City & DOS v. L. 246, SEIU, 63 OCB 32 (BCB 1999) [Decision No. B-32-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration between City of New York and the New York City Department of Sanitation, Petitioners, and Local 246, Service Employees International Union AFL-CIO, Respondent.	:	Decision No. B-32-1999 Docket No. BCB-2023-98 (A-7056-97)

DECISION AND ORDER

On November 2, 1998, the City of New York and the New York City Department of Sanitation ("Department") filed a verified petition challenging arbitrability of a grievance brought by Local 246, Service Employees International Union ("Union"). The grievance claims that a Union member was subjected to drug testing although his title is not eligible for testing.

The Union filed an answer on February 4, 1999. The City filed a reply on April 23, 1999.

BACKGROUND

The Union and the City are parties to a current collective bargaining agreement which contains a grievance and arbitration procedure culminating in binding arbitration. Article VI of

the contract defines arbitrable grievances.[1]

The Grievant, Dennis Davis, has been employed by the Department since 1986 as an Electrician (Automobile) ("Auto Electrician"), a title certified to the Union as bargaining agent. He holds a motor vehicle driver's license and a Commercial Driver's License ("CDL"). According to the Union, the Grievant obtained a CDL for his personal use. When the Grievant was appointed, Auto Electricians were required to "possess a motor vehicle driver's license valid in the State of New York," and this requirement remains in force.

Pursuant to the Omnibus Transportation Employee Testing Act of 1991, an employer must subject to random drug-testing "safety-sensitive employees holding commercial driver licenses who operate commercial motor vehicles." According to the Union, a Department employee in the title Auto Mechanic must hold a CDL and, therefore, is subject to drug testing. From 1986 until the present, however, the Department has not required Auto Electricians to have commercial licenses. Although the Grievant has not performed safety-sensitive work or driven vehicles weighing more than 26,000 pounds, the Union says, he was called for drug testing 12 times during an 18-month period. The City maintains that all Auto Electricians who work for the Department are required to have a CDL so that they can test the vehicles they fix by driving them and that this is required because they perform safety-sensitive work.

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[1]Article VI of the contract provides, in relevant part:
Section 1.
DEFINITION: The term "Grievance" shall mean:

* * *

(b) 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....

The Department issued a Citywide Vacancy Notice in October, 1996. It sought applicants for the title "Auto Mechanic (or like titles)" and lists, as "like titles," Auto Machinist and Electrician (Auto), which "do not require Class B Commercial Driver's License," and Auto Mechanic (Diesel), which "does require Class B Commercial Driver's License."

On April 29, 1997, the Grievant filed a grievance at Step I, which was denied. It claimed that by sending him for random drug testing, the Department misinterpreted or misapplied the rules and regulations of its Controlled Substance and Alcohol Use Testing Program and affected his terms and conditions of employment.

The grievance was denied at Step II on June 12, 1997. According to the Step II decision, the Union claimed that subjecting the Grievant to random drug testing was improper because employees in his job title are not required to hold commercial licenses. The hearing officer wrote, "[The Union] cited the Employee Handbook for the Controlled Substance and Alcohol use testing Program which did not list the grievant's title as one that was subject to testing. The [Union] also raised some other arguments concerning employees that they claimed did not have a CDL." The grievance was denied on the grounds that, although the Grievant's title is not specifically one which requires testing, the employee handbook cited by the Union stated that "employees in other titles who utilize a CDL in their job duties are also subject to these regulations," and employees in the Grievant's title are required to have a CDL if employed by the Department.

On December 2, 1997, the City's Office of Labor Relations denied the grievance at Step III, noting that "the Union and grievant claim that the Department misinterpreted or misapplied

the rules and regulations of the City of New York regarding its controlled substance and alcohol use testing program when it sent the grievant for random drug testing." The hearing officer found that substance abuse testing of "safety-sensitive employees holding commercial driver licenses who operate commercial motor vehicles" is required by the Omnibus Transportation Employee Testing Act of 1991. Although a CDL is not required for employees in the Grievant's title, he wrote, there was testimony that the Grievant performs "safety-sensitive" work and may be required to road test commercial vehicles weighing over 26,000 pounds.

