City & DEP v. L. 376, DC 37, 65 OCB 18 (BCB 2000) [Decision No. B-18-2000 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration -between- THE CITY OF NEW YORK and THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioners, -and- DISTRICT COUNCIL 37, LOCAL 376, AFSCME, AFL-CIO, Respondent.	Decision No. B-18-2000 Docket No. BCB-2052-99 (A-7638-99)

DECISION AND ORDER

On March 31, 1999, the City of New York and the Department of Environmental Protection ("DEP"), appearing by the Office of Labor Relations, filed a Petition Challenging the Arbitrability of a grievance and a Request for Arbitration filed by District Council 37 ("Union" or "DC 37") on February 12, 1999. The Union filed an Answer on June 4, 1999. The City filed a Reply on July 16, 1999 and the Union filed a Sur-Reply on August 27, 1999.

Background

On May 10, 1996, the Union filed a Request for Arbitration alleging that the DEP violated the collective bargaining agreement ("agreement") by assigning the grievant, Dennis Mayes, to duties substantially different from those stated in the job specification for his position, Watershed Maintainer. On June 30, 1998, Arbitrator Miriam Lipton upheld the grievance and awarded Mayes "compensation calculated on the basis of the difference between the salary he has

been receiving as a Watershed Maintainer and the salary to which he would be entitled as a Tractor Operator, for the period running from January 20, 1995 until such time as the Agency ceases to assign him out-of-title duties or reassigns him to an appropriate title."

On November 6, 1998, the Union filed a Step III grievance on behalf of Dennis Mayes alleging that the DEP violated Article VI, § 2, Step IV[1] and Article VI, § 9[2] of the Blue Collar Unit Agreement by failing and refusing to abide by the final and binding decision and award of the arbitrator. Arbitrator Lipton's decision ordered DEP to continue to pay the grievant the difference between the salary of his Watershed Maintainer title and that of the Tractor Operator so long as he performed out-of-title work. The Union argues that after July 28, 1998, the grievant has performed such duties but was not paid the wage differential.

The City denied the Step III grievance on January 19, 1999, stating that "It is not the policy of the Mayor's Office of Labor Relations, at the Step III grievance level, either to implement or enforce arbitration award(s) which have not been effected by City Department(s)."

Petitioner then filed a Request for Arbitration on February 12, 1999, alleging that the DEP violated Article VI, §§ 1(c)[3], 2 and 9 of the agreement by failing and refusing to abide by

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[1] Article VI, § 2, Step IV provides in relevant part:
[T]he arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with Article 75 of the Civil Practice Law and Rules...

[2] Article VI, § 9 provides in relevant part:
If a determination satisfactory to the Union at any level of the Grievance Procedure is not implemented within a reasonable time, the Union may re-institute the original grievance at Step III of the Grievance Procedure...

[3] Article VI, § 1(c) provides:

(continued...)

the final and binding arbitration Award issued on June 30, 1998, and by failing to continue to pay the grievant for out-of-title duties after July 28, 1998. As a remedy, the Union seeks that the DEP reimburse the grievant for out-of-title back pay owed to him pursuant to the Arbitrator's Award and his continued performance of Tractor Operator duties.

On June 3, 1999, the Union filed a Petition to Confirm the arbitration Award in New York State Supreme Court, New York County. The Petition asks the court to confirm Arbitrator Lipton's Award and for the grievant to continue to receive out-of-title compensation. On August 4, 1999, the City filed a Verified Answer in court alleging that it complied with the Award by paying the grievant $100,000 in back pay, no longer assigning him out-of-title duties, and by supervising the grievant.

On January 3, 2000, the Union submitted to the Office of Collective Bargaining ("OCB") a copy of Honorable Diane A. Lebedeff's Order and Judgment dated December 7, 1999, in which she confirmed Arbitrator Miriam M. Lipton's Award. The decision further states that,

> [T]he respondent has paid Dennis Mayes, the grievant, the difference between his salary as a watershed maintainer and the salary to which he would have been entitled as a tractor operator for the out-of-title work performed by the grievant from January 20, 1995 through and inclusive of July 28, 1998; nothing in this Order and Judgment shall preclude the grievant from seeking compensation for out-of-title work performed after July 28, 1998, via the grievance and arbitration provisions of the underlying applicable collective bargaining agreement.

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[3](...continued)

> The term "Grievance" shall mean:
> A claimed assignment of employees to duties substantially different from those stated in their job specifications...

Positions of the Parties

City's Position

The City, in its Petition Challenging Arbitrability, contends that the grievance must be dismissed because it fails to allege a nexus between the act complained of and the provision of the agreement cited in the Request for Arbitration. The City argues that Article VI, § 2, Step IV of the agreement provides that, "the arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with Article 75 of the Civil Practice Law and Rules." Article VI, § 9 states that, "If a determination satisfactory to the Union at any level of the Grievance Procedure is not implemented within a reasonable time, the Union may re-institute the original grievance at Step III of the Grievance Procedure..."

The City argues that the Union is seeking to confirm Arbitrator Lipton's Award through arbitration and mistakenly relies upon Article VI, § 9 as its right to do so. The City argues that § 9 does not mean that if the Union is dissatisfied with the City's implementation of the Step IV decision, it could re-institute the original grievance at Step III. The City contends that to give § 9 such meaning would render Article VI, § 2 — which states that an arbitrator's Award is final and binding and enforceable in accordance with Article 75 of the CPLR— meaningless.

Section 7510 of the CPLR states that, "The Court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." The City argues that the proper forum to confirm an arbitration award is in court and not through arbitration. Furthermore, the City argues that the agreement does not include a motion to confirm an arbitrator's award within the

definition of a grievance.

The City argues that the Union appears to be waiving its right to confirm the arbitration Award in court under Article 75 of the CPLR. Furthermore, the City maintains that Article VI, § 9 of the agreement provides that, "the Union may re-institute the original grievance at Step III." According to the City, the Union did not re-institute the original grievance at Step III, rather, the Union asked that the City comply with an arbitrator's award.

The City further contends that Article VI, §§ 2 and 9 set forth the procedures to be followed when filing a grievance. According to the City, the Union's statement of the grievance does not state a grievable claim because the grievance procedure does not define or create substantive rights and does not furnish an independent basis for a grievance.

Furthermore, the City argues that the Request for Arbitration must be dismissed because the Union is barred from submitting this matter to arbitration by the doctrine of *res judicata*. *Res judicata* bars the litigation of a claim which has already been decided. According to the City, the issue presented by the instant Request for Arbitration is the same as that which was decided by an arbitrator. The instant request involves the same parties and the same claim.

In its Reply, the City further contends that on June 3, 1999, pursuant to Article 75 of the CPLR, the Union filed a Petition to Confirm the Arbitration Award in New York County Supreme Court. The Petition asks the court to confirm Arbitrator Lipton's Award and for the grievant to continue to receive out-of-title compensation.[4] The City argues that the Union seeks

[4] The Union, in its Sur-Reply, included as an exhibit the Union's court Petition to Confirm the Arbitration Award and the City's Answer. In the Answer, the City alleges that in accordance with the relief ordered by the Arbitrator, the City paid the grievant over $100,000 in (continued...)

the same remedy in its Request for Arbitration.

