NYCHA v. L. 237, CEU, 67 OCB 31 (BCB 2001) [Decision No. B-31-2001 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

NEW YORK CITY HOUSING AUTHORITY,

Petitioners,

Decision No. B-31-2001
Docket No. BCB-2179-01
(A-8590-00)

-and-

CITY EMPLOYEES UNION
LOCAL 237, IBT,

Respondent.
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DECISION AND ORDER

The New York City Housing Authority ("the NYCHA") filed a petition challenging the arbitrability of a group grievance filed by the City Employees Union, Local 237, IBT ("Union"). The grievance involves employees who were scheduled to work on New Year's weekend, 1999/2000, but had their shifts canceled on the day they were supposed to work. The NYCHA alleges that the Union has failed to show a nexus between the act complained of and the provisions of the parties' collective bargaining agreement ("agreement"). The Union argues that it has shown the required nexus. Since we find that the Union has not demonstrated a nexus, we grant the NYCHA's petition.

BACKGROUND

The grievants are employees of the NYCHA in various titles represented by the Union. The agreement was in effect from April 1, 1995, to March 31, 2000. On January 24, 2000, the Union filed a group grievance at Step II of the grievance procedure on behalf of unit employees who were

scheduled to work a shift during the weekend of December 31, 1999, through January 3, 2000 ("Y2K weekend"), but had their shifts canceled by the NYCHA. The Union did not specify the grievants' titles. The grievance alleged that the NYCHA failed to pay employees who were to report to work on the Y2K weekend because their ability to travel was restricted by order of the Authority. The Union alleged violations of Articles 16, 17, and 21 of the Agreement. These provisions state, in pertinent part:

> **16. WORK SCHEDULES**
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> a. The work schedules for employees in the titles specified below shall generally begin, terminate and include the meal period as hereinafter provided:
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> [Chart of titles, shift start times, end times, and meal times omitted]
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> b. In the event an employee serving in a title referred to in subparagraph "a" above is required, because of the needs of the Authority, to work a special schedule, such special schedule shall consist of either an 8-hour day . . . or a 7-hour day, with the respective meal period as indicated above, except that Maintenance Workers [while assigned to a certain shift], shall not be permitted to leave their assigned post during their meal period and shall make themselves available for duty during such time should an emergency condition arise.
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> **17. OVERTIME & WEEKEND PAY**
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> a. This subparagraph shall apply only to the following titles:
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> | | |
> |---|---|
> | Caretaker (HA)/Housing Caretaker | Supervising Housing Groundskeeper |
> | Housing Exterminator | Supervisor of Housing Caretakers |
> | Housing Stock Worker | Supervisor of Housing Exterminators |
> | Sr. Supv. Of Housing Exterminators | Supervisor of Housing Stock Workers |
>
> i. Each employee shall be paid in cash for hours worked in excess of 40 performed from Monday through Friday at one and one-half times the hourly rate.
>
> ii. Employees whose normal work day is 8 hours, Monday through Friday, shall be paid time and one half (1 ½x) for all hours worked in excess of eight (8), provided those employees work at least two (2) other shifts in that same Monday-through-Friday period.

> iii. Premium pay shall also be paid to such employees at one and one-half times (1 ½x) the hourly rate for work performed on a Saturday, and at one and three-quarters (1 3/4x) the hourly rate for work performed on a Sunday or a holiday.
>
> iv. If an employee is required to work on an excused day preceding a Saturday holiday, or following a Sunday holiday, then such employees shall be paid one and three-quarters (1 3/4x) of the hourly rate for work performed on such excused day.
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> v. Notwithstanding the limitations of this subparagraph, the provisions of subpart "i" only of this paragraph shall also apply to Assistant Resident Buildings Superintendents.
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> g. This subparagraph shall apply only to the following titles:
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> | | |
> |---|---|
> | Assistant Res. Bldgs. Superintendent | Resident Buildings Superintendent |
> | Caretaker (HA)/Housing Caretaker | Sr. Supv. Of Housing Exterminators |
> | Heating Plant Technician (HA) | Supervising Housing Groundskeeper |
> | Housing Exterminator | Supervisor of Housing Caretakers |
> | Housing Manager | Supervisor of Housing Exterminators |
> | Housing Stock Worker | Supervisor of Housing Stock Workers |
> | Maintenance Worker | |
>
> An employee in an above title, when called out from home for emergency duty during non-scheduled working hours to a development in which he/she is not a resident, shall receive a minimum of three (3) hours pay. Travel time shall not be included in computing work time, except for the purposes of the Workers' Compensation Law.

Article 21, entitled "Holidays," defines the term and outlines the holiday schedule, including floating holidays and contingencies when a holiday falls on a Saturday or Sunday or an employee's scheduled day off.

A Step II grievance meeting was held on May 22, 2000, during which representatives of the parties advanced their respective positions regarding the grievance. On June 1, 2000, the NYCHA deemed that it did not violate or misapply any provisions of the agreement or the rules and regulations and denied the grievance. The Union appealed on June 9, 2000. The NYCHA again

denied the grievance at Step III on November 2, 2000, on the grounds that the complaint did not meet the definition of a grievance.

On December 15, 2000, the Union filed a Request for Arbitration. The Union described the grievance as a "[f]ailure to compensate employees after canceling scheduled work assignments for the 1999/2000 New Year's holiday." The Union alleged that the NYCHA violated Article 17 and Articles 45b(i) and (ii) of the agreement, and Office of Labor Relations Interpretive Memorandum No. 90A ("IO 90A"). Article 45 defines the term "grievance." IO 90A defines standby pay and states that the memorandum "is offered by way of clarification as to the meaning and scope of the standby, beeper and recall provisions of the Citywide Agreement." The Union seeks compensation for affected employees consistent with the provisions of the agreement and/or IO 90A and/or any policies or procedures of the employer.

POSITIONS OF THE PARTIES

NYCHA's Position

The NYCHA argues that the Request for Arbitration must be dismissed since there is no nexus between the acts complained of and the provisions of the agreement cited by the Union. The NYCHA contends that in its Answer, the Union limits its Article 17 claim solely to Article 17(g). Even when viewed in its entirety, Article 17 provides no arbitrable right with respect to any compensation for the cancellation of work shifts, as the Article involves situations in which employees are paid for time actually worked. Nothing in Article 17 which with payment of any kind for time *not worked*, whether such non-working time results from cancellation of scheduled shifts or any other cause.

Moreover, the Board is particularly vigilant, according to the NYCHA, in requiring the party seeking arbitration to demonstrate the required nexus where, as here, the matter involves such statutory prerogatives of management as the assignment and scheduling of the workforce.[1] The NYCHA's statutory right to eliminate employee overtime or other premium payments by canceling scheduled work cannot be reviewed in arbitration unless an express contract term restricts the employer. Since there is no such restriction, there is no basis for arbitral review of the NYCHA's decision to cancel scheduled work assignments.[2] The absence of the required nexus is revealed by one of the Union's demands in negotiations for a new agreement: the Union has asked for a provision mandating minimum guaranteed pay for work scheduled on normal days off but subsequently canceled.

The NYCHA asserts that it is not a signatory to the Citywide Agreement and, thus, the Union may not rely on IO 90A to provide a nexus. IO 90A is a clarification to the meaning of the standby, beeper, and recall provisions of the Citywide Agreement and does not bind the NYCHA or have any status as a NYCHA rule or regulation. Nor should the Board consider the IO 90A claim since the Union first alleged it in the Request for Arbitration, a procedure which the Board has held is not arbitrable.[3] The NYCHA notes that the Union argues only that the NYCHA put its members on "stand-by-duty" as that concept is defined in the Citywide Agreement and IO 90A.

The Union waived or abandoned its claimed violations of Articles 16 and 21 because they

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[1] Decision No. B-29-92.

[2] *See also*, Decision Nos. B-7-99; B-41-88; B-7-81.

[3] *See, e.g.*, Decision No. B-31-99.

were omitted from the Request for Arbitration. Additionally, The Union's reliance upon Article 16(b)'s requirement "to work a special schedule" is not a basis for arbitrating the cancellation of the Y2K schedules because the employees did not work, and Article 16(b) on its face requires actual work as a predicate to its application. A plain reading of the full text of Article 16(a) and (b) shows that Article 16(b)'s "special schedule" deals with an "alternative" regular schedule of work with daily hours different from the hours set forth in Article 16(a), not with an unprecedented potential emergency which is expected to occur only once on a specific date.

The NYCHA argues that nowhere in Article 21 is the NYCHA prohibited or restricted in any way from scheduling or assigning employees to work on a holiday. If employees actually perform work on a holiday, they are paid overtime or premium compensation under Article 17. If employees perform no work on a holiday, they are paid for a holiday. In this case, however, the Union seeks additional compensation for employees whose work schedule for Y2K was canceled; who therefore did not work; who remained away from work; and who received their regular pay for the New Year's holiday.