On December 9, 1997, the Union filed a request for arbitration of the grievance, which was processed by the Office of Collective Bargaining ("OCB"). It claimed:

> Grievant was subjected to inordinate number of drug tests in a short period despite fact his title was not listed as subject to testing. Grievant was hired as Electrician (Auto) 10/18/86 and was not required to get a Commercial Drivers License (CDL) by the job specifications at that time and could not be forced to have a CDL for his employment.

As the "contract provision, rule or regulation" which it claimed had been violated, the Union cited "Job posting notice: Department of Sanitation 10/18/96 (A written example of City Policy)." It relied on Article VI, Section 1 as the contract provision under which it sought arbitration.

By letter dated May 2, 1998, the Office of Labor Relations informed the OCB that it had not received a waiver from the Union and would take no further action in the case until it received one.[2] After the OCB asked the City to submit a panel designation in the case, the City's

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[2]Section 12-312 of the New York City Collective Bargaining Law ("NYCCBL") provides:

d. As a condition to the right of a municipal employee organization to invoke impartial

(continued...)

attorney responded, by letter dated October 19, 1998, that the City would not go forward in the case unless it received a waiver from the Grievant.

On October 22, 1998, the Union sent the City a copy of the Grievant's waiver, dated February 7, 1998, that it said had been faxed to an incorrect telephone number in August, 1998. The waiver was stamped as having been received by the OCB on February 26, 1998. On the reverse side of the printed waiver form, the Grievant wrote, "I in no way waiver Federal and civil rights guaranteed to me as a citizen of this country. I do waiver rights regarding this grievance language and terminology of this grievance for arbitration. [Signed] D. Davis."

The Union submitted into evidence a second waiver form signed by the Grievant and dated November 30, 1998. The second waiver, which was submitted to the OCB and the City on December 21, 1998, was made without reservation.

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration should be dismissed because the Grievant failed to comply with the statutory waiver requirement. His waiver is not valid, it contends, because he has made it clear that he does not intend to waive his right to bring his claim in

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[2](...continued)
arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

another administrative or judicial tribunal. Since the statutory waiver requirement is a condition precedent to arbitration and the Grievant has not complied, the City asserts, the grievance is not arbitrable.

The City claims the Union cannot show that a Citywide Vacancy Notice may be the basis of an arbitrable grievance under the contract because it is not a rule or regulation, written policy or order of the Department. According to the City, the Board has defined a written policy as a plan, unilaterally promulgated by the employer, that furthers the mission of the agency and which is communicated to the union and the employees governed by it.[3] The City argues, further, that the vacancy notice applies only to the 25 temporary workers hired in October, 1996, and not to the approximately 500 full-time workers in the Auto Mechanic and related titles.

The City also argues that the Union has failed to show a nexus between the act complained of and the provision of the agreement cited by the Union as having been violated. It argues that the Union has cited the October, 1996 job vacancy notice as the written policy violated, but the notice does not establish procedures concerning drug testing. Further, it maintains, the requirements listed in the job vacancy notice are for temporary, part-time jobs and are unrelated to the Grievant's full-time, permanent position. Therefore, it argues, the job vacancy notice may not constitute the basis of an arbitrable grievance.

According to the City, the Department has the right to determine qualifications and job content for the 25 temporary, part-time positions advertised in October, 1996.[4] Since the Union

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[3]The City cites Decision Nos. B-27-93; B-2-92; B-7-89.

[4]The City cites Decision Nos. B-74-89; B-64-89; B-36-86; B-24-72; B-7-69; B-3-69; and
(continued...)

has not shown that the City has bargained away its rights in this area, it argues, there is no limit on the City's right to act and the requirements listed in the job vacancy notice may not be the basis of an arbitrable grievance.

According to the City, the Union's claim that the language in the Step II response constitutes a policy that was not followed is an issue raised for the first time in its answer. It argues that an issue raised after a request for arbitration is filed is not arbitrable. Furthermore, it says, the Department's written responses during the grievance procedure are not an independent basis of an arbitrable grievance.[5] Similarly, the City argues that the Union's challenge to classification of the Grievant's title as safety-sensitive was not raised at the appropriate time.

