NYCHA v. L. 237, CEU, 67 OCB 44 (BCB 2001) [Decision No. B-44-2001 (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,

Petitioner,

Decision No. B-44-2001
Docket No. BCB-2197-01
(A-8673-01)

-and-

CITY EMPLOYEES UNION, LOCAL 237, I.B.T.,

Respondent.

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DECISION AND ORDER

The New York City Housing Authority ("City" or "NYCHA") filed a petition on March 2, 2001, challenging the arbitrability of a grievance brought by the City Employees Union, Local 237, IBT ("Union" or "Respondent") on behalf of Michael Cromwell. The grievance asserts that NYCHA violated the parties' collective bargaining agreement ("CBA") when it failed to pay the grievant assault clause pay for an injury resulting from an on-duty assault. NYCHA argues that the CBA provision dealing with the assault clause is not arbitrable because the City has reserved for itself the right to make the final determination as to whether an individual is granted payment under the clause. Based upon our review of the parties' submissions, the Board finds that Respondent has established the requisite nexus and that the CBA language does not limit the arbitrability of grievances brought under the assault clause. Accordingly, we deny NYCHA's petition and direct that the grievance proceed to arbitration.

BACKGROUND

Grievant Michael Cromwell was a Housing Assistant at the Pink Houses in Brooklyn. He claims to have been injured on-duty on June 18, 1996, in an altercation with a tenant. Cromwell sought benefits under the assault clause – Article 37c of the CBA– which provides:

> Any employee who has been injured as a result of an assault, and has been determined by the Authority to be physically disabled because of such assault arising out of and in the course of employment, shall receive leave with pay . . . .

However, on August 29, 1996, Madelyn Oliva, NYCHA's Director of Human Resources, denied his request. In a March 10, 1997, letter, Edmund Kane, Assistant Director of Local 237, disputed Oliva's decision to deny Cromwell assault clause coverage and on March 27, 1997, Oliva replied that a "thorough and comprehensive" review of the claim had been undertaken, and it had been determined that the "benefit of Assault Clause coverage will not be granted to Mr. Cromwell." On July 8, 1997, Todd M. Rubinstein, Citywide Grievance Coordinator for Local 237, appealed Oliva's decision to Paul T. Graziano, then NYCHA's General Manager, and asked for a Step 3 meeting. On July 24, 1997, Rubinstein advised Oliva that the Union was re-filing the Cromwell grievance at Step 2 and that since the Workers Compensation Board had accepted Cromwell's physical disability, he should be awarded assault clause coverage under the CBA as well.

After a Step 2 hearing on July 5, 2000, Oliva again denied Cromwell assault clause coverage. Rubinstein then appealed Oliva's decision to NYCHA's General Manager who, in November 2000, denied Cromwell's grievance at Step 3. Subsequently, on January 31, 2001, Local 237 filed a request for arbitration on behalf of Cromwell, and alleged that NYCHA has violated Article 37 of the CBA by its failure to pay Cromwell under the assault clause for his June 18, 1996, injury.

POSITIONS OF THE PARTIES

NYCHA's Position

NYCHA argues that the words "has been determined by the Authority" in Article 37c of the CBA indicate that NYCHA has the authority to make the final determination as to whether an individual may receive assault clause benefits thereby precluding the arbitrability of such determination.

NYCHA contends that when the parties have provided in their contracts that the Department make certain determinations, the Board has dismissed requests for arbitration on those matters. NYCHA cites several cases and specifically points to two, *Uniformed Firefighters Ass'n*, Decision No. B-10-79, and *Detectives Endowment Ass'n*, Decision No. B-10-99, in which the Board denied arbitrability because the contract language indicated that certain decisions would remain with the Department and would not be subject to arbitration. Similarly, in the present case, NYCHA contends that even though "final" is not used in the contract language at issue, the term "determined by the Authority" means that NYCHA has the final word on whether an employee qualifies under the assault clause.

NYCHA also maintains that even if it did not challenge the arbitrability of a similar issue in the past, it is not precluded from raising the challenge in the present case. Furthermore, the request for arbitration must be denied to the extent that the Union alleges that NYCHA violated, misinterpreted, or misapplied any written rule or regulation because NYCHA's Personnel Manual states that the Director of Human Resources is to "conduct a thorough and comprehensive . . . review and determine whether the employee will be entitled to the assault clause benefits."

Union's Position

The Union argues that its grievance on behalf of Cromwell is arbitrable and that there is a nexus between the denial of his claim of injury and Article 37c of the CBA. The Union contends that the NYCCBL's policy is to promote arbitration in order to resolve grievances. The grievance provisions of the parties' CBA state that the grievance process culminates in impartial arbitration, and the grievant's dispute falls within the definition of a grievance. Since he followed the proper grievance procedure, he is therefore entitled to arbitration.

