City & HPD v. L. 237, CEU, 63 OCB 31 (BCB 1999) [Decision No. B-31-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration Between

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,
Petitioners,

-and-

CITY EMPLOYEES' UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

DECISION NO. B-31-1999

DOCKET NO. BCB-2051-99
(A-7652-99)

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DECISION AND ORDER

On March 26, 1999, the New York City Department of Housing Preservation and Development ("HPD") and the City of New York ("City") filed a petition challenging the arbitrability of a grievance filed by the City Employees' Union, Local 237, International Brotherhood of Teamsters ("Union"), on behalf of Abbott Gorin ("Gorin" and "Grievant"). After requests for an extension of time, pleadings were complete as of July 1, 1999.

Background

The City and Union are parties to a collective bargaining agreement ("Attorneys Agreement" and "unit agreement") for the period January 1, 1995, to December 31, 1999. The Attorneys Agreement covers, *inter alia*, the title Attorney at Law, which the Grievant holds. The title is also covered by the 1990-1992 Citywide collective bargaining agreement, as amended,

("Citywide Agreement"), whose terms continue in effect pursuant to § 12-311d of the New York City Collective Bargaining Law ("NYCCBL").[1]

Grievant Gorin claims that, as a result of an idea that he proposed to his employer in 1993, which assertedly was part of an incentive program for employees to offer workplace suggestions, HPD decided to hire part-time, *per diem*, housing inspectors for the winter, 1997, "heat" season. He seeks a cash reward for the suggestion.

On February 9, 1998, Assistant Commissioner Bernard F. Schwarz denied the reward, because the decision to hire *per diem* inspectors assertedly was made several years after Gorin's suggestion and because discussions on the proposal allegedly took place both before and after Gorin's suggestion. Schwarz said no valid connection could be drawn between Gorin's idea and the decision to hire years later. In addition, although Schwarz commended Gorin for his "professional interest and concern" in promoting HPD's "important mission," Schwarz explained nevertheless that no measurable productivity gains were forthcoming from the pilot program and that it was discontinued for 1998.

On March 9, 1998, Gorin sent a memo to Michael Slutsky ("Slutsky"), HPD Director of Labor Relations, to grieve the denial of the reward. The next day, Slutsky sent Gorin a memo acknowledging receipt of Gorin's grievance and asking which contractual clause Gorin claimed was violated. On March 11, 1998, Gorin wrote Slutsky that, under "Article 6 of the City Wide Bargaining Agreement, the Department is obligated to follow any written rule, policy, or

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[1] The "*status quo*" provision of the NYCCBL requires the terms of a collective bargaining agreement to continue in effect until the effective date of a successor agreement.

procedure of the agency." He went on to say, "I have alleged that the policy of reimbursing employees for money saving ideas was not followed."

By memo dated March 30, 1998, Slutsky denied Gorin's grievance on the same grounds that Schwarz denied it, *i.e.*, the timing between Gorin's suggestion and the implementation of hiring *per diem* inspectors was too tenuous and no productivity gains were realized which would produce savings that could be shared with the purported originator of the suggestion. Slutsky also determined that the complaint was not grievable under the article Gorin had cited in the Citywide Agreement.

By letter dated April 16, 1998, the Union filed a request for a Step III hearing, based on the original grievance submission and the "relevant contract provisions."[2] A Step III conference was held on December 2, 1998, but the hearing officer dismissed the grievance, on the grounds that no violation of written policy or contract was stated and no savings accrued to HPD as a result of the 1997 pilot program of hiring *per diem* inspectors. The Union filed the instant request for arbitration on February 23, 1999.

Positions of the Parties

City's Position

The City contends the Union attempts to argue a violation of both the unit agreement and the Citywide Agreement. The City challenges the grievance on the ground that the Union has

[2] The hearing was requested "per the CSBA Side-Letter Agreement," which is not more specifically identified.

failed to establish a nexus between either of the two applicable collective bargaining agreements and HPD's failure to pay Gorin for his suggestion. Noting that Article VI of the Citywide Agreement which Gorin cited at the lower steps of the grievance procedure concerns "Time and Leave Variations," rather than the grievance procedure, the City maintains that the Union has failed to articulate a section of the Citywide Agreement which arguably is related to the grievance.

The City also challenges the instant grievance on the ground that the claimed violation of the unit agreement was belatedly asserted. Even if such a claim were permitted at this stage, the City argues that the Union has failed to specify a provision of the Unit agreement which allegedly was violated, in the same way it assertedly failed to specify a section of the Citywide Agreement.