Union's Position

The Union claims that the Grievant has never performed safety-sensitive work or driven vehicles weighing more than 26,000 pounds on city streets. Since the Grievant does not fall within statutory or Department criteria for random drug-testing, it maintains, the Grievant may

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[4](...continued)
§ 12-307b. of the NYCCBL, which provides, in relevant part:

b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining....

[5]The City cites Decision No. B-74-90.

not be subjected to testing.

According to the Union, the Grievant's addendum to the waiver form simply reserved his civil rights while waiving rights concerning the grievance and arbitration. It argues that there can be no prospective waiver of an employee's civil rights[6] and that the statutory waiver under the NYCCBL does not apply to an employee's right to initiate a complaint under a federal civil rights statute. Therefore, it claims, the waiver is valid. The Union notes, also, that the Grievant signed a second waiver without reservation of his civil rights.

The Union claims that the Citywide Vacancy Notice is only a written example of the citywide policy which has been violated, misinterpreted and misapplied. That citywide policy, it says, stated on the vacancy form, is that the title Electrician (Auto) and Auto Machinist do not require employees to hold commercial licenses. It notes that the Step II decision mentions the Department's policy, which does not require Auto Electricians to hold CDLs. This policy, it maintains, was unilaterally promulgated by the Department to the Union and all employees. Since the Department expressed its policy in the job vacancy notice, the Union argues, the petition should be dismissed.

The Union maintains that the Grievant holds a CDL only for his personal use, and should not be subjected to testing simply because he holds the license. Since the Grievant is exempt from drug testing by express policy of the Department, it says, subjecting him to testing violates the Department's policy.

The Union asserts that doubtful issues of arbitrability are to be resolved in favor of

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[6]The Union cites *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) and Decision No. B-9-74.

arbitration. Since the Department claimed at the Step III hearing that the Grievant performs safety-sensitive work, it says, the Union should have the opportunity to prove otherwise before an arbitrator; for the Board to decide this question, it would have to inquire into the merits of the case. The Union maintains that contract interpretation is the function of the arbitrator, not the Board.

The Union contends that the City's managerial rights are not at issue in this case. When an employer and union agree to allow arbitration of claimed misinterpretations or misapplications of rules, regulations or policy, it says, as in the present case, the City has waived its managerial rights in that area.

DISCUSSION

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties have obligated themselves to arbitrate alleged violations of the contract and, if they have, whether that contractual obligation encompasses the act complained of by the Union.[7] When challenged, the burden is on the union to establish an arguable nexus between the City's act and the contract provision it claims has been violated.[8] If we find such a connection, we look no further; it is then for an arbitrator to decide the merits of the case.[9]

Here, the City and the Union have agreed to final and binding arbitration of grievances.

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[7] *Office of Labor Relations and Social Service Employees Union,* Decision No. B-2-69.

[8] *Id.*

[9] *See, Dept of Correction and Correction Officers Benevolent Ass'n,,* Decision No. B-12-94 and the cases cited therein.

The issue is whether there is an arguable nexus between the grievance and a contract provision that may have been breached. According to the contract, the Union may grieve a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the employer.

We have held that "guides, 'informationals,' manuals and other documents external to the collective bargaining agreement may constitute 'written policy' of the employer within the contractual definition of the term 'grievance.'"[10] In Decision No. B-28-83, we said that although the agreement of the union to such a policy need not be sought, a policy "must be communicated to the union and/or the employees who are to be governed thereby." For example, we found an employees' handbook to be a written policy of the employer because it imposed specific standards and requirements that were communicated to the union,[11] and found other, similar department guides to be written policies of an agency.[12]

We find that the employee handbook and substance abuse testing policy cited by the Grievant are written procedures and guidelines of the employer. The Department promulgated

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[10]*Health and Hospitals Corp and L. 1549, Dist. Council 37, AFSCME,* Decision No. B-67-89, citing *City of New York and Patrolmen's Benevolent Ass'n*, Decision No. B-43-88 (guides); *City of New York and L. 371, Social Service Employees Union,* Decision No. B-38-85 ("informationals"); *City of New York and L. 371, Social Service Employees Union,* Decision No. B-31-82 (manuals). *See also, City of New York and L. 371, Social Service Employees Union,* Decision No. B-75-90 (Department memorandum); *City of New York and Dist. Council 37, AFSCME,* Decision No. B-64-91 (Department of Personnel Policy and Procedure); *City of New York and Communications Workers of America,* Decision No. B-27-93 (job description).