The Union agrees that Article 37c of the CBA affords NYCHA the right to determine administratively whether an employee is physically disabled. However, the grievant and the Union have the contractual right to disagree with NYCHA's findings. According to the Union, the CBA does not contain any language indicating that NYCHA makes the final determination on these issues or that the Union is barred from bringing disputes under the assault clause to arbitration. The words "determined by the authority" are not conclusive. The question whether Cromwell qualifies for assault clause benefits is an appropriate subject for arbitration.

Furthermore, the Board decisions upon which NYCHA relies are not applicable. In those decisions, the clauses at issue possess limiting language indicating that management's authority is final and that the parties intended the City's determination to be the last word. Here, there is no such limiting language. Therefore, the petition challenging arbitrability must be dismissed.

The Union also points to other collective bargaining agreements containing similar language in which the parties have ultimately gone to arbitration to resolve their disputes. In fact, on previous occasions, NYCHA has gone to arbitration over the application of the assault clause.

DISCUSSION

This Board has carefully reviewed the positions of the parties as set forth in their respective pleadings, and, based on the record before us, we find that the Union's grievance is arbitrable. The test to determine arbitrability is, first, whether the CBA obligates the parties to arbitrate their controversies, and second, whether a nexus exists between the grievance and the contract provision said to have been violated.[1] The burden is on the Union to establish an arguable relationship between NYCHA's acts and the contract provision it claims have been breached.[2]

We find that the Union has established a nexus between the denial of the grievant's claim of on-duty injury and Article 37c – the assault clause provision of the CBA. We also find no merit in NYCHA's contention that the CBA limits the arbitrability of grievances brought under Article 37. Article 37 states, in relevant part:

> Line-of-Duty Disability & Worker's Compensation
>
> * * *
>
> c. Any employee who has been injured as a result of an assault, and has been determined by the Authority to be physically disabled because of such assault arising out of and in the course of employment, shall receive leave with pay . . . .

NYCHA argues that Cromwell's grievance is not arbitrable, but NYCHA's reliance on several Board decisions is misplaced. In *Uniformed Firefighters Ass'n*, Decision No. B-10-79, the Board denied the Union's request for arbitration because the parties' CBA stated that in filling vacancies, "the Department's decision is final." The Board looked to the dictionary definition of "final," which means "leaving no further chance for action, discussion, or change;

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[1] *New York State Nurses Ass'n*, Decision No. B-24-2001 at 6; *District Council 37*, Decision No. B-47-99 at 7.

[2] *Local 1180, Communications Workers of America*, Decision No. B-1-2001 at 7.

deciding; conclusive." The Board held that "There is no doubt, on the face of the contract, that the wording of Article XX . . . makes the Fire Department's decisions, pertaining to the subjects covered by these provisions, final. The City has not consented by contract or otherwise, to submit such questions to arbitration."

Similarly, in *Detectives Endowment Ass'n*, Decision No. B-10-1999, the Board denied the Union's request for arbitration because the Patrol Guide stated, "Health Services Division will make final determination [sic] of APPROVAL/DISAPPROVAL of ALL applications for line of duty injury/illness designation and will notify the commanding officer of member concerned of final designation." (Emphasis in original). The Board held that "the express language of the Patrol Guide, on its face, precludes the submission to arbitration of the Police Department's decision on applications for line-of-duty injury designation."[3]

In both cases, the Board denied arbitration because it was clear from the word, "final," that the parties intended the Department to have the last word on certain matters. In the present case, however, there is no such language in the CBA. While NYCHA argues that the word "determined" in Article 37c indicates that it has the authority to make the final determination regarding assault clause coverage, we disagree. "Determination," does not connote finality and we do not find that the contract language explicitly precludes decisions regarding assault clause coverage from arbitration. Because the Union met its burden and established a nexus between the denial of the grievant's claim of on-duty injury and Article 37c of the CBA, we deny

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[3] In support of its argument, NYCHA also cites *Correction Officers' Benevolent Ass'n*, Decision No. B-35-98; *Committee of Interns and Residents*, Decision No. B-2-89; *United Probation Officers Ass'n*, Decision No. B-47-99; and *Communications Workers of America*, Decision No. B-19-81. In each of these decision, the applicable contract possessed limiting language, specifically stating that a determination by the employer was "final." Thus, in each case the Board found that the parties agreed not to submit such determination to arbitration.

NYCHA's petition challenging arbitrability. We leave it to the arbitrator to decide whether NYCHA's determination was properly made.

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 New York City Housing Authority's petition challenging arbitrability be, and the same is hereby is, denied; and it is further

ORDERED, that the City Employees Union, Local 237, I.B.T.'s request for arbitration be, and the same hereby is, granted.

Dated: November 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
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