City & DOT v. L. 1180, CWA, 65 OCB 20 (BCB 2000) [Decision No. B-20-2000 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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| In the Matter of the Arbitration | : | |
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| -between- | : | |
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| THE CITY OF NEW YORK and THE DEPARTMENT OF TRANSPORTATION, | : | |
| | : | Decision No. B-20-2000 |
| Petitioners, | : | Docket No. BCB-2065-99 |
| | : | (A-7739-99) |
| -and- | : | |
| | : | |
| COMMUNICATION WORKERS OF AMERICA, LOCAL 1180, | : | |
| Respondent. | : | |

## DECISION AND ORDER

On May 28, 1999, the City of New York and the Department of Transportation ("DOT"), appearing by the Office of Labor Relations, filed a Petition Challenging the Arbitrability of a grievance and a request for arbitration filed by Communication Workers of America ("Union" or "CWA") on April 26, 1999. The Union did not submit an answer.

### Background

The grievant, Aida Horacio-Ramos was employed by the DOT as a Principal Administrative Associate, Level III. In June 1995, the grievant was assigned to the Pre-Kindergarten Student Transportation Unit ("Pre-K Unit"). On January 16, 1998, the DOT's Office of the Auditor General conducted an audit of the timekeeping procedures and practices of the Pre-K Unit. After completing the audit, it was determined that the grievant was overpaid in the gross amount of $3,147.05. On July 6, 1998, the DOT's Director of Payroll/Timekeeping wrote to the grievant notifying her that beginning August 7, 1998, $375.00 will be deducted from

each pay check until the overpayment is recouped.

On September 1, 1998, the Union wrote to Marianna Riordan-Bellizzi, a Grievance Review Officer at the New York City Office Of Labor Relations ("OLR") and requested a Step III review of the recoupment arguing that the grievant disputes the overpayment and that the deduction of $375 per pay check would create a hardship for her. A conference was held at OLR on October 28, 1998. On February 10, 1999, the DOT unilaterally reduced the amount to be deducted from the grievant's paycheck to $187.50 until all the money is recouped.

The Step III Reply from OLR Review Officer, Maria A. Guccione, dated February 19, 1999, stated that an audit had been performed, the entire amount of overpayment was $3,147.05, and that she has determined that "the Department's recoupment of the aforementioned amount is appropriate. Accordingly, the complaint is dismissed and the recoupment may commence in accordance with Article IX, § 8 of the Citywide Agreement**.**"[1]

On February 26, 1999, Union Representative Gloria Middleton sent a letter to CWA, Local 1180 Civil Service Director Joseph Diesso requesting that the case be taken to arbitration.

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[1]Article IX, §8 of the Citywide Agreement provides:
In the event of an overpayment to an employee which is agreed by both parties to be erroneous, the employer shall not make wage deductions for recoupment purposes in amounts greater than: 10% if the employee's gross pay is under $17,500, 15% if the employee's gross pay is $17,500 or over and under $32,500, and 25% if the employee's gross pay is $32,500 or more. In the event the employee disputes the alleged erroneous overpayment, the employee or the union, except as provided in Section 8(b), may appeal to the Office of Labor Relations ("OLR") within 20 days of a notice by the employer of its intent to recoup the overpayment and no deduction for recoupment shall be made until OLR renders a decision, which decision shall be final. Nothing contained above shall preclude the parties or affected individuals from exercising any rights they may have under law.

Middleton stated that Article IX, § 8 of the Citywide Agreement states the Step III decision is final. "We are requesting that we go to the next Step as our position still remains that Ms. Ramos was not overpaid $2,926.45, overstated regular and overtime hours due to the inclusion of lunch hours."

On May 4, 1999, the Union filed a request for arbitration alleging that the Department violated Article IX, § 8 of the Citywide Agreement.