[11]*Health and Hospitals Corp and L. 1549, Dist. Council 37, AFSCME*, Decision No. B-67-89.

[12]*'City of New York and Dist. Council 37, AFSCME,* Decision No. B-28-87.

them so that it could comply with the law and effect the mission of the agency. It is obvious that they were communicated to both the Union and the Grievant, since both cited them at the lower steps of the grievance procedure. Therefore, they meet the criteria of written policies of the employer under our law.

At Step I of the grievance procedure, the Grievant said that the employer violated the rules and regulations of its Controlled Substance and Alcohol Use Testing Program when it subjected him to random drug testing. At Step II, the Union cited the “Employee Handbook for the Controlled Substance and Alcohol Use Testing Program,” claiming that it did not list the Grievant’s title as one that was subject to testing. At Step III, the Union and the Grievant claimed that the Department misinterpreted or misapplied its rules and regulations regarding the controlled substance and alcohol use testing program when it sent the Grievant for random drug testing. Having found that the documents cited by the Grievant and the Union are written policies of the agency, we find further that the grievance, at the lower steps, alleged a violation of those policies.

The City is correct in arguing that an issue raised after a request for arbitration is filed is not arbitrable. In this case, however, the Union cited a written policy of the employer at each of the lower steps of the grievance procedure and then failed to cite it in its request for arbitration. Instead, it cited the Citywide Vacancy Notice, which sets forth requirements for employees in the Grievant’s job title. Although we have also ruled that a union may not amend a grievance in its request for arbitration, we have found a grievance arbitrable if the City was put on notice of the

Union's claims at the lower steps of the grievance and arbitration procedure.[13]

The Department was on notice from the beginning that the Grievant's complaint concerned his being subjected to random drug testing, that he and the Union believed the Department did not follow its guidelines and policies as set forth in its handbook and policy, and that this was the basis of the grievance. These claims were made, and adjudicated by the Department and the Office of Labor Relations, at Steps I, II and III of the grievance procedure. Although the Union relied on a different document at Step IV, we conclude that the nature of the grievance, which was a claimed violation of a written policy of the employer, was known to the employer beginning at Step I of the grievance procedure. However, to the extent that the request for arbitration did cite the Citywide Vacancy Notice, we hold that so much of the grievance as relies in any fashion on that document may not be submitted to the arbitrator.

As to the remainder of the Union's claim, our function is not to consider the merits of the case, but to decide whether the Union has demonstrated that its grievance falls within the parties' own definition of arbitrable disputes. Here, the alleged violation of a written policy of the employer that was raised at the lower steps of the grievance procedure is an arbitrable grievance. Since the Union has made an arguable connection between the grievance and a written policy of the employer, that much of the grievance is arbitrable.

The City also argues that the Grievant's waiver is not valid because he declined to waive, in his words, "Federal and civil rights guaranteed ... as a citizen of this country." Since the Grievant subsequently executed a waiver without reservation, we need not reach this argument.

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[13] *See, e.g., City of New York and New York City Police Dep't and Dist. Council 37, L. 1549*, Decision No. B-50-98, at 7-8.

Accordingly, the instant petition challenging arbitrability is dismissed. The request for arbitration is granted, except as to the claimed violation of the Citywide Vacancy Notice.

DECISION AND 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-2023-98 be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration docketed as No. A-7056-97 be, and the same hereby is, granted, except as to the claimed violation of the Citywide Vacancy Notice.

Dated: New York, New York
August 31, 1999

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER