City & DOC v. COBA, 69 OCB 42 (BCB 2002) [Decision No. B-42-2002 (Arb)]

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

-between-

THE CITY OF NEW YORK and
DEPARTMENT OF CORRECTION,

Decision No. B-42-2002
Docket No. BCB-2286-02
(A-9269-02)

Petitioners,

-and-

CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

Respondent.
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DECISION AND ORDER

On May 17, 2002, the City of New York and the Department of Correction ("City" or "DOC") filed a petition challenging the arbitrability of four requests for arbitration filed by the Correction Officers Benevolent Association ("Union"). The Union's grievances assert that DOC misapplied and miscalculated the number of vacation days to which a Correction Officer hired on or after June 30, 1993, is entitled under Article XI, § 3(d)(ii), of the 1995-2000 collective bargaining agreement ("CBA"). The City contends that under the doctrines of res judicata and/or collateral estoppel, the Union is barred from arbitration of this matter because an arbitrator has previously determined the issue. For the reasons set forth below, this Board concludes that the Union is estopped from arbitrating the instant claim. The request for arbitration is therefore denied.

BACKGROUND

On December 12, 1997, two Correction Officers ("Officers"), hired on February 14, 1991, and April 25, 1991, filed a grievance alleging that DOC violated Article XI, § 2(c), of the 1991-1995 CBA by posting an improper number of vacation days to which the Officers were entitled in the fifth anniversary year of appointment.[1] Subsequently, on June 17, 1998, the Union filed a group grievance at Step III on behalf of approximately 2000 Officers alleging that DOC violated Article XI, § 2(c), of the CBA "in that an officer does not receive the contractually required number of vacation days in the calendar year in which his/her fifth anniversary of appointment occurs." A request for arbitration was filed for both cases and the grievances were consolidated on July 8, 1999. When Arbitrator Alan R. Viani conducted a hearing, the issue under consideration was: "Did the City violate Article XI, § 2(c), of the collective bargaining

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[1] Article XI, § 2 (c) states:
The Department shall provide the following authorized annual vacations for Correction Officers hired between July 1, 1988, through to June 30, 1993, inclusive:

* * *

c. During the calendar year in which the fifth anniversary of appointment occurs:

If Appointment Allowance Date Is: From	To	Vacation Shall Be:
Jan. 1	Feb. 14	27 work days
Feb. 15	April 15	26 work days
Apr. 16	June 15	25 work days
June 16	July 15	24 work days
July 16	Sept. 15	23 work days
Sept. 16	Nov. 15	22 work days
Nov. 16	Dec. 15	21 work days
Dec. 16	Dec. 31	20 work days

agreement?" *Correction Officers Benevolent Ass'n*, Case Nos. A-7392-98, A-7506-98. The remedy sought by the Union was a credit of additional vacation days for the Officers and an order that DOC make the proper number of vacation days available in the future. In an award dated December 2, 2001, Arbitrator Viani concluded that the City's method of calculating and posting annual leave accrual was in accordance with the CBA. Viani also stated that the language of Article XI, § 2(c), was neither unclear nor ambiguous and that the Union, at least since 1971 and until it initiated the grievance, had accepted DOC's method for calculating annual leave accrual, a fact giving support to the conclusion that DOC's interpretation of the contract provision is consistent with the parties' intentions. Therefore, he determined that DOC had not violated Article XI, § 2(c), of the CBA and denied the grievance.

On July 27, 2000, the Union again filed a group grievance at Step III alleging that Officers hired on September 15, 1995, received an incorrect number of vacation days in their fifth anniversary of appointment. The grievance claimed that DOC misinterpreted and misapplied Article XI, § 3(d)(ii), of the CBA in its method for calculating and posting annual leave in an Officer's fifth anniversary of appointment.[2] The remedy sought by the Union was

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[2] Article XI, § 3(d), states:

Effective July 1, 1997, the Department shall provide the following authorized annual vacations for Correction Officers hired after June 30, 1993:

i. During the first 5 years of service: thirteen (13) work days.

ii. During the calendar year in which the fifth anniversary of appointment occurs:

If Appointment Allowance Date Is From	To	Vacation Shall Be:
Jan. 1	Feb. 14	27 work days
Feb. 15	April 15	24 work days

(continued...)

