HRA & City v. L. 1549, Haynes & Heaton, et al., 63 OCB 18 (BCB 1999) [Decision No. B-18-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration Between

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION and the CITY OF NEW YORK,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO; DIEDRA HAYNES; AND EILEEN HEATON, *et al.*

Respondents;

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DECISION NO. B-18-1999

DOCKET NO. BCB-1952-98
(A-6933-97; A-6944-97)

DECISION AND ORDER

On January 26, 1998, the New York City Human Resources Administration ("HRA"), the Department of Sanitation ("Department"), and the City of New York ("City") filed a petition challenging the arbitrability of group grievances filed by District Council 37, AFSCME, AFL-CIO, ("Union"), on behalf of members of its affiliated Local 1549, as well as named individuals, *viz.*, Diedra Haynes, and Eileen Heaton. After three requests for an extension of time, the Union filed its answer on September 30, 1998. The City filed a reply on October 16, 1998.

On January 7, 1999, Counsel for the Union filed a letter withdrawing from arbitration grievances incorporated in the instant petition "to the extent that they deal with the issue of Work Experience Program ("WEP") participants performing the duties set forth in the job specification

of bargaining unit members."[1] The Board of Collective Bargaining ("Board"), at its February 4, 1999, meeting, directed the Trial Examiner to request additional information of the parties regarding the temporary workers.[2] By letter dated February 8, 1999, the Trial Examiner conveyed the Board's request.

After several requests for extension of time to submit the information, the City filed its submission on April 2, 1999. The Union filed no statement despite numerous written and oral notifications by the Trial Examiner as to when such a statement would be due.[3]

Background

The City and Union are parties to a collective bargaining agreement ("Clerical Agreement") for the period January 1, 1992, to March 31, 1995, whose terms continue in effect pursuant § 12-311(d) of the New York City Collective Bargaining Law ("NYCCBL").[4] The

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[1] For this reason, the grievances docketed as A-6905-97 (o/b/o Velez, *et al.*) and A-6929-97 (group grievance), which originally were filed as companion arbitrability cases to those considered herein, are not under consideration in this determination.

[2] Specifically, the Board wanted to know by whom the temporary workers at issue are employed, *i.e.*, whether by the City directly (*see* N.Y. Civil Service Law § 64), by a private employment agency under contract to the City, or by some other arrangement. The parties were also invited to submit information as to who pays their salary and who assigns and supervises them.

[3] In a letter dated May 5, 1999, the Trial Examiner advised the Union's attorney that the record would be closed and no further submissions permitted as of the close of business on Friday, May 14, 1999.

[4] That section of the NYCCBL, as amended, provides, *inter alia*, for the preservation of *status quo* with respect to terms which constitute mandatory subjects of

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contract covers the titles Eligibility Specialist and Clerical Associate, at issue here.

The Union filed grievances alleging that temporary workers are performing the work of its members in violation of Article VI, §§ 1(b), 1(c), and 14 of the Clerical Agreement. The Department of Social Services within the Human Resources Administration employs Grievants Eileen Heaton, *et al.*, Clerical Associates (A-6944-97), and Diedra Haynes, Eligibility Specialist (A-6933-97). Because of the similar nature of each grievance, the parties have agreed to consolidate the grievances for the purpose of this proceeding challenging arbitrability.

There is no dispute that, at the time period relevant herein, temporary workers performed the duties and responsibilities that usually are performed by Eligibility Specialists and Clerical Associates.

The Haynes grievance against HRA was denied at Step III on May 14, 1997. The Heaton, *et al.*, grievance against HRA was denied at Step III on May 22, 1997. In each decision, the Step III review officer reasoned that the relevant provisions of the Clerical Agreement are limited to disputes concerning the assignment of "City employees," and that temporary workers are not City employees within the meaning of the Clerical Agreement.