**City's Challenge to Arbitrability**

The City contends that the grievance must be dismissed because the Union has failed to demonstrate the requisite nexus between the act complained of, the recoupment of an overpayment, and the source of the right to pursue the grievance at arbitration. The City argues that the Union cannot demonstrate a prima facie nexus between Article IX, § 8 of the Citywide Agreement and the contractual grievance procedure found in Article XV, § 2, Step IV, of the Citywide Agreement.[2] According to the City, Article IX, § 8, establishes that City agencies may recoup an erroneous overpayment of salary and an employee may dispute the alleged erroneous overpayment through an appeal to OLR. The City maintains that according to the contract, OLR's decisions on such matters are final and are not subject to arbitration.

The City argues that the Board has held that, "where contracts provide expressly that certain actions or decisions of management are final, such actions and decisions are not subject to arbitration." According to the City, the only caveat to such finality clauses is where there is a

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[2] Article XV, § 2, Step IV provides in relevant part:
An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of receipt of the Step III determination...

claimed failure to follow procedures. In such cases, the procedures may be arbitrable even though the final decision is not subject to arbitral review. The City contends that in the present case, the Union merely argues that OLR's decision was wrong. The Union Representative's letter to CWA alleges that this grievance should proceed to arbitration because the grievant was not overpaid. According to the City, in a final decision dated February 19, 1999, an OLR Review Officer determined that the grievant was in fact overpaid and that recoupment of the grievant's salary was proper. The City argues that the Union is attempting to challenge OLR's final decision by going to arbitration.

The City alleges that while the Union claims that DOT's recoupment of the grievant's salary is subject to the grievance procedure, it does not cite any source of the alleged right. Since Article IX, § 8, of the Citywide Agreement establishes a procedure for handling recoupment actions and states that OLR's decision is final, it does not provide substantive rights which a grievant can pursue under contractual grievance. The City concludes that the grievance must be dismissed because the Union has failed to establish the necessary nexus between the recoupment and the source of the right to grieve the action at arbitration.

**Discussion**

While the Union has defaulted in answering the Petition in this case, it is still the responsibility of this Board to ascertain the *prima facie* sufficiency of the City's Petition before granting the relief requested by the City.[3] We have reviewed the Petition as well as the Request for Arbitration and the documents attached thereto and are satisfied that the City's Petition, on its

[3] *The City of New York v. International Brotherhood of Electrical Workers, Local 3,* Decision No. B-8-97 at 5.

face, is meritorious and should be granted.

The City cites a number of cases to support its argument that, because Article IX, § 8 of the Citywide Agreement provides that OLR's decision in an appeal is final, the Union may not bring a grievance about that decision to arbitration. The Board has long recognized that where a contractual provision sets forth a procedure to be followed, but provides that, as to the determination made at the conclusion of the procedures, management's decision is "final," there cannot be a review of that decision in arbitration.[4] We have found that in cases involving such finality clauses, a claimed failure to follow procedures may be arbitrable, even though the final decision is not subject to arbitral review. We have applied these principles where the grievance was alleged to consist of a claimed violation or misapplication of a rule, regulation or written policy of the employer.[5]

In the present case, however, the Union attempts to arbitrate OLR's decision that the grievant was overpaid. Such an argument addresses the merits of the OLR decision and not a procedural issue. In *The City of New York v. United Probation Officers Association*,[6] the Board stated that, "we have consistently held that where contracts have provided expressly that certain actions or decisions of management are final, such actions and decision are not subject to

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[4] *The City of New York and The New York City Police Dept. v. Detectives Endowment Ass'n.*, Decision No. B-10-1999 at 7-8.

[5] *Id.* at 8.

[6] Decision No. B-47-88 at 15-16.

arbitration."[7] We find that the express language of Article IX, § 8 of the Citywide Agreement provides that the Union may appeal a decision that there was an erroneous overpayment to OLR and that OLR renders the final decision on the matter. Given the language of the Citywide Agreement, OLR's decision is not subject to arbitral review. Accordingly, inasmuch as the Union has failed to demonstrate a nexus between the act complained of and the source of a contractual right, the City's petition challenging arbitrability is granted.

**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.

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

[7] *Id.*; *See also The City of New York and the New York City Police Dept. v. Detectives Endowment Ass'n.* Decision No. B-10-1999 at 8-9.

MEMBER

BRUCE H. SIMON
MEMBER