As to the assertion in a supporting affidavit by Todd Rubinstein ("Rubinstein"), the Union's Grievance Coordinator, that information was distributed at one time "about an agency incentive, offering employees compensation for suggestions," the City responds that the Union has failed to produce any written document to prove the existence of such an incentive program and has failed to provide even the information which the Rubinstein affidavit references. Moreover, the City continues, the Union has not cited any *written* rule, regulation or existing policy which could arguably be related to Gorin's claim. Contrary to the Union's claim that the City does not dispute the existence of an incentive program, the City contends that it has maintained throughout "these proceedings" that there is no such incentive program at HPD and no written policies or procedures about any such program. Consequently, the City argues,

without any written policies or procedures in place, no nexus to "the contract" is possible.

For these reasons, the City urges that the Union's request for arbitration be denied.

Union's Position

The Union argues that the instant challenge to arbitrability should be denied on grounds that it has identified Article VI, § 1(a), of the unit agreement as having been violated. The Union points out that this section of the unit agreement provides that the Union may file a grievance "concerning the application or interpretation of the terms of this Agreement."

The Union also asserts that Article VI, § 2, of the Unit agreement, defines a grievance as a violation of "existing written policy or written orders of the employer applicable to the agency which employs the grievant affecting terms and conditions of employment. . . ."[3] The Union also asserts that the instant request for arbitration is made under this same provision, *i.e.*, Article VI, § 2, of the Unit agreement.

The Union contends that an employee incentive program did exist at HPD, and it supports its contention with Grievance Coordinator Rubinstein's affidavit. Rubinstein avows that, as managing attorney of the Community Services Unit of HPD's Housing Litigation Bureau prior to his release under Executive Order No. 75, "HPD distributed information about an agency incentive, offering employees compensation for suggestions that are subsequently implemented by HPD." Rubinstein further states that he co-authored a memorandum with Gorin "on the

[3] Section 1(b) of Article VI of the applicable Attorneys Agreement defines a grievance in this way. Section 2 of Article VI describes a multi-step grievance procedure.

subject" and that Gorin did in fact submit the suggestion of using *per diem* inspectors "during that period." Rubinstein also asserts that, during his representation of Gorin at the Step III hearing, the agency representative "admitted that the [incentive] program existed."

Contrary to the City's assertion, the Union contends the City does not deny the existence of an incentive program at HPD. The Union maintains that the existence of such a program is "implicitly acknowledge[d]" in two exhibits included in the City's petition. One is Gorin's memo of March 9, 1998, to Slutsky, with Schwarz' memo of February 9, 1998, attached denying the "Reward Incentive Claim" (Petition Exhibit A). The other is Slutsky's memo of March 30, 1998, to Gorin, denying the claim for "Savings Reimbursement." "If there exists such an incentive program," the Union adds, "then clearly the issue to be arbitrated is whether or not the Department wrongfully denied Mr. Gorin compensation under the incentive program."

Finally, the Union addresses the City's objection to the claim that the grievance concerns an alleged violation of the Unit agreement. The Union maintains that the City is placing form over substance when it contends that the first time it had notice of the Union's claim was when it received the request for arbitration. The Union argues that the City had "clear notice" of the nature of the grievance at the lower steps of the grievance procedure and that the gravamen of the claim has remained unchanged, with "the only difference [being] the harmless error of misidentification of the CBA cited by the Grievant at the earlier steps of the grievance [procedure]." As party to the Unit agreement, the City had either actual or constructive knowledge of the provision to which Gorin intended to refer, the Union argues, and "any claim of surprise by the City is without merit."

In conclusion, the Union argues that it has proven that HPD's incentive program did exist, as evidenced by Rubinstein's affidavit and the City's "inability to deny" the existence of such a "written policy." The Union cites § 1(a) of Article VI and, for the first time, § 1(b) of Article VI of the unit agreement as providing the Union with "an avenue to seek redress for the violations alleged."[4] The Union urges that the instant petition be denied.

Discussion

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[5] There is no disagreement here that the parties have agreed to arbitrate certain disputes. The issue concerns whether the instant matter falls within the parties' agreement to arbitrate. At the outset, we note that the Union has abandoned the Grievant's original claim that the *Citywide* Agreement was violated. Thus, we need not reach that issue. Our inquiry is limited, then, to the dispute as it

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[4] The Union earlier cited § 2, rather than § 1(b), in addition to § 1(a) of Article VI of the unit agreement.

[5] *City of New York v. D.C. 37, L. 375*, Decision No. B-12-93, *aff'd sub nom. N.Y.C. Dep't of Sanitation & City v. Malcolm D. MacDonald, et al.*, Index No. 402944/93 (Sup. Ct. N.Y. Co. 1993). *See*, also*, New York City Human Resources Administration and the City of New York v. District Council 37, Local 1549, AFSCME, AFL-CIO; Diedra Haynes; and Eileen Heaton, et al.*, Decision No. B-18-1999; also, *see*, also, *City of New York and Department of Juvenile Justice v. Social Services Employees' Union, Local 371*, Decision No. B-3-98; *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.

relates to the *Attorneys* Agreement.

The Union contends that it has articulated a nexus between HPD's failure to pay an incentive award to Gorin for his 1993 suggestion and an asserted right grounded in the unit agreement to arbitrate such a claim. Before we reach that question, however, we must determine whether the claimed violation of the unit agreement has been timely asserted. The City argues that it has not because of the undisputed fact that the unit agreement was not cited at the lower steps of the grievance procedure.

We have consistently denied arbitration of claims raised for the first time in a request for arbitration, because permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure.[6] We have also held, however, that, in appropriate cases, we may find that the employer was or should have been on notice of the nature of a claim based on the totality of the grievance as expressed by a union.[7] In fact, we have declined to adopt a strict pleading rule which, under certain circumstances, could defeat arbitrability if the nature of an underlying claim were clear.[8] This approach is consistent with the clear mandate of the NYCCBL 12-302, which

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[6] *See, e.g., City of New York and New York City Health and Hospitals Corporation v. New York State Nurses Association*, Decision No. B-2-97; *New York City Health and Hospitals Corporation v. New York State Nurses Association*, Decision No. B-2-95; and *City of New York and Department of Homeless Services v. New York City Local 246, Service Employees' International Union, AFL-CIO*, Decision No. B-30-94

[7] *See, e.g., City of New York and Department of Probation v. Unit ed Probation Officers Association*, Decision No. B 55-89 at 8.

[8] *Id.*

states, in sum, that it is the policy of the City to favor and encourage, *inter alia*, final, impartial arbitration of grievances between municipal agencies and certified employee organizations. It is also consistent with our own well-established policy of favoring the resolution of disputes through impartial arbitration.[9]

The request for arbitration at issue in the matter before us identifies § 1(a) of Article VI of the Unit agreement as the contract provision allegedly violated. It also cites § 2 of Article VI of the Unit agreement as the alleged source of the right to arbitrate, while quoting language pertaining to § 1(b) of Article VI of the Unit agreement. Although it appears that error has crept into the filings at a couple of steps of the proceeding, there is no dispute about the nature of the claim here. That claim is HPD's failure to pay a cash award for Grievant Gorin's suggestion to use *per diem* housing inspectors. From the first step of the grievance procedure, HPD was on notice that the dispute concerned payment of money for the suggestion. We find, therefore, that HPD was not taken by surprise at the request for arbitration which recited the Attorneys Agreement as the contract allegedly violated as opposed to the Citywide Agreement which the Grievant cited throughout the lower steps of the grievance procedure.

The Union, however, has failed to articulate a nexus to the unit agreement. We have denied arbitration in the past where a union cited only a definition of a grievance as the contract provision allegedly violated, *i.e.*, without reference to a specific rule, regulation, written policy or

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[9] *Id.; see,* also, *New York City Dep't of Sanitation and City of New York v. Malcolm D. MacDonald, et al.* N.Y. Co. Supreme Court (12/20/93), *aff'd* 215 A.D.2d 324, 627 N.Y.S.2d 619 (1st Dep't), *aff'd* 87 N.Y.2d 650, 664 N.E.2d 1218, 642 N.Y.S.2d 156.

order.[10] Nothing persuades us to decide differently on the facts before us.

The Union has also failed the nexus test in another respect as well. It has failed to establish a nexus between the alleged incentive program and the Unit agreement. Even if we were to accept as true the Rubinstein affidavit attesting to the existence of such a program at HPD, we would still find that the Union has provided no evidence at all that such an incentive program was actually memorialized in any "existing written policy or written orders of the employer" which the unit agreement requires before such a claim could be deemed arbitrable. Thus, even were we to permit a claim based on the Unit agreement, we would find no nexus on this ground as well.

For the reasons stated above, we grant the instant petition challenging arbitrability in its entirety and deny the request for arbitration of the grievance docketed as A-7652-99.

[10] *City of New York and New York City Health and Hospitals Corporation v. New York State Nurses Association*, Decision No. B-2-97.

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-2051-99, be, and the same hereby is, granted; and it is further

DIRECTED, that the Request for Arbitration, docketed as A-7652-99, be denied.

Dated: August 31, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

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