City & DOH v. L. 371, SSEU, 65 OCB 24 (BCB 2000) [Decision No. B-24-2000 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
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-between-	:	
	:	
THE CITY OF NEW YORK AND THE DEPARTMENT OF HEALTH,	:	Decision No. B-24-2000
	:	Docket No. BCB-2087-99
Petitioners,	:	(A-7800-99)
	:	
-and-	:	
	:	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	
Respondent.	:	

DECISION AND ORDER

On August 27, 1999, the City of New York ("City") and the New York City Department of Health ("DOH" or "Department"), appearing by the Office of Labor Relations, filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Service Employees Union, Local 371 ("Union" or "Local 371"). The Union filed an Answer on January 10, 2000.

BACKGROUND

Ramona Brabham was employed as a Community Coordinator in the Department of Health's Office of Correction AIDS Prevention Program. On October 5, 1998, Brabham was assigned to various clinic areas of Rikers Island and was directed to use the time clock rather than record her time on time sheets. On October 30, 1998, the Union filed a Step II group

grievance on behalf of Ramona Brabham and six other employees[1] ("Grievants") alleging that the DOH violated Article XII, §5 of the 1992-1995 Social Services Agreement[2] and DOH's Time and Leave Procedure. A Step II decision was issued on November 16, 1998 in which the grievance was denied. No Step III decision was issued.

On June 16, 1999, the Union filed the instant Request for Arbitration. The Union stated the grievance to be arbitrated as follows:

> Department of Health changed the way time & leave was recorded in prison health services without discussion and proper notification to its' employees. They contracted out the time keeping function with [sic] proper notification and discussion with the impacted workers and/or their union.

As the contract provision, rule or regulation it claims was violated, the Union lists Article XIX[3] and Article XII, §5[4] of the Social Services Agreement as well as "Agency Time Rules." It cites Article VI of the SSEU Local Contract as the section of the contract under which

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[1] All seven grievants were assigned to the Correctional AIDS Prevention Program. Furthermore, all the individuals were in the civil service title of Community Coordinator when they filed the grievance.

[2] Article XII, §5 of the 1992-1995 Social Services Agreement reads:

Labor-Management Committee

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Section 5: The Employer agrees to make every reasonable effort to supply the Union with information regarding changes in working conditions, changes in job content, changes in programs, or functions prior to proposed implementation of such changes.

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[3] Article XIX of the 1992-1995 Social Services Agreement reads:

Contracting-Out Clause:

The problem of "Contracting Out" or "Farming Out" of work normally performed by personnel covered by this Agreement shall be referred to the Labor-Management Committee as provided for in Article XII of this Agreement.

[4] *See, supra* fn. 2.

the demand for arbitration is made.[5] The remedy sought is to have time restored to those employees adversely affected by time and leave deductions and to have any disciplinary action rescinded.

POSITIONS OF THE PARTIES

City's Position

The City, in its petition, contends that the grievance must be dismissed because it fails to allege a nexus between the act complained of, the use of time clocks, and the three provisions it cites as violated in the Request for Arbitration. The City argues that the Union cannot demonstrate a prima facie nexus between Article XIX of the Social Services Agreement[6] and the related grievance to be arbitrated. According to the City, to establish a violation of Article XIX, the Grievants must allege that their work has been "contracted out" or "farmed out." The City maintains that the Grievants have not alleged that any portion of their work has been contracted out as is required for a violation of Article XIX. The sole allegation that the Grievants have made is that the time clock they were instructed to use was privately owned. The City argues that Article XIX does not in any way prevent the City from taking any action regarding the use of time clocks.

The City maintains that the Request for Arbitration also fails to establish a nexus between

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[5] Article VI of the 1992-1995 Social Services Agreement outlines various steps of the grievance procedure.

[6] *See, supra* fn. 3.

the use of time clocks and Article XII, § 5.[7] According to the City, changes regarding the method that the Grievants use to record their time and leave does not constitute a change in working conditions, programs or functions. Furthermore, the City emphasizes that only the Citywide Agreement mentions the use of time clocks. In its petition, the City claims that Article IV, §7(c) of the Citywide Agreement vests the Department of Health with the authority to direct employees covered by the Fair Labor Standards Act ("FLSA") to use time clocks.[8] Therefore, no notice to the Union concerning the use of time clocks is required. [9]

The City also argues that the action must be dismissed because the Union has failed to meet its burden of proving a demonstrable nexus between the act complained of and "Agency Time Rules." The City claims that the DOH does not have any "Agency Time Rules" nor did the Union cite to any rules concerning the utilization of time clocks.

Finally, the City argues that the Union's request to arbitrate the grievance should be denied because it falls within the scope of management's statutory rights pursuant to § 12-307(b)

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[7] *See*, *supra* fn. 2.

[8] Article IV, §7(c) of the Citywide Agreement provides:
Section 7. Overtime Cap
C. Employees who are not covered by FLSA whose annual gross salary including overtime, all differentials and premium pay is in excess of the cap shall be required to submit periodic time reports at intervals of not less than one week, but shall not be required to follow daily time clock or sign-in procedures. *Employees covered by the overtime provisions of FLSA shall be required to follow daily time clock or sign-in procedures. The periodic time report shall be in such form as is required by the Agency.* [Emphasis added].