Furthermore, the City argues that the grievance must be dismissed because the Union filed a petition in court thereby rendering the waiver that was submitted with the Request for Arbitration null and void. According to § 12-312(d) of the New York City Collective Bargaining Law ("NYCCBL"),

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

Title 61 of the Rules of the City of New York states:

> If the request for arbitration is served by a public employee organization, there shall be attached thereto a waiver, signed by the grievant or grievants and the public employee organization, waiving their rights, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

On February 24, 1999, the Union filed a waiver with the Office of Collective Bargaining. According to the City, the Board has held that a waiver submitted with a request for arbitration is ineffective when the underlying dispute in the arbitration is the same as that in another forum. The City argues that the Union has submitted the same issue and has asked for the same remedy

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[4](...continued)
back pay for the period running from January 1995 until July 28, 1998. Since July 28, 1998, the DEP has assigned the grievant duties which it alleges are consistent with the job specifications for a Watershed Maintainer and the relief ordered by the Arbitrator's Award. The City argues that since July 28, 1998, the grievant has been directly supervised by a Watershed Maintainer Supervisor. The supervisor is instructed to be present on the job sites where the grievant has been working for approximately ninety percent of his time. The supervisor has been instructed to travel to each job site at least twice a day and oversee and document the work being performed by the Watershed Maintainers under his supervision.

in both its Request for Arbitration and its Petition to Confirm the Arbitration Award. The City concludes that the waiver is thus ineffective and the grievance must be dismissed in its entirety.

Union's Position

The Union contends that the DEP paid the grievant the difference between his salary as a Watershed Maintainer and the salary of a Tractor Operator through July 28, 1998. However, DEP continued to assign the grievant out-of-title duties as a Tractor Operator after July 28, 1998 and refused to compensate the grievant for the out-of-title work as mandated by Lipton's Award.

The Union maintains that there is a nexus between DEP's failure to abide by the arbitration Award and Article VI, §§ 2 Step IV and 9 of the contract.[5] Article VI, § 2, Step IV provides that, "The arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with Article 75 of the Civil Practice Law and Rules." The Union argues that there is a nexus between the DEP's failure to comply with the arbitration Award and the contract provision which states that an "arbitrator's award shall be final and binding." The Union contends that there is an arbitrable issue as to the meaning of the "final and binding" language of the contract. The Union further argues that Article VI, § 9 of the agreement states that, "If a determination satisfactory to the Union at any level of the Grievance Procedure is not implemented within a reasonable time," the Union may re-institute the original grievance at Step III. According to the Union, "any level of the Grievance Procedure" includes Step IV.

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[5] In the Sur-Reply, the Union alleges that the standard for arbitrability is a "reasonable relationship" test set forth in *Matter of the Arbitration between Board of Education of Watertown City School District and Watertown Education Association*, 93 N.Y.2d 132 (1999).

The Union also argues that there is a nexus between the out-of-title provision of the agreement and the grievant's continued performance of out-of-title work. The Union states that its failure to explicitly mention the out-of-title provision of the agreement in its Step III grievance should not affect the validity of the request because the City was placed on notice that the gravamen of the dispute is DEP's failure to pay for out-of-title work performed after July 28, 1998.

The Union also contends that it has not waived its right to confirm the arbitration Award in court.

The Union agrees with the City's claim that Lipton's Award conclusively decided the issue and that the doctrine of *res judicata* should be applied to order the DEP to pay the grievant for his continued out-of-title work. The Union argues that the City cannot on one hand argue that the doctrine of *res judicata* applies to preclude arbitration, yet on the other hand, refuse to comply with the Award after July 28, 1999.

The Union further asserts that the City's claim that the waiver requirement of the NYCCBL has been violated is an invalid argument that directly conflicts with the position taken by the City in its Answer to the Petition to Confirm. The Union alleges that in the Answer, the City admits that the grievant continues to perform out-of-title work. According to the Union, an arbitrator will be required to interpret the Lipton Award in light of the underlying facts to determine if DEP has complied with the Award as required by the final and binding language of the arbitration clause of the agreement. According to the Union, the Article 75 proceeding to confirm the Lipton Award does not preclude the Union from utilizing the Lipton Award to

enforce the out of title language of the agreement. The Union argues that the confirmation of the Lipton Award does not prohibit the Union from simultaneously seeking to resolve an ongoing dispute between the parties concerning an interpretation of an arbitration award through arbitration. The Union relies on the Award and argues that an arbitrator must interpret the final and binding language of the arbitration clause and the out-of-title clause.

The Union, upon submission of a copy of Honorable Lebedeff's Order and Judgment, again requests that the Board dismiss the City's Petition Challenging Arbitrability.

Discussion

There are two issues raised in the Union's Request for Arbitration. First, the Union requests arbitration over whether the DEP has violated Articles VI, §§ 2, Step IV and 9 of the agreement by "failing and refusing to abide by the final and binding decision and award of arbitrator Miriam Lipton..." Second, the Union seeks to arbitrate whether the DEP has violated Article VI, § 1(c), the out-of-title provision of the agreement, by "failing to continue to pay the grievant when he performed out-of-title duties since July 28, 1998." Regarding the first issue, we must address the City's argument that the Union has not satisfied the statutory waiver requirement, which is a jurisdictional condition precedent to the Board's authority to order a case to arbitration.[6] The waiver ensures that a grievant who requests arbitration will not also litigate the same underlying dispute in another forum.[7] It is well established that a union that has

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[6] *Dept. of Corrections and the City of New York v. The Correction Officers Benevolent Association*, Decision No. B-24-96 at 10.

[7] *City of New York v. City Employees Union, L. 237 International Brotherhood of Teamsters*, Decision No. B-44-97 at 7.

submitted an underlying dispute in two forums, has rendered itself incapable of executing an effective waiver, if the proceedings in both forums arise out of the same factual circumstances, involve the same parties, and seek the determination of common issues of law.[8]

In the present case, the Union has filed a Request for Arbitration at the OCB and a Petition to Confirm the Arbitration Award at the New York State Supreme Court. The Union's request to arbitrate whether the City has failed to comply with the Arbitrator's Award is one of the issues that the Union has submitted to court in support of its Petition to Confirm the Arbitration Award. By initiating a court proceeding to confirm the Arbitrator's June 30, 1998 Award, the Union has invalidated the waiver it filed with the OCB with respect to its request to arbitrate the City's alleged failure to comply with the Arbitrator's Award. In fact, the court has already issued an Order and Judgment dated December 7, 1999, in which the Honorable Lebedeff confirmed the Arbitrator's Award. The Union is thus precluded from bringing this claim to arbitration.[9]

However, the issue of whether the grievant continues to perform out-of-title work was not adjudicated by the court. In fact, Honorable Lebedeff states that "nothing in this Order and Judgment shall preclude the grievant from seeking compensation for out-of-title work performed after July 28, 1998, via the grievance and arbitration provisions of the underlying applicable collective bargaining agreement." We agree.

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[8] *Id.; Dept. Of Corrections and the City of New York v. The Correction Officers Benevolent Association*, Decision No. B-24-96 at 10.

[9] It is well established that arbitration awards under our law are intended to be final and binding, NYCCBL § 12-312 (b), (f) and are subject to review, confirmation, and/or enforcement pursuant to the provisions of Article 75 of the CPLR.

While the Union cites Article VI § 1(c) for the first time in its Request for Arbitration, we find that the City was put on notice of the claim that the grievant continued to perform out-of-title duties at Step III of the grievance procedure.[10] In its November 6, 1998 Step III grievance form, the Union alleges that "The grievant has continued to perform out-of-title duties since July 28, 1998, but has not been paid the wage differential required by that award." Accordingly, the Union's request, that an arbitrator determine whether the DEP violated Article VI § 1(c) of the agreement by failing to continue to pay the grievant when he performed out-of-title duties after July 28, 1998, is granted.

[10] *City of New York v. Local 924, District Council 37, AFSCME, AFL-CIO,* Decision No. B-24-91 at 13.

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 the same hereby is, granted as to the Union's request to arbitrate whether the City has failed to comply with the Arbitrator Lipton's Award; and it is further

ORDERED, that the Petition Challenging Arbitrability filed by the City of New York be, and the same hereby is, denied as to the issue of whether the grievant was assigned out-of-title duties after July 28, 1998.

Dated: July 24, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

BRUCE H. SIMON
MEMBER