There is no dispute that Article VI (Grievance Procedure), § 1 (Definition), Subsection (b), defines the term "grievance" as 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. . . ." There is also no

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[4](...continued)
bargaining in an expired collective bargaining agreement pending negotiations for a successor agreement or pending completion of impasse panel proceedings and appeal.

dispute that Subsection (c) defines a "grievance" as a "claimed assignment of employees to duties substantially different from those stated in their job specifications. . . ."

In addition, § 14 of Article VI provides as follows:

> Notwithstanding any other provisions of this Agreement, the parties agree that Section 1(c) of this Article VI shall be available to any employee who claims to be aggrieved by an alleged assignment of any *City employee*, whether within or without the collective bargaining unit defined in Article I, Section 1 of this Agreement, to clerical duties which are stated in the aggrieved employee's job specifications but are substantially different from the duties stated in the job specifications for the title held by such other City employee. Light duty assignments of permanent City employees, within or without the collective bargaining unit defined in Article I, Section 1 of this Agreement, who have been certified by the appropriate procedures, shall be excluded from this provision. Grievances arising pursuant to this provision may be taken directly to STEP IV of Section 2 of this Article VI upon election by the Union. (Emphasis supplied.)

Positions of the Parties

City's Position

The City challenges the request for arbitration on the grounds that the Union has failed to establish a nexus between the provisions of the Clerical Agreement cited in the Requests for Arbitration as the basis of the claims and the actions which are the subject of the Union's complaint, *i.e.*, that temporary workers have been assigned by the City to perform the work of unit members.

The City argues that the temporary workers are not City employees within the meaning of the applicable contract, because their employment relationship with the City is "too casual and transient to fit the requirements" of the NYCCBL for public employee status. The City describes the temporary workers at issue here as employees of a not-for-profit, temporary-employment

agency with whom the City contracts to obtain certain services. That agency is New York State Industries for the Disabled ("NYSID"). NYSID is an independent contractor, the City argues, adding that the temporary employees at issue here are employees of NYSID, paid by NYSID for the hours that they perform "a variety of office services in order to staff emergency and short-term mandated projects." According to the City, NYSID is responsible for the temporary employees' acts, personal conduct, and work, and provides fringe benefits to them as well. For these reasons, the City asserts, they are not employees within the meaning of the collective bargaining agreement and they are not temporary appointments as defined in N.Y. Civil Service Law § 64.

Additionally, the City notes that NYSID recruits the temporary workers primarily from New York City residents who are on public assistance, Medicaid, or who are "enrolled in any supported work program such as the Work Experience Program (WEP)." The City describes the goal of NYSID's program as assisting "each temporary employee in obtaining full time, unsubsidized employment."

Any determination as to the employment status under the NYCCBL of the workers at issue here should be made by the body with sole authority to render such determinations, namely, the Board of Certification, the City maintains. In fact, the City contends that Board has already determined that temporary workers are not City employees. The City cites a recent interim determination by that Board.[5] The City further maintains that the Union is incorrect to suggest

[5] *Civil Service Bar Ass'n, Local 237, International Brotherhood of Teamsters, v. City of New York and New York City Department of Finance*, Board of Certification Interim
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that the meaning of the term "City employee," as used in Article VI, § 1(c), of the Clerical Agreement, should be determined "outside" the NYCCBL. The City urges that its petition be granted.

Union's Position

The Union states that the sole issue raised in the City's challenge to arbitrability is the meaning of the term "City employee" as used in Article VI, § 14, of the applicable Clerical Agreement. The Board has made clear, the Union argues, that it subscribes to the rule that matters of contract interpretation should be left to resolution in arbitration when the parties have selected that as the means for determining such questions, as in the instant case. The Union asserts that the language in Article VI, § 14, of the Clerical Agreement was negotiated between the Union and the City in the agreement for the term from January 1, 1969, to June 30, 1971. The Union contends that the City cannot unilaterally declare that the term "'City employee' as

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Decision No. 6-97.

The City also cites *Local 32B-32J and Local 144, Service Employees International Union, AFL-CIO, and District Council 36, AFSCME, AFL-CIO, and City of New York and Related Public Employers*, Decision No. 20-80 (Board of Certification granted City's motion to dismiss on grounds that Board had no jurisdiction over Home Attendants' employer, *viz.*, vendor of purchase-of service agreement, which had sole control and discretion over conditions of the Home Attendants' employment, *e.g.*, hiring, supervision, and assignment, withholding of taxes, insurance coverage, discipline and discharge, personnel practices including job specifications, job orientation, maintenance of time and personnel records, time and leave policy, payroll practices, and continuing training); and *District Council 37, AFSCME, AFL-CIO, and City of New York and Related Public Employers*, Decision No. 21-81 (Board of Certification granted City's motion to dismiss on grounds that Board had no jurisdiction over recipients of Home Relief or Aid to Families with Dependent Children who took part in the New York State Public Works Program ("PWP").

utilized therein" excludes temporary employees. In the Union's view, this is a question of contract interpretation, an issue of what the respective parties intended, and a question of fact for an arbitrator to decide. The Union urges that the instant petition 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.[6] Doubtful issues of arbitrability are resolved in favor of arbitration.[7]

The instant challenge to arbitrability requires us to determine whether the dispute as it relates to temporary workers is encompassed within the parties' agreement to arbitrate contract disputes. The Union argues that the applicability of the contractual grievance procedure to the temporary workers at issue hinges upon whether those workers are City employees as the parties to the applicable collective bargaining agreement understood that phrase to mean when they

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[6] *See*, *e.g., City of New York and Department of Juvenile Justice v. Social Services Employees' Union, Local 371*, Decision No. B-3-98; *see*, also, *City of New York v. Organization of Staff Analysts*, Decision No. B-28-94; *City of New York v. District Council 37, Local 1795*, Decision No. B-19-89; *City of New York and Fire Department of the City of New York, v. Uniformed Firefighters' Association of Greater New York,* Decision No. B-65-88; *City of New York v. Communications Workers of America, AFL-CIO,* Decision No. B-28-82.

[7] *City of New York and Department of Juvenile Justice*, Decision No. B-3-98; *City of New York v. Organization of Staff* Analysts, Decision No. B-28-94; *City of New York and Fire Department of the City of New York, v. Uniformed Firefighters' Association of Greater New York*, Decision No. B-65-88; and *District Council 37 and Local 1549 v. City of New York and Human Resources Administration,* Decision No. B-16-80.

incorporated it into Article VI, § 14, of the 1992-95 Clerical Agreement.

The City contends that the phrase must be interpreted according to the NYCCBL's definition of "municipal employees" and "public employees." That, the City maintains, is for the Board of Certification to determine, if, in fact, its determinations in earlier cases are not dispositive here.[8]

A similar case was considered by the Appellate Division of the Supreme Court of the State of New York ("Court") in *Board of Education of the Enlarged City School District of the City of Auburn, New York, v. Auburn Teachers Association.*[9] There, the Court directed that a contract dispute proceed to arbitration despite the public employer's contention that the dispute really concerned a representation matter over which, arguably, only the New York State Public Employment Relations Board ("PERB") had jurisdiction.[10]

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[8] *See* n. 5, above.

[9] 49 A.D.2d 35 (Fourth Dep't 1975), 371 N.Y.S.2d 201, 90 L.R.R.M. 2352, 79 Lab. Cas. P 53,858.

