
> (3) All time spent on the conduct of labor relations granted pursuant to this Order including ad hoc, full and part-time assignments, and leaves of absence without pay, must be approved in advance by authorized officials.
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> ***

On January 7, 1998, Hanley sent Stanley Hill, Executive Director of District Council 37, a letter stating,

> Please be advised that effective Wednesday, January 14, 1998, the Health and Hospitals Corporation will discontinue unauthorized 'release time' at the respective facilities for the below listed individuals. . .
>
> Unless employees have been issued certificates pursuant to Executive Order No. 75, they shall not be permitted to be released to conduct union business. Permission to

> participate on an 'ad hoc' basis in the activities enumerated under Section 2 and 3 of Executive Order No. 75 must be requested in advance and may be granted, consistent with the provisions of Executive Order No. 75, subject to the approval of authorized officials.

On January 30, 1998, Hanley sent a follow-up letter to Hill, stating,

> At your request, the Health and Hospitals Corporation agreed to defer this matter until January 28, 1998.
>
> In subsequent discussions, we proposed that up to four (4) designated individuals would be permitted to be released for Union business on a leave without pay (LWOP) basis. If you decide to designate up to four (4) individuals on an LWOP basis, please provide me with the necessary information so that the proper authorization may be furnished to HHC.
>
> Otherwise, employees who have not been issued certificates pursuant to Executive Order No. 75 shall not be permitted to be released to conduct union business. . .
>
> Accordingly, the aforementioned employees are required to report to their regular work locations effective Monday, February 2, 1998.

According to the City, as part of his continued investigation into the unauthorized release time, William Hermann discovered that DC 37 was utilizing office space at a number of HHC's facilities without compensating the City for the space.

On February 2, 1998, the deadline for the employees to return to work was extended to February 13, 1998. The Union and the City met to discuss the issue on February 6, 1998. At this meeting, Hanley allegedly stated that the release time would be discontinued and for the first time, indicated that the Union's use of the office space would also be discontinued. According to the City, Dennis Sullivan, Director of Research and Negotiations for DC 37, stated that the union was prepared to bargain over release time and office space and that Hanley told him that the offer to bargain would amount to an economic demand that the MCMEA forbade. The Union contends that Hanley stated that the Unions would have to pay the employee representatives themselves if the status quo with respect to release time was to be maintained. They also contend that Hanley told them that the Unions would no longer have use of office space without charge and that the Union

representatives informed the City that the unilateral changes in the longstanding practices constituted an economic demand forbidden by the MCMEA.

On February 10, 1998, Sullivan wrote a letter to Hanley advising Hanley that the Union wishes to submit the issue of the HHC's decision to discontinue release time for certain individuals to arbitration in accordance with the provisions of § 16 of the 1995 Municipal Coalition Memorandum of Economic Agreement ("MCMEA").[1] That request was docketed as Case No. A-7187-98. The Union also contended that the actions of the City constituted a unilateral change in longstanding practices within the HHC and the City's demand at a labor-management meeting in February that the Union "pay" to retain the status quo constitutes an economic demand that is

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[1] Section 16, titled "Resolution of Disputes" reads,

a. Subject to the subsequent provisions of this Section 16(b), any dispute, controversy, or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this 1995 MCMEA shall be submitted to arbitration upon written notice therefor by any of the parties to this 1995 MCMEA to the party with whom such dispute or controversy exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining pursuant to Title 61 of the Rules of the City of New York. Any award in such arbitration proceeding shall be final and binding and shall be enforceable pursuant to Article 75 of the CPLR.

b. After incorporation of this 1995 MCMEA into an applicable *Successor Separate Unit Agreement*, any dispute, controversy or claim referred to in Section 16(a) which arises between the parties to such separate unit agreement shall be submitted in accordance with the dispute resolutions provisions of such applicable *Successor Separate Unit Agreement* except that any dispute, controversy or claim arising under Sections 8, 9, 13(a) or 13(b) shall be resolved pursuant to the Citywide or other similar applicable agreements with the Employers, and except as provided in Sections 16(c) and 16(d) below.

c. Any dispute, controversy or claim arising under Sections 8, 10, 11 and 17 shall continue to be submitted under Section 16(a) above.

d. The provisions of Sections 16(a) and 16(b) shall not apply to any dispute, controversy or claim arising under Sections 12, 13(c) or 15. Any dispute, controversy or claim arising under Section 13(c) shall be resolved pursuant to Paragraph 8 of Appendix B of the Severance Agreement, dated April 29, 1994.

e. The term of this Section 16 shall be from the date of execution of this 1995 MCMEA to the date of execution of any successor agreement(s) to this 1995 MCMEA.

prohibited by §3 of the MCMEA.[2] The Union states that the dispute should be submitted to an arbitration panel consisting of the three Impartial members of the Board of Collective Bargaining ("BCB").

On February 13, 1998, the deadline for the employees to return to work was extended to February 20, 1998. Hanley responded to Sullivan's letter through a letter of his own on February 17, 1998. Hanley stated that the City was not making an economic demand nor a demand in bargaining, and that the City has merely put the Union on notice that those individuals who had not been given a certificate by OLR for authorized paid release pursuant to EO 75 will be returned to work. On February 20, 1998, another meeting was held between the parties to discuss the controversy, where Hanley reiterated that the release time would be discontinued and that the Union's use of office space would be discontinued. The subject of the Union paying for the use of office space was again covered at the meeting. Hanley extended the deadline for the employees to

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[2] Section 3 of the 1995 MCMEA reads,

No party to this 1995 MCMEA shall make additional economic demands during the term of the 1995 MCMEA or during the negotiations for the applicable Successor Separate Unit Agreement, except as provided in Sections 4(e) and 6. Any disputes hereunder shall be promptly submitted and resolved.

Section 4(e) of the 1995 MCMEA reads,

The general increases provided for in subsections 4(b)(i), 4(b)(ii), 4(b)(iii) or 4(d) may be subject to revision or modification in the *Successor Separate Unit Agreements*, provided, however, that such revision or modification in wages or fringe benefits shall not result in any current or future cost increase or decrease as compared with the cost required to pay the increases provided for in this Section 4.

Section 6, is titled "Annuity and Additional Compensation Funds." It covers the establishment of an annuity fund for employees in active pay status at any time during the period of the first day of the fifteenth month through the last day of the 26th month of this 1995 MCMEA. Section 6(iv) reads,

For the purpose of Section 6(a), excluded from paid working days are all scheduled days off, all days in non-pay status and all paid overtime.

return to work to February 24, 1998.

On February 23, 1998, Justice Karla Moskowitz granted the Union a temporary restraining order preventing the HHC from discontinuing the Union's use of office space and requiring the employees on release time to return to their work locations. On February 27, 1998, Sullivan wrote Hanley a letter indicating that the Union wished to submit the dispute concerning the union's office space to arbitration under § 16 of the MCMEA. The Union contended that the City's announced decision to discontinue the provision of office space for union purposes constitutes a unilateral change in longstanding practices and that the City's suggestion that the Union pay for such space constitutes an economic demand prohibited by § 3 of the MCMEA. This request was docketed as Case No. A-7186-98.

POSITIONS OF THE PARTIES

City's Position

The City argues that the instant grievance must be dismissed because it fails to allege any nexus between the act complained of and the provision of the agreement cited by the Union in its letter requesting arbitration. The City states that the Union identified § 3, a prohibition of additional economic demands during the term of the 1995 MCMEA, as having been violated. Although the City and the Union have agreed to submit claims arising under the MCMEA to an arbitration panel, the City contends, the BCB cannot enlarge the duty to arbitrate beyond the scope established by the parties,[3] and the Union has the burden of establishing that the contract provision invoked is arguably

[3] The City cites Decision No. B-14-87.

related to the grievance to be arbitrated.[4] In order for the Union to prevail at arbitration, it contends, it is necessary for the Union to show that the City has made an economic demand with regard to release time. It argues that an obvious prerequisite to showing that there has been an economic demand by the City, the Union must prove that the City has made a bargaining demand. However, the City states, the Union has not met the threshold burden.

The City argues that the Union has merely stated in their letter requesting arbitration that the City made an economic demand because it suggested that the Union pay to retain the employees on release time in question. The City urges the Board to look into the facts in order to determine whether this issue is substantively arbitrable.[5] The City contends that it placed the Union on notice that any HHC employees on unauthorized release time would be returned to their work locations and the Union requested meetings with the City to discuss the matter. At one of the meetings, specifically the February 6, 1998 meeting, it argues that the Union asked the City to continue the employees on release time, in and of itself a bargaining demand. It also states that the Union offered to bargain over office space. On February 20, 1998, the City contends that in response to the Union's demand to bargain over paid release time, OLR stated that it would be willing to prove unpaid release time for some of the individuals but a demand to bargain over paid release time for the employees would amount to a further economic demand prohibited by the MCMEA. It also

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[4] The City cites Decision Nos. B-41-88 and B-4-88.

[5] The City cites Decision No. B-29-92, which stated, "it is sometimes difficult to determine valid issues of substantive arbitrability without crossing the line separating them from issues which involve the merits of the particular case. It has been our practice in such cases to allow limited incursions upon the realm of the arbitrator which are essential and unavoidable in determining threshold questions of substantive arbitrability."

stated that the only way to retain the release time would be for the Union to fund it as had been done with other unions. The City contends that it did not make any economic demands of its own.

Union's Position

The Union argues that once the Board finds that there is an agreement to arbitrate disputes, the Board then determines whether a claim, on its face demonstrates an arguable relationship between the act complained of and the source of the right alleged to have been violated. If an arguable relationship is shown, the Board will not consider the merits of the case; it is for an arbitrator to decide whether the cited provision applies.[6] The Union states that a practice has existed for thirty years of union employee representatives being given paid release time to engage in certain labor-management activities. It argues that the practice has not been refuted by the City and the officials of OLR either were aware of the practice, or with the slightest diligence could have and should have been aware of it. It states that the same is true of the use of the office space.

The Union contends that the City's demand that the Union either pay to have the Union representatives remain on release time or no longer have on-the-job representatives at the affected hospitals is obviously an economic demand prohibited by the MCMEA, either because the Union would now have to pay for services it was not previously required to expend monies on, or as a withdrawal of a benefit during the term of the agreement. It argues that this is more than sufficient to show a nexus between the act complained of and § 3 of the MCMEA.

The Union argues that the City, in arguing that it did not make an economic demand, is seeking to have the Board decide a matter of contract interpretation which must be left to an

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[6] The Union cites Decision Nos. B-12-94 and B-24-91.

arbitrator. It states that once it is shown that there is a prima facie relationship between the contractual provision cited and the subject matter of the grievance, the Board does not inquire further into the merits, but leaves that issue for the arbitrator.[7] It states that doubtful issues of arbitrability must be resolved in favor of arbitration.

The Union contends that the City's allegations regarding the supposed insufficiency of proof to support the Union's claim that the City made an economic demand, and not necessarily a bargaining demand, must be rejected. It states that a similar assertion was forcefully denied in Decision No. B-10-77 when the Board stated,

> There is no requirement, such as is claimed by the City, that a grievant must do any more than allege a contractual violation within the definition of a grievance agreed to by the parties and incorporated by them into their contract. No 'proof' need be presented to this Board regarding the merits of the grievance; such proof is to be put before an arbitrator who must decide the grievance.

The Union contends that since it has pointed to a specific provision of the contract which they claim the City has violated, and have presented facts which show that the provision arguably deals with the issue in question, the issue must be submitted to arbitration.

DISCUSSION

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate their controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.[8] The

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[7] The Union cites Decision Nos. B-25-91; B-72-89 and B-30-89.

[8] *City of New York v. Communications Workers of America, AFL-CIO*, Decision No. B-28-82.

parties do not dispute the arbitrability of the provision in the instant matter. The City, however, argues that the Union has failed to demonstrate the requisite nexus between the act complained of and a provision of the parties' agreement.

We find that the Union has not met that burden. Although the Union claims a violation of the MCMEA, a substantial portion of its argument is directed toward its contention that the City wrongfully ended a past practice where representatives were given free office space in City buildings and release time. We find that the alleged discontinuation of that past practice forms the true basis for the Union's claim. That the Union alleges that the discontinuance of that practice constitutes the making of an economic demand does not change the true character of the Union's claim. Accordingly, we shall examine this claim as if it were brought as a claimed violation of past practice.

We have long held that before we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation of past practice is within the scope of the definition of the term "grievance" which is set forth in the parties' agreement.[9] In the instant matter, neither of the Locals' unit contracts, nor the MCMEA itself, includes an alleged violation of past practice in the definition of a grievance.[10] Furthermore,

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[9] *City of New York v. District Council 37, Local 1549, AFSCME, AFL-CIO*, Decision No. B-20-90.

[10] The Hospital Technichians' contract and the Clerical Workers' agreement reads:
Section 1-Definition:
The term "grievance shall mean:
a. A dispute concerning the application or interpretation of the terms of this Agreement;
b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer. . .
c. A claimed assignment of employees to duties substantially different from those stated
(continued...)

the mere passage of time does not convert a past practice into a rule, regulation, written policy or order that may be grieved under the parties' unit contracts.[11] Therefore, we hold that an alleged violation of past practice may not serve as an independent basis for arbitration in the instant matter. Moreover, the assertion that the alleged violation of a past practice constitutes the making of an economic demand simply is not persuasive. Accordingly, we grant the petition challenging arbitrability filed by the City of New York.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City

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[10](...continued)
in their job specifications;
d. A claimed improper holding of an open-competitive rather than promotional examination;
e. A claimed wrongful disciplinary action taken against a permanent employee. . .
f. Failure to serve written charges as required by Section 75 of the Civil Service Law . . .
g. A claimed wrongful disciplinary action taken against a provisional employee . . .
h. A claimed wrongful disciplinary action taken against a non-competitive employee . . .

[11] *City of New York v. Patrolmen's Benevolent Association*, Decision No. B-43-88.

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 Locals 420 and 1549, District Council 37, AFSCME, AFL-CIO be, and the same hereby is denied.

Dated: New York, New York
February 4, 1999

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

I concur in the result.

JEROME E. JOSEPH
MEMBER