City & Dep't of Mental Health v. L. 1407 & L. 768, DC 37, 65 OCB 26 (BCB 2000) [Decision No. B-26-2000 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
CITY OF NEW YORK and the DEPARTMENT OF MENTAL HEALTH, MENTAL RETARDATION AND ALCOHOLISM SERVICES,	:	
	:	Decision No. B-26-2000
Petitioners,	:	Docket No. BCB-2036-99 (A-7468-98)
	:	
-and-	:	
	:	
LOCAL 1407, DISTRICT COUNCIL 37 and LOCAL 768, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On January 27, 1999, the City of New York ("City") and the Department of Mental Health, Mental Retardation and Alcoholism Services ("Department"), by their representative, 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 District Council 37, Locals 1407 and 768 ("Union" or "Local 1407" and "Local 768"). The Union filed an answer on March 10, 1999. The City submitted a reply on October 15, 1999.

BACKGROUND

Pursuant to Rule 6.1.9 of the City Personnel Director's Rules and Regulations,[1] on June 3,

[1] Rule 6.1.9 of the Rules and Regulations of the City Personnel Director reads, in whole:
(continued...)

1997, Andrea J. Flateau, Assistant Commissioner for Human Resources submitted a form to the New York City Department of Citywide Administrative Services ("DCAS") requesting a change of title for Glendora Saunders. Saunders' title at that time was as a permanent Associate Accountant at the Department. The proposed title was as a permanent Consultant (MHSS).

On October 14, 1997, DCAS approved the change of title and authorized Flateau to "take the necessary payroll action." It also stated that the change of title was subject to Vacancy Control Board Approval ("VCB") and a one year probationary period. On November 18, 1997, the Commissioner of DCAS approved a "Commissioner's Calendar Item" dated November 5, 1997. This item read, in part:

> Upon approval, the attached matter should appear on the Commissioner's calendar.
>
> The Calendar Item should read:
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> Consultant (MHS&S), Title Code No. 51000, Exam No. 9093 - 1 candidate in the Department of Mental Health, Mental Retardation and Alcoholism Services.
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> ***

On April 29, 1998, Carmela Piazza, Assistant to the Mayor, sent a memorandum to the Commissioner of DCAS, approving Saunders' title change. On June 2, 1998, Flateau sent Saunders a letter confirming her title change and salary increase, which was made effective retroactively to May 4, 1998.

On July 29, 1998, Local 1407 filed a Step I grievance on Saunders' behalf. The nature of

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[1](...continued)

Transfer and change of title: Notwithstanding the provisions of paragraph 1.1.1 of this section or any other provisions of law, any permanent employee in the competitive class who meets all of the requirements for a competitive examination, and is otherwise qualified as determined by the city personnel director, shall be eligible for participation in a non-competitive examination in a different position classification provided, however, that such employee is holding a position in a similar grade.

the grievance was:

> As defined under Article VI, Section I(a) of the Executed Contract - Accounting and EDP (January 1, 1992 - March 31, 19995),[2] a payroll error of a continuing nature in that grievant was approved by DCAS for a change of civil service title to Consultant (MHSS), with an increase in total compensation, pursuant to rule 6.1.9 of the Rules and Regulations of the City Personnel Director. This action was approved by DCAS on November 18, 1997. The agency notified grievant on June 2, 1998 that the title change and increase in compensation was effective on May 4, 1998.

The remedy sought was payment to grievant of the difference in salary between Consultant (MHSS) and Associate Accountant as approved by DCAS from November 18, 1997 to May 3, 1998. No Step I determination was issued. Instead, Flateau reviewed the Step I grievance at Step II. The grievance was denied on August 14, 1998 for the reason that the appointment of Saunders was done pursuant to Rule 6.1.9 of the City Personnel Director's Rules and Regulations and that claims involving those rules are not subject to the grievance procedure according to Article VI, Section 1(b). It also stated that Saunders was being paid the correct rate as Consultant (MHSS).

On August 17, 1998, Local 1407 requested a Step III hearing. On September 10, 1998, the grievance was denied again for similar reasons. It also stated that no applicable provision of the Accounting and EDP agreement was cited as the basis of the claim, and the fact that Saunders was not paid the Consultant rate starting in November 1997 was not a payroll error but a function of the effective date of the appointment.

On October 9, 1998, a Request for Arbitration was filed with this office by DC 37 Locals 1407 and 768. The grievance is stated to be:

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[2] Article VI, Section 1(a) reads, in part:
The term "Grievance" shall mean:
a. A dispute concerning the application or interpretation of the terms of this Agreement;
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> Whether the employer violated the collective bargaining agreement by assigning the grievant duties that were substantially different from those in her job specification, by failing to pay her the appropriate salary and by disregarding its own rules and regulations. If so, what shall the remedy be?

The provisions the Locals claim were violated are Article VI, Sections 1(b) and (c) of the Accounting and EDP Contract,[3] and Article III, Section 3 of the Social Services Contract.[4] The request for arbitration was made under Article VI, Section 2 of the Accounting and EDP Contract. The remedy sought is payment of out-of-title monies with interest and any other remedy deemed proper.

Also on October 9, 1998, a Step III determination was made in a separate out of title grievance filed on behalf of Saunders by Local 1407. It found that grievant performed the duties of a Consultant (MHSS) while she was an Associate Accountant. It directed the Department to pay the difference between her salary as an Associate Accountant and that of Consultant for the period from February 3, 1997 through May 3, 1998. It denied the claim that the grievant was assigned to the duties of a Senior Consultant (MHSS). The City states that grievant was paid $2,650.06 for her out-of-title work in accordance with that decision.

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[3] Article VI, Sections 1(b) and (c) of the Accounting agreement read:
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; provided, disputes involving the Rules and Regulations of the New York City Personnel Director . . . shall not be subject to the grievance procedure or arbitration;
(c) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

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[4] Article III, Section 3 of the Social Services contract specifies the salaries, salary adjustments and salary ranges for the covered titles.

POSITIONS OF THE PARTIES

City's Position

The City argues that an out-of-title claim pursuant to Article VI, Section 1(c) of the Accounting agreement and a claim that the employer violated its agency rules pursuant to Article VI, Section 1(b) of the Accounting agreement was improperly added in its request for arbitration. It argues that the earlier grievance steps alleged only a payroll error in violation of Article VI, Section 1(a) of the agreement and that the Board has consistently refused to permit a party to amend a claim at the arbitration step.[5]

In addition, the City argues that the grievance was also amended in the request for arbitration by naming Local 768 as a party and claiming for the first time a violation of the Social Services agreement, to which Local 768 is a party. It asserts that prior to the request for arbitration Local 768 was not a part of the grievance, that the grievance was originally filed by Local 1407 and the grievance alleged that the applicable agreement was that entered into between the City and Local 1407. For the same reasons as above, the City urges the Board not to consider the improperly named party or the assertions of a violation of the Social Services agreement.

The City argues that Local 1407 does not have standing to bring a grievance on behalf of the grievant, a Consultant (MHSS) at the time of the filing of the Step I grievance because the title is represented by Local 768. It contends that the contract between Local 1407 and petitioner does not grant any rights to those in the title of Consultant (MHSS), nor does it authorize arbitration of claims on their behalf.

It also argues that the Union failed to allege sufficient facts to establish a nexus between the

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[5] The City cites Decision Nos. B-20-74 and B-22-74.

rights claimed to have been violated and contract provisions or agency rules which afford such rights. The City argues that the out-of-title claim made was made under Article VI, Section 1(c) of the Accounting agreement, which does not cover the title the grievant held at the time the grievance was filed, Consultant (MHSS). The City argues that no nexus may exist because the Accounting contract affords the grievant no rights.

The City argues that there is not a nexus between Article III, Section 3 of the Social Services agreement and this grievance because the claim that grievant was not paid her appropriate salary without more is a conclusory allegation which provides insufficient facts to establish a nexus between an alleged right and the contract section claimed to have been violated. The City also contends that there is no nexus between Article VI, Section 1(b) of the Accounting agreement and the contention that the City disregarded its own rules and regulations because they did not identify any rule or regulation that was violated.[6] It also argues that the Rules and Regulations of the New York City Personnel Director are excluded from the grievance process, including arbitration. The City also contends that the Board has determined that a change in the title of a City employee is a right reserved to management, and in the absence of any contractual or other limitation, the City retains its managerial prerogative to change employee titles in its exercise of discretion over governmental operations.[7]

Union's Position

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[6] The City cites Decision Nos. B-1-76; B-19-89 and B-68-89, which hold that the Union has a duty to show that a departmental rule invoked is arguably related to the grievance to be arbitrated.

[7] The City cites Decision No. B-54-87.

The Union states that the out-of-title claim in the instant matter may be moot due to a successful Step III decision from an earlier grievance. However, it states that the other issues remain. The Union contends that petitioner's claims about which affiliated local should have filed are irrelevant because the Board has held that the proper party to grieve or arbitrate a matter on behalf of a member is that member's certified bargaining representative.[8] It argues that DC 37 holds the bargaining certificates for both Local 1407 and Local 768 and therefore is the grievant's certified bargaining representative. It states that while Local 1407 may have filed the grievance, the matter was still a DC 37 grievance. It argues that the Board has also found that the proper party to file an arbitration is the signatory to a Unit Contract or the party receiving the Union dues check-off.

The Union argues that the fact that the Union first articulated the contractual basis for its grievance in the Request for Arbitration does not preclude it from presenting its claim at arbitration because the City was on notice of the nature of the claim based on the totality of the grievance as expressed by the Union. It states that the City has been on notice of the nature of the claim since Step I.

DISCUSSION

The City argues that the grievance was improperly amended in the Union's request for arbitration by adding claims pursuant to Article VI, Sections 1(b) and (c) of the Accounting agreement, a claim pursuant to the Social Services agreement and by adding Local 768 as a party. Given the Union's statement of the nature of the grievance at Step 1,[9] we find that the City was on notice of the claimed violation of Article VI, Section 1(b) *i.e.*, claimed erroneous compensation as a

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[8] The Union cites Decision No. B-4-68.

[9] *Supra*, at p. 2.

result of a title change pursuant to Rule 6.1.9 of the Rules and Regulations of the City Personnel Director. The determinations at the lower steps of the grievance procedure specifically address an alleged violation of Rule 6.1.9, so there is no question that the City was on notice of the breadth of the claim or the exact provision involved.[10] However, we find that the City was not on notice of the out-of-title claim or the alleged violation of the Social Services agreement and thus, improperly amended the instant grievance at the request for arbitration.

We note that both parties recognize that the outcome of a separate out-of-title grievance filed on this grievant's behalf was favorable. The Step III decision in that grievance ordered the Department to pay the difference between the grievant's salary as Associate Accountant and Consultant for the period from February 3, 1997 through May 3, 1998.[11] The City asserts that this money was, in fact, paid to the grievant as directed in the Step III decision. Although the Union recognizes that the out-of-title portion of the instant grievance may be moot, it argues that other issues remain to be decided concerning provisions of the Locals' unit agreements.

The City raises issues as to the propriety of each of the Locals as parties to this grievance. Because we have denied arbitrability of the claimed violation of the Social Services agreement, we need not reach the question of whether Local 768 is properly a party. The City also argues that Local 1407 does not have standing ~~to bring a grievance on behalf of the grievant~~. We hold that Local 1407 has standing to bring the instant grievance. Any injury that may have happened arose while grievant was in the title of Associate Accountant, and the Accounting agreement between

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[10] The Board first discussed this issue in *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-20-74. *See also*, Decision Nos. B-14-84; B-6-80 and B-12-77.

[11] Step III Decision in OLR File No. 31805, *supra*, at p. 4. In the instant matter, the grievant only seeks to be compensated from November 18, 1997 through May 3, 1997.

petitioner and Local 1407 covers those employees in the title Associate Accountant.[12] This agreement grants the appropriate rights to Local 1407.

The remaining question is whether Local 1407 has shown a nexus between Article VI, Section 1(b) and the claim that grievant did not receive the appropriate compensation in relation to a Rule 6.1.9 change of title request. As the term "grievance" under Article VI, Section 1(b) expressly excludes those disputes involving the Rules and Regulations of the New York City Personnel Director from the grievance procedure or arbitration, there can be no nexus between the applicable contract provision and the instant grievance. Accordingly, the petition challenging arbitrability is granted.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City

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[12] *Cf.*, *New York City Health and Hospitals Corporation v. Committee of Interns and Residents*, Decision No. B-61-88 (Where grievant had left petitioner's employ prior to the filing of the grievance, respondent Union had standing to bring grievance because pleadings indicated that the gravamen of the claim involved events which occurred while grievant was employed by the petitioner.)

Collective Bargaining Law, it is hereby,

ORDERED, that the petition challenging arbitrability filed by the City be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the DC 37 Local 1407 and 768 be, and the same hereby is denied.

Dated: September 7, 2000

New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER