City & FDNY v. Local Union No. 3, IBEW, 71 OCB 17 (BCB 2003) [Decision No. B-17-2003 (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
THE NEW YORK CITY FIRE DEPARTMENT,

Petitioners,

-and-

LOCAL UNION NO. 3, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.
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Decision No. B-17-2003
Docket No. BCB-2312-02
(A-9523-02)

DECISION AND ORDER

On November 27, 2002, the City of New York and the New York City Fire Department ("City" or "Department") filed a petition challenging the arbitrability of a grievance brought by Local Union No. 3, International Brotherhood of Electrical Workers ("Union"). The Union's grievance asserts that the Department denied Brian Colella union representation during supervisory conferences and did not compensate him for overtime work. The City does not challenge the arbitrability of the issue of overtime work, and therefore that issue will proceed to arbitration. However, the City contends that the Union's claim that Colella was denied union representation during supervisory conferences is not arbitrable because the Union has failed to identify a source of the alleged right. This Board concludes that the Union has not demonstrated a reasonable relationship between the alleged denial of union representation at supervisory

conferences and the general subject matter of the parties' relevant agreements.

BACKGROUND

Brian Colella holds the title of Electrician in the Department and is assigned to the Buildings Maintenance Division. On November 28, 2001, the Union filed a grievance on behalf of Colella at Step I. The grievance alleged that he was denied union representation at several supervisory conferences in violation of "Federal Law and Contract" and was not compensated for overtime work in violation of the "Fair Labor Standards Act and in Breach of Contract." There was no decision at Step I. On December 11, 2001, the grievance was filed at Step II and alleged only contract violations. Again, no decision was issued at Step II. The record does not indicate when these supervisory conferences occurred, who was present at such events, what the content of the conferences were, and what the outcomes were.

On December 30, 2001, the grievance was filed at Step III. The July 17, 2002, Step III decision denied the grievance and found that the request failed to cite to a contractual provision, rule, regulation, written policy, or order alleged to be violated. The decision further noted that a supervisory conference is not discipline.

The City and the Union are subject to a Consent Determination of the Comptroller setting forth the wages and supplemental benefits for covered employees (including the title Electrician) and are parties to a non-economic agreement which contains a grievance procedure. In addition, Executive Order No. 83 contains a grievance procedure, which applies to these Section 220 employees. The Union filed its request for arbitration on August 2, 2002, and sought an order that the City cease and desist from denying union representation during supervisory conferences and for payment for overtime worked. In its request for arbitration, the Union cites to the

Consent Determination on the issue of overtime, and cites to the non-economic agreement, Art. V, § 2, as the grievance procedure under which the demand for arbitration was made. The Union did not cite to any substantive contractual provision in the Consent Determination, or non-economic agreement applicable to supervisory conferences. In its answer to the City's petition challenging arbitrability, the Union cites to Art. V, § 1, which defines the term grievance.[1]

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's claim that Colella was denied union representation at supervisory conferences must be dismissed because the Union failed to cite any policy, procedure, or contract provision alleged to have been violated.

Union's Position

The Union argues that the grievance is arbitrable because a supervisory conference is an element of the disciplinary process, and the parties' non-economic agreement, Art. V, § 1, provides that a claimed wrongful disciplinary action taken against a permanent employee is grievable. According to the Union, the question whether a supervisory conference constitutes a

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[1] Art. V, § 1(e) of the non-economic agreement provides, in relevant part, that the term grievance shall mean:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

In its petition, the City cites to the grievance procedure in Executive Order No. 83 but does not contest that the parties are also subject to Art. V, § 1, of the non-economic agreement. In this decision, we shall refer only to Art. V when we address the parties' grievance procedure.

disciplinary action is a matter for an arbitrator to decide.

DISCUSSION

The issue in this case is whether denial of union representation at supervisory conferences is arbitrable under the parties' relevant agreements. This Board finds that this issue is not arbitrable. The Union has failed to identify a contractual provision that is the source of the alleged right to union representation during supervisory conferences. Furthermore, there is no showing that attendance at supervisory conferences constitutes discipline and is grievable under the parties' grievance procedure.

To determine arbitrability, initially the Board decides whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employees Union,* Decision No. B-2-69; *see District Council 37, AFSCME,* Decision No. B-47-99, or, in other words, "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." *New York State Nurses Ass'n,* Decision No. B-21-2002.

Although it is appropriate to cite the definition of a grievance in a request for arbitration, the alleged violation, misinterpretation, or misapplication of the definitional provision of a contract may not, by itself, furnish the basis of a grievance. *United Probation Officers Ass'n,* Decision No. B-4-94 at 12. Such a citation must be made together with citation of a specific substantive provision, the alleged breach of which the parties have agreed would form the basis of an arbitrable claim. *Local 30, International Union of Operating Engineers,* Decision No