that all affected Officers be given five additional vacation days, or the money equivalent, at the Officers' option. The Union filed a request for arbitration, and a hearing was conducted on November 15 and December 6, 2001. At the hearing, the City objected to the Union's proposal to broaden and redefine the issue to apply to all Officers hired after June 30, 1993. Arbitrator Richard J. Roth found that the proposed change was not unfairly prejudicial to the City and agreed with the Union that the contract clause refers to all Officers hired after June 30, 1993. Thus, the issue before the arbitrator was: "Did the Department misinterpret and misapply Article XI, § 3(d)(ii) of the collective bargaining agreement relative to all officers hired after June 30, 1993?" *Correction Officers Benevolent Ass'n,* Case No. A-8458-00. Arbitrator Roth found, in an award dated February 25, 2002, that this group was not included in Viani's prior decision, which was limited to Officers hired between July 1, 1988 through June 30, 1993. Furthermore, Roth determined, although Viani's decision did not involve the same facts and contractual provision, Article XI, § 2(c), and Article XI, § 3(d)(ii), were substantially identical except for the period of time when Officers were hired and the amount of vacation days accrued after five years of employment. For many of the same reasons previously articulated by Viani, Roth concluded that DOC did not misinterpret or misapply Article XI, § 3(d)(ii), of the CBA in the way it posted and calculated annual leave accrual. In particular, Roth concurred that the Union's acceptance since 1971 of DOC's method for calculating annual leave accrual showed both parties'

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[2](...continued)

Apr. 16	June 15	22 work days
June 16	July 15	20 work days
July 16	Sept. 15	18 work days
Sept. 16	Nov. 15	16 work days
Nov. 16	Dec. 15	14 work days
Dec. 16	Dec. 31	13 work days

agreement.

The Union subsequently filed four grievances in September 2001, all of which allege a violation of Article XI, § 3(d)(ii), and challenge DOC's procedures for calculating and posting annual leave in the calendar year in which an Officer reached the fifth anniversary of appointment. The grievances were on behalf of Officers hired on January 4, 1996, July 1, 1996, November 14, 1996, and December 12, 1996. All four grievances were denied at Step III by the Office of Labor Relations on the grounds that the claims had already been decided by Arbitrator Roth.

On April 9, 2002, the Union filed four requests for arbitration, one for each grievance. The Union seeks arbitration of the following issue: "Whether the Department has misapplied and miscalculated the number of vacation days, an Officer hired on or after June 30, 1993, is entitled pursuant to Article XI, § 3(d) of the 1995-2000 Collective Bargaining Agreement." The remedy sought by the Union is the monetary value or the credit number of lost vacation time with interest, at the Officers' option.

POSITIONS OF THE PARTIES

City's Position

The City argues that since Arbitrator Roth has already resolved this matter, the Union is barred from arbitration pursuant to the doctrine of res judicata. First, Roth made a final judgment on the merits and found that the City did not violate Article XI, § 3(d)(ii), of the CBA relative to all Officers hired after June 30, 1993. Second, the issue in the Union's four requests for arbitration and the issue that was before Roth are identical. Third, these cases involve the same

parties: COBA and DOC. Roth's definition of the issue in the group grievance covers all of the individual grievants in the present case, and the Officers that are the subjects of this case are in privity with the Union.

The City also argues that the Union's request for arbitration should be dismissed under the doctrine of collateral estoppel because the issue the Union seeks to arbitrate has been adjudicated by Arbitrators Roth and Viani. First, the issue in this case – whether the Department misinterpreted or misapplied Article XI, § 3(d)(ii), of the CBA – is identical to the issue that was before both arbitrators. In addition, both prior proceedings addressed the issue whether DOC's method of posting annual leave in an Officer's fifth anniversary of appointment is a misapplication and misinterpretation of the parties' CBA.

Union's Position

The Union argues that prior arbitration decisions generally do not preclude subsequent arbitrations on similar issues and cites to arbitration awards, in particular *In re KCI Construction Company*, 115 Lab. Arb. (BNA) 1313 (an arbitration opinion and award), in support of its claim. The doctrines of res judicata and collateral estoppel generally do not apply in arbitration proceedings because arbitrators' awards do not have the comparable legal authority or force of a holding by a court of law. Therefore, prior arbitration decisions can be referred to for guidance by the new arbitrator but should not be used to preclude arbitration.

DISCUSSION

The issue in this case is whether prior arbitration proceedings bar arbitration of the four instant grievances under the doctrines of res judicata and/or collateral estoppel. This Board finds

that the Union is estopped from further litigating these grievances.

In determining questions of arbitrability, this Board will not inquire into the merits of a dispute, a subject for an arbitrator to resolve. However, the Board, rather than the arbitrator, "is the forum charged with the duty of determining substantive arbitrability." *United Probation Officers Association,* Decision No. B-27-82 at 7. This Board bars arbitration of a previously arbitrated claim sparingly. *See Civil Service Technical Guild,* Decision No. B-77-90*; District Council 37, Local 420,* Decision No. B-27-85. We do so when a party's repeated attempts to arbitrate one underlying dispute may constitute an abuse of this Board's processes and discourage labor-management relations. *See District Council 37, Local 420,* Decision No. B-27-85 at 8; *Uniformed Firefighters Association,* Decision No. B-16-75 at 21, *aff'd sub nom. City v. Anderson,* No. 41407 (Sup. Ct. N.Y. Co. 1976). We have also suggested that when there is a longstanding controversy regarding a particular contractual provision which has been arbitrated in numerous cases, the parties should attempt to resolve the dispute through collective bargaining. *Patrolmen's Benevolent Association,* Decision No. B-31-80 at 10-11.

We have recognized that the courts, when faced with a claim of res judicata, have used a three-prong test to determine whether a claim is barred from relitigation. The proponent must show:

(1) a final judgment on the merits in an earlier action;

(2) an identity between the cause of action in both the earlier and later action; and

(3) an identity of the parties or their privies in the two actions.

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *Maflo Holding Corp. v. Blume,* 308 N.Y. 570 (1955); *Civil Service Technical Guild,* Decision No. B-77-90 at 3-4, 9; *District Council 37,*

Local 420, Decision No. B-27-85 at 7 (litigation of a claim is barred if it has already been decided on the merits, is identical to the claim in the prior action, and involves the same parties).

The City has satisfied the first element of the test. Arbitrator Roth's decision was a final judgment on the merits of the calculation of annual leave accrual for Officers in the fifth anniversary of appointment.

As for the second element – an identity of claims – the issue submitted and the remedy sought in the instant case are identical to the cause of action and remedy sought before Arbitrator Roth; both cases arise from the same underlying factual circumstances and allege a violation of the identical contract provision. In determining whether there is an identity of claims, this Board may consider a union's presentation of new facts which could make the claim arbitrable. However, the test is satisfied when the new facts are irrelevant or do not give rise to a new issue from the prior arbitration. *See Civil Service Technical Guild,* Decision No. B-77-90 (new documents which referred to grievants as "prosecutors" were irrelevant to the issue presented); *District Council 37, Local 420,* Decision No. B-27-85 (additional fact that criminal charges against grievant had been dropped did not affect the identity of issues in the prior and subsequent actions); *and cf. Patrolmen's Benevolent Association,* Decision No. B-22-86 (in subsequent claim, Board found new facts - that claim involved a different contract provision from the previous one and employees were at a different location - presented a new issue for arbitration). Here, the Union claims a violation of the same contractual provision as in the prior arbitration, and seeks identical remedies for the same group of employees. The Union has not asserted that there are any new facts which are germane to the issue and which change the nature of the controversy. Moreover, there is no evidence that the City has engaged in any subsequent action

different from the circumstances in the prior arbitration.

Finally, the parties – COBA and DOC – and the group of grievants they represent are the same as those in the prior action. The prior grievance had initially been filed on behalf of a small number of individual employees, but the Union, over the City's objection, asked Roth to broaden the issue to encompass all Officers hired after June 30, 1993, the entire group of Officers covered by Article XI, § 3(d). Thus, Roth's opinion concerned the same group of employees allegedly affected in the current case.

Since all three elements of the test are satisfied, the Union is estopped from arbitration in this matter. We therefore deny the Union's request for arbitration and grant the City's petition.

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 in Docket No. BCB-2286-02 filed by the City of New York be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers Benevolent Association, docketed as A-9269-02, be, and the same hereby is, denied.

Dated: November 22, 2002
New York, New York

MARLENE A. GOLD
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