[9] There is no dispute between the City and the Union concerning the fact that the civil service title of Community Coordinator is covered by the Fair Labor Standards Act.

of the New York City Collective Bargaining Law ("NYCCBL").[10] The City asserts that the Board has determined that directing employees to utilize a mechanical time-keeping system is a managerial prerogative. The City cites Decision No. B-62-88 for the proposition that the implementation and utilization of time clocks is not mandatorily bargainable when it does not "materially change the degree of employee participation established in a prior system."[11] The City recognizes that the Department's use of time clocks may be limited by voluntary collective bargaining, but points out that if this is the case, it "must be supported by reference to an *express statement* of such limitation in the collective bargaining agreement." [Emphasis in original].[12] The City concludes that the Union did not refer to any provision of the Social Services Agreement or the Citywide Agreement which contains an "express statement" limiting DOH's right to instruct the Grievants to use time clocks. Furthermore, the City stresses in its petition that the Citywide Agreement gives management "the discretion to determine whether time sheets or time clocks will be used." Thus, the City concludes that because the Union is attempting to deny management the exercise of its rights, their grievance must be dismissed.

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[10] § 12-307 Scope of collective bargaining; management rights.

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(b) It is the right of the city... 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....

[11] Decision No. B-62-88 at 5-6.

[12] Decision Nos. B-44-98; B-24-75; B-10-75; B-6-74; B-4-69.

Union's Position

The Union alleges that the DOH violated Article XII, §5 of the Social Services Agreement[13] when it changed "the way time and leave was recorded in prison health services without discussion and proper notification to its employees." The Union contends that whether the DOH implemented a change in working conditions by ordering the Grievants to use a time clock is a question of fact for an arbitrator to decide. Furthermore, the Union argues that the question as to whether the DOH notified the Union of the alleged change before it was instituted is also a matter that must be resolved by an arbitrator. Thus, the Union concludes that the Petition Challenging Arbitrability should be denied and the Request for Arbitration should be granted.

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 invoked is arguably related to the grievance to be arbitrated.[14]

In the present case, the parties have agreed to arbitrate their disputes as defined in Article

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[13] *See*, *supra* fn. 2.

[14] *The City of New York v. District Council 37 et al.*, Decision No. B-2-98 at 11; *The City of New York v. District Council 37 et al*., 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.

VI of their Social Services Agreement.[15] The City maintains, however, that the Union has failed to demonstrate the requisite nexus between the act complained of and the three provisions it cites as violated in the Request for Arbitration. We find that the Union has failed to demonstrate the required nexus between the subject of the grievance and Article XIX of the Social Services Agreement which concerns the contracting out of work performed by members covered by the Agreement. On the record established by the parties, this provision has no application to the dispute. The Union did not allege that the work of these employees was contracted out. We also do not find that the requisite nexus has been established between the use of time clocks and an alleged violation of "Agency Time Rules." The City maintains and the Union does not dispute that the DOH has not promulgated any rules regarding the use of time clocks nor did the Union offer any evidence to support their allegation. Thus, the Union has failed to meet its burden to demonstrate that either of these provisions constitute an arguable source of right to arbitrate this dispute.

We reach a different result, however, with respect to Article XII, §5 of the Social Services Agreement which requires that the DOH provide the Union with information concerning any changes in the working conditions of their employees prior to the implementation of those changes. We find that this provides an arguable basis to submit the dispute to an arbitrator.

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[15] Article VI of the 1992-1995 Social Services Agreement provides in pertinent part:
Section 1- Definition:
The term "grievance" shall mean:
a. A dispute concerning the application or interpretation of the terms of this Agreement;
b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders or the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment...
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Whether using time clocks as opposed to time sheets is sufficient to constitute a change in working conditions as contemplated by the parties goes to the merits of the dispute. Similarly, Article IV, §7(c) of the Citywide Agreement, which covers the use of time clocks for employees under the FLSA, also goes to the merits of the dispute. Once an arguable relationship is shown, the Board will not consider the merits of the grievance, rather, it is for an arbitrator to decide whether there was a violation of Article XII, §5 of the collective bargaining agreement.[16]

Accordingly, the City's petition challenging arbitrability is granted to the extent it challenges the arbitration of alleged violations of Article XIX and "Agency Time Rules." The Union's request for arbitration is granted to the extent it claims a violation of Article XII, §5 of the Social Services Agreement.

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 to the extent it challenges the alleged violation of Article XIX and "Agency Time Rules," and it is further,

ORDERED, that the request for arbitration is granted to the extent it claims a violation of Article XII, §5.

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[16] *New York City Health and Hospital Corp. V. Local 30 et al.,* Decision No. B-16-98 at 6; *City of New York v. Local 300 et al.,* Decision No. B-6-95 at 9; and *City of New York v. Social Services Employees Union Local* 371, Decision No. B-46-91 at 8.

Dated: July 24, 2000
New York, New York

MARLENE A. GOLD
CHAIR

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