The Union raises the Y2K Contingency Plan for the first time in its answer, and, therefore, it should not be considered because the NYCHA was not on notice of the claim.[4] Even the Board found the NYCHA to be on notice of the claim, the Y2K Contingency Plan, which was in effect for only three days and was not distributed to all Union members, is not a rule or regulation but a

[4] The Contingency Plan states that during the three day period, "the [NYCHA] will be scheduling for work, post employees assigned to developments, community centers and borough offices in order to provide 24 hour coverage at *all* of our developments. . . . In view of the above, taking into account the priority that has been assigned to this matter, if an employee is *directed* and *scheduled* to work during [this] period, he/she will be fully expected to work as scheduled. . . ."

procedure for handling a potential event of an unprecedented nature and grants no independent substantive rights.

The NYCHA argues that the Union must file waivers from each individual involved in the group grievance because this type of grievance necessitates the identification of each affected employee. The Board of Collective Bargaining ("Board"), on a case-by-case basis, has required that the Union file both Union and individual waivers.[5]

Union's Position

The Union asserts that there is a nexus between the agreement and the grievance because there is an arguable relationship between the minimum payment provided for in Article 17 of the agreement and the assignment of employees to work during the Y2K weekend. For several months prior to the Y2K weekend, the NYCHA developed a detailed contingency plan to confront the potential problems surrounding the Y2K emergency. The Union has maintained throughout the grievance process that this emergency scheduling entitled affected employees, at a minimum, to three hours of pay as enumerated in Article 17(g) of the agreement. The Union's citation to Article 17 was in regard to the provisions for minimum pay for emergency duty, not the assignment of overtime.

The NYCHA's assignment of employees to work the Y2K weekend meant that employees were "required, because of the needs of the [NYCHA], to work a special schedule" and that "such special schedule shall consist of either an 8-hour day . . . or a 7-hour day" depending on the title of the employee. Accordingly, any employee so assigned is entitled to either seven or eight hours of pay, as mandated by Article 16 of the agreement. Additionally, the Y2K Contingency Plan provides

[5] Decision No. B-46-86 at 15.

that in the event that the scheduled coverage is no longer deemed necessary, there will be a notification process so that the employees are properly and timely informed of their canceled work schedule. Here, the NYCHA did not advise the employees in a proper or timely manner because the employees were told that their shift was canceled on the same day that they were scheduled to work.

The Union did not waive or abandon its claims related to Articles 16 and 21. The Board has held that when an employer is on notice of the issues to be arbitrated, the failure to specify a particular term of the agreement will not be a bar to arbitration.[6] Here, the employer was aware at the earliest steps of the grievance procedure that the Article 16 and 21 claims were involved. The NYCHA's contention that the Union's allegation regarding IO 90A should be dismissed because it is raised for the first time at the arbitration stage is baseless because at the Step II conference, the Union posited that assigning members to the Y2K Contingency Plan work schedule was equivalent to assigning the employees to stand-by-duty, as defined in the Citywide Agreement and IO 90A.

The Union's issuance of a contract demand does not constitute an admission that the present contract does not contain the rights being sought in the new demand. Rather, the demand acknowledges that the employer may attempt to avoid an obligation by advocating an alternative interpretation and exploiting an alleged ambiguity.

The Union argues that the grievance is a "union grievance" or a "group grievance" which does not require individual waivers from the members because the Union has alleged that the actions taken by the NYCHA are in violation of the spirit and letter of the agreement that effects the membership as a whole.

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[6] Decision No. B-30-94.

DISCUSSION

The first matter we will discuss is the NYCHA's assertion that the Union has amended the nature of its grievance and now solely relies on Article 17(g) to provide its claim of right. The Board has held that a grievance is arbitrable if the City was put on notice of the nature of the claim during the initial grievance procedures.[7] Here, the Union and the NYCHA discussed Articles 16, 17, and 21 during Steps II and III of the grievance procedure. Even though the Union did not mention Article16 or 21 in its request for arbitration, the NYCHA was on notice of these claims, and we will not dismiss them on this ground. Similarly, all of Article 17 had been considered in the earlier Steps; therefore, we will not limit our examination to Article 17(g).