[10] *Id.* at 206. The Court reasoned that the contractual language on which the employer based its argument (*i.e.*, that an arbitration award could encroach upon PERB's jurisdiction in certification matters) was no more than a statement of the general grounds, under § 7511 of the Civil Practice Law and Rules, upon which an arbitration award could be reviewed in court. (*Id.* at 205--206; the contract issue there provided that an arbitrator "shall have no power or authority to make any decision which requires commission of an act prohibited by law" or which is beyond the scope of the agreement itself .) To hold that an arbitrator would render a decision violative of the law or in excess of his contractual authority, the Court stated, would be to engage in speculation. (*Id. at 206.)* It would also require the Court to pass upon the merits of the controversy, it said, which it declined to do. (*Id.*) Moreover, the Court pointed out that PERB would not be ousted of its jurisdiction by a direction that the parties proceed to arbitration in that case, because if arbitration failed to resolve the matter to the satisfaction of both parties, the party remaining aggrieved could bring it before PERB or seek redress in the courts. (*Id.; see*,

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There is no disagreement that the contractual phrase "City employee" is at the heart of the controversy in the instant case. That this term has a statutory meaning for purposes of the NYCCBL does not mandate that the parties have given it the same meaning for purposes of their collective bargaining agreement. The grievance herein raises a contractual issue for an arbitrator, not a statutory one for this Board.[11]

The City's argument -- that we must look to the statutory definition of "municipal employee" or "public employee" to resolve the instant dispute -- relates to its substantive argument before the arbitrator on the underlying matter.[12] It does not address the question as to whether the Union has asserted a nexus to the contractual provision claimed to have been violated. Because the question concerns whether the phrase "City employees" in Article VI, § 14, of the contract contemplates temporary workers as are found in this case, we find that the Union has indeed articulated a nexus permitting the matter to be submitted to arbitration.[13]

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[10](...continued)
also, *Town of Wallkill Unit of the Orange County Chapter, Civil Service Employees' Association, Inc., and Betty A. Jaroka, Petitioners, v. Town of Wallkill*, 85 Misc.2d 1076, 382 N.Y.S.2d 224, 225, 92 L.R.R.M. 3646, N.Y.Sup.Ct. Orange County, Aug. 1, 1975 [PERB's function is to determine issues of representative status of bargaining units, not whether a particular employee is covered by a contract].)

[11] *See*, also, *City of New York v. Malcolm D. MacDonald, et al.*, N.Y. Co. Supreme Court, Sept. 29, 1994, Index No. 405350/93, *aff'd sub nom. Matter of City of New York v. MacDonald et al.*, App. Div. 1st Dep't, Jan. 25, 1996 (56726).

[12] Whether the Board of Certification decisions cited by the City support its argument on the merits is a question we need not reach here.

[13] As in *Auburn*, our arbitrability determination here does not divest the Board of Certification of its jurisdiction, because if arbitration failed to resolve the matter to the
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For the reasons stated above, we deny the instant petition challenging arbitrability and direct that the grievances docketed as A-6944-97 (o/b/o Heaton, *et al.*) and A-6933-97 (o/b/o Haynes) proceed to arbitration.

[13](...continued)
satisfaction of both parties, the party remaining aggrieved could bring it before that Board or seek redress in the courts.

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, docketed as BCB-1952-98, be, and the same hereby is, denied; and it is further

DIRECTED, that the Requests for Arbitration, docketed as A-6944-97 (o/b/o Heaton, *et al.*) and A-6933-97 (o/b/o Haynes), be granted.

Dated: June 7, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

ROBERT H. BOGUCKI
MEMBER

DISSENT

For the reasons set forth below, Board Members Richard A. Wilsker and Anthony P. Coles respectfully dissent.

The Union's grievance should not be arbitrated. The Union has clearly failed to show a nexus between the actions complained of and the reverse out-of-title provision of the parties' collective bargaining agreement. The contract provision is clear and unequivocal and states that in order for there to be a violation, a *"City employee"* must be assigned work that is within "the aggrieved employee's job specifications *but are substantially differently from the duties stated in the job specifications for the title held by such other City employee.*" See, Board majority decision page 4. The Union is alleging that temporary workers are performing the work of clerical employees covered by the collective bargaining agreement.

By allowing this Request for Arbitration to proceed, the majority is completely ignoring certain unrebutted facts. The New York City Collective Bargaining Law ("NYCCBL") defines the parameters under which the City, the Unions and the Office of Collective Bargains operate. In addition, the NYCCBL, section 12-303(e) defines the term "municipal employee" as "persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury." Section 12-303(d) states in pertinent part that:

> The term "municipal agency" shall mean an administration department, division, bureau, office, board, or commission, or other agency of the **city** ... [emphasis added]

It is axiomatic that the term in the parties' collective bargaining agreement, "City employee", and the term defined in the NYCCBL, "municipal employee", are synonymous.

However, the Board, in the majority decision, has reasoned that the parties, when they negotiated the language at issue, might have placed a meaning on the term "City employee" which differs from the one in the NYCCBL. The suggestion that the parties have the ability to change the provisions of the NYCCBL by simply negotiating the changes into a contract is preposterous. The statutory obligations and definitions of the NYCCBL will apply to the City, the Unions and the Office of Collective Bargaining regardless of what a contract might provide to the contrary. By reasoning that the parties might have intended to place a meaning on the term "City employee" which is different from that found in the NYCCBL, the majority would have the City and the Unions defining each and every term in the collective bargaining agreements.

Perhaps most surprising about the majority decision is how they reached it. At the February meeting, the Board deemed it necessary to determine the employment status of the temporary workers at issue. Specifically they asked the parties to ascertain who employs the workers, who pays their salary, who assigns them work and who supervises them. Obviously, the Board was interested in this information in order to make a determination as to whether the temporary workers are "City employees". The information provided by the City clearly indicated that the temporary workers are employed by an organization who contracts with the City. Assuming that there was ever a question as to whether the temporary workers were "City employees", once this information was provided to the Board there was no doubt that they were not "City employees" under the NYCCBL or the collective bargaining agreement. This is especially true given the fact that the Union never submitted a rebuttal to the information provided by the City. However, the Board has chosen to ignore the information it requested

which clearly supports the City's position.

The Board has held that "while it is our policy not to adjudicate the merits of a claim, in certain cases, we necessarily must scrutinize the terms of a provision more closely than we might otherwise in order to determine, as a threshold matter, whether it provides a colorable basis for the claim." Board Decision No. B-13-90. See also, Board Decision Nos. B-29-92, B-23-90, and B-54-87. The instant matter is exactly the kind of case that requires the Board to scrutinize the terms of the contract provision more closely. The term "City employee", as used in the contract, is clear on its face. The plain meaning of the term is implicit based on the relationship between the parties and the NYCCBL. It wouldn't require extensive scrutinization to find that the term "City employee" means exactly the same thing as the term "municipal employee" as defined in the NYCCBL.

A brief review of the contract language shows that in order for there to be a finding of a violation, the alleged reverse out-of title would have to be performed by a "City employee" who has a job specification. The contract states that the assigned duties have to be "substantially different from the duties stated in the job specifications for the title held by such other City employee." Given that the temporary workers at issue herein are not employees of the City, they do not have job specifications and therefore, there can never be a finding that there is a violation of the contract.

If it was unclear to the majority whether the temporary workers at issue were "City employees", the logical place to have turned was not to an arbitrator, but, rather it should have been the Board of Certification. It is within the Board of Certification's jurisdiction to make

determinations as to who are City employees. In fact, as the City pointed out in their papers, the Board has already found that temporary workers, under similar scenarios as are found here, are not "City employees". See, Board Decision Nos. 6-97; 21-81 & 20-80.

A review of the Board of Certification decisions, together with the information provided by the City at the Board's request, as well as the contract language, which is plain on its face, clearly shows that the Union has failed to provide any evidence which would suggest that the term "City employee", has a meaning which is separate and distinct from the New York City Collective Bargaining Law.

Dated: June 24, 1999
New York, New York

RICHARD A. WILSKER
MEMBER

ANTHONY P. COLES
MEMBER