DOG & City v. L. 237, IBT, 63 OCB 28 (BCB 1999) [Decision No. B-28-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
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-between-	:	
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THE DEPARTMENT OF HEALTH and THE CITY OF NEW YORK,	:	Decision No. B-28-1999 Docket No. BCB-2040-99 (A-7607-99)
Petitioners,	:	
	:	
-and-	:	
	:	
LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On February 11, 1999, the Department of Health ("DOH" or "Department") and the City of New York ("City"), appearing by the 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 Local 237, International Brotherhood of Teamsters ("Union"). The Union filed an answer on March 4, 1999 and the City filed a reply on March 10, 1999.

Background

On September 28, 1998, Special Officer Harold Bailey, on behalf of himself and a number of other Special Officers filed a grievance alleging that the Department violated Article V § 2 of the Citywide Agreement ("Agreement")[1] and the DOH Time and Leave Manual[2] when it

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[1] Article V § 2 of the Agreement provides in relevant part:

a. Employee requests for annual leave made pursuant to agency policy or collective bargaining agreement, shall be in writing on a form supplied by the agency.

issued a memorandum stating that all annual leave requests must be submitted at least two weeks in advance.

On October 13, 1998, the Union filed a Step III grievance on behalf of the Special Officers. In a December 15, 1998 letter, the grievance was denied at Step III stating that "There is nothing in Article V, Section 2, however, that prevents the employer from requiring that annual leave requests be submitted two weeks in advance." The Union then filed a request for arbitration on January 13, 1999, alleging that by "requiring that Special Officers submit annual leave requests more that seven days in advance," the DOH is "in violation of Article V § 2 of the Citywide Contract." As a remedy, the Union seeks "rescission of Department of Health policy, rule and/or regulation requiring that Special Officers submit annual leave requests more that seven days in advance ..."

> Approval or disapproval of the request shall be made on the same form by a supervisor authorized to do so by the agency.
> Decisions on requests for annual leave or for leave with pay shall be made within seven (7) working days of submission except for requests which cannot be approved at the local level or requests for leave during the summer peak vacation period or other such periods for which the Employer has established and promulgated a schedule for submission and decision of leave requests...
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> b. In order to allow employees to make advanced plans, decisions on requests for annual leave in amounts of at least 5 consecutive work days or tours falling during an agency's designated summer peak vacation period shall be made not less that thirty (30) days prior to the scheduled commencement of said peak vacation period. Such requests must be made no later that forty-five (45) days or tours prior to the commencement of the summer peak vacation period or by the designated submission date for such requests, whichever is earlier...
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[2] The Union does not assert a violation of the Time and Leave Manual in its request for arbitration.

Positions of the Parties

City's Position

The City contends that the grievance must be dismissed because the Union has not demonstrated the requisite nexus between the act complained of and the provisions of the contract in question. The City argues that the language of Article V § 2 merely requires that decisions on requests for annual leave be made within seven working days. There is nothing in the language of the contract that prevents the employer from requiring that annual leave requests be submitted two weeks in advance.

The City also argues that requiring Special Officers to submit annual leave requests two weeks in advance is a management right under § 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL"), which grants management the right to "direct its employees; ... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operation are to be conducted."

In its reply, the City further alleges that arbitration is an inappropriate forum to resolve the present dispute because there is no ambiguity in the language of the contract for an arbitrator to resolve. Article V § 2(b) requires that an employee submit leave requests forty-five days in advance during the summer peak vacation periods. Nothing in that section prevents the employer from requiring that all other annual leave requests be submitted two weeks in advance. The City contends that if the Union alleges that the Department has changed a mandatory subject of bargaining, then it should have filed an improper practice petition and not a request for arbitration. Only grievances can be arbitrated; not alleged improper practices.

Further, the City contends that the Union's argument that the DOH memorandum violates a past practice must be dismissed as untimely. The City maintains that the Union cannot raise a new claim after the request for arbitration has been filed and further, even if the past practice claim was timely, it would not be arbitrable because it is not a dispute concerning the application or interpretation of the terms of the Agreement.

Finally, the City contends that any Board of Collective Bargaining ("Board") decisions that the Union cites where the Board found the grievances arbitrable, were cases where there was ambiguity in the contract language for an arbitrator to interpret. However, there is no ambiguous language in the Article V § 2 of the Agreement.

Union's Position

The Union contends that there is, indeed, a nexus between DOH's memorandum requiring that leave requests be submitted at least two weeks in advance of the proposed leave and Article V § 2 of the Agreement. The Union argues that Article V § 2(b) sets forth a comprehensive mechanism for requesting annual leave. The requests for annual leave are to be made forty-five days in advance of the proposed leave, only during peak vacation periods, Memorial Day through September 30. The Union argues that the parties did not otherwise limit the notice to be given for annual leave requests. Thus, there is no provision in Article V § 2 that authorizes a two week notice of leave requirement. The Union argues that if the Department and the Union intended for there to be a two week notice requirement, they would have bargained for the requirement and it would be documented in Article V.

The Union further maintains that by issuing the DOH memorandum, the Department is

attempting to unilaterally change the terms of a mandatory subject of bargaining, employee annual leave, without bargaining with the Union over the issue.

Furthermore, the Union contends that if there is an ambiguity in the Agreement concerning the request for leave, the Board must not interpret such ambiguity. Rather, only an arbitrator can interpret an ambiguity in the Agreement. It argues that an arbitrator can determine that this two week notice policy is a departure from past practice. The Union contends that in the past, the Board found limitations on personal leave and vacation days to be arbitrable issues. Also, it argues that the policy is inconsistent with DOH's Time and Leave Manual, which sets forth the Department's rules and procedures on annual leave. The Union maintains that the Board must decide whether the parties are obligated to arbitrate this controversy and in deciding this question, the Board may not inquire into the merits of the dispute.

Discussion

In considering challenges to arbitrability, this Board has a responsibility to ascertain whether the parties are in any way obligated to arbitrate their dispute and, if so, whether a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision is arguably related to the grievance to be arbitrated.[3]

In the instant matter, it is clear that the parties have agreed to arbitrate their disputes as

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[3] *The City of New York v. District Council 37*, Decision No. B-2-98 at 11; *The City of New York v. District Council 37,* Decision No. B-19-90 at 5; and *The City of New York v. Patrolmen's Benevolent Assoc.*, Decision No. B-51-89 at 7.

defined in Article XV of the Agreement.[4] The City maintains, however, that "there is no connection between the act complained of and the provision of the Citywide agreement cited by the Respondent in its Request for Arbitration."

We find that the Union has failed to demonstrate the required nexus between the instant grievance and Article V § 2 of the Agreement. The Union alleges that the September 21, 1998 memorandum requiring that "all annual leave requests must be submitted ... at least two weeks in advance," violates Article V § 2 of the Citywide Agreement. Article V § 2 (a) of the Agreement provides that,

> Decisions on requests for annual leave or for leave with pay shall be made within seven (7) working days of submission except for ... requests for leave during the summer peak vacation period or other such periods for which the Employer has established and promulgated a schedule for submission and decision of leave requests.

While the Union may contend that this contract provision requires that leave requests be submitted seven days in advance of the sought vacation time, the Union's argument cannot be reconciled with the plain meaning of the Article. A simple reading of the language of Article V § 2 (a) is that decisions on requests for annual leave are to be made within seven days of submission of the request. Nowhere does the Agreement say that submissions of the request for leave must be made seven days in advance of the vacation.

Furthermore, the Union looks to Article V § 2(b) to support its proposition. Article V § 2 (b) provides that during the summer peak vacation period, requests for leave must be made forty-

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[4] Article XV provides in relevant part:
§1. The term "grievance" shall mean a dispute concerning the application or interpretation of the terms of this Agreement.
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five days prior to the commencement of the summer peak vacation period. The Union argues that because the Agreement only specifies the appropriate time for submission of requests during the summer peak time, the Department is precluded from regulating requests during any other time of the year. While such an argument may be presented in the context of bargaining, it does not present an arbitrable claim. Since Article V § 2 is silent on the issue of when to submit leave requests (for times other than the summer months), the Union has not established an arguable relationship between the Department's memorandum requiring two weeks notice and Article V § 2 of the Agreement.

Accordingly, for the above reasons, the Board shall grant the City's petition challenging arbitrability.

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 hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Local 237, International Brotherhood of Teamsters be, and the same hereby is denied.

Dated: July 13, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL B. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOBUCKI
MEMBER

SAUL G. KRAMER
MEMBER