The NYCHA's argument that the Union cannot rely on the Y2K Contingency Plan as a claim of right because it was raised for the first time in the answer is not persuasive. While the Y2K plan was not specifically mentioned in either of the grievance Steps or in the Request for Arbitration, the Board has recognized that our determination of whether the City was on notice is ". . . based on the totality of the grievance as expressed by the Union."[8] Here, the source of the controversy was the scheduling and cancellation of work based on the Y2K Contingency Plan. Further, the Union specifically advanced the "Y2K zero-day period," as mentioned in the Y2K Contingency Plan, in the request for a Step III grievance. Since the Union's claim based on the Y2K Contingency Plan was part of the totality of the grievance, we will not dismiss the claim on the grounds of lack of notice.

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[7] *See New York City Health and Hospitals Corp. and Local 420, Dist Council 37, AFSCME,* Decision No. B-24-99 at 6.

[8] *City of New York Off-Track Betting Corp. and City of New York and Local 858, Int'l Bhd of Teamsters,* Decision No. B-29-92 at 9.

To determine arbitrability, we must first ascertain whether the parties are contractually obligated to arbitrate disputes, and, if they are, whether the acts alleged in the grievance are covered by that contractual obligation.[9] Here, the contract provides a grievance and arbitration procedure, but the parties disagree as to whether the instant matter is arbitrable within the meaning of the contract. Where an employer challenges the arbitrability of an issue, the burden is on the Union to show an arguable relationship between the contract provisions it claims as its source of right and the City's actions.[10]

The Board has consistently held that:

> Although the policy of the NYCCBL is to promote and encourage arbitration as the selected means for adjudicating and resolving grievances, we cannot create a duty to arbitrate where none exists. Where contract language or a provision of a departmental order or policy is clear and unambiguous on its face, as in this case, we will look no further into the intent of the parties or to other provisions of the policy at issue.[11]

Here, the employees scheduled to work over the holiday were forced to cancel their personal plans to fulfill their employment responsibilities. When the NYCHA ultimately determined that it did not need the additional employees during the holiday and canceled the shifts, the grievants

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[9] *See, e.g., New York City Police Dep't and City of New York v. Detectives' Endowment Ass'n*, Decision No. B-4-96; *City of New York v. Dist Council 37, AFSCME,* Decision No. B-52-91; *City of New York v. Dist Council 37 AFSCME, Local 1795*, Decision No. B-19-89.

[10] Decision No. B-4-96; *City of New York and the New York City Dep't of Transportation v. Doctors Council*, Decision No. B-28-92; *City of New York v. Local 2021, District Council 37, AFSCME,* Decision No. B-58-90.

[11] *City of New York and Patrolman's Benevolent Ass'n,* Decision No. B-68-89 at 6; *see also*, *City of New York and District Council 37, AFSCME,* Decision No. B-37-80; *Uniformed Fire Fighter's Ass'n, Local 94, IAFF,* Decision No. B-10-79; *City of New York and Communication Workers of America, Local 1182,* Decision No. B-19-75.

were understandably upset as they could neither fully enjoy their holiday nor receive their overtime and holiday pay. However, there is nothing in the cited provisions that allows the employees to recover for work scheduled but not performed, as all of the provisions the Union relies upon deal in some way with compensation for "work done," "overtime worked," etc.

IO 90A defines standby pay, which is payment for work scheduled and not performed; however, the NYCHA a not signatory of the Citywide Agreement and, therefore, cannot be bound by it. No other applicable provision arguably addresses the issue of standby pay.

The Board has held that documents outside of the agreement may be considered a rule or regulation if the policy is distributed to both the Union and the affected employees, and has been promulgated to comply with the law and affect the mission of the agency.[12] The Y2K Contingency Plan falls short of the criteria we have adopted. As a one-time plan designed to meet the instant needs of the NYCHA, the Y2K Contingency Plan was not distributed to the Union and all the employees it affected. Thus, it is not a rule or regulation subject to arbitration.

There is no nexus between the NYCHA's actions and the provisions the Union asserts as their source of right. As the nexus issue is controlling we need not make a determination on the waiver issue. Accordingly, the NYCHA's challenge 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,

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[12] *City of New York and New York City Dep't of Sanitation and Local 246, Serv Employees Int'l Union,* Decision No. B-32-99.

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

ORDERED, that the request for arbitration filed by the City Employees Union, Local 237, IBT be, and the same hereby is, denied.

Dated: July 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

I dissent. VINCENT BOLLON
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER

EUGENE MITTELMAN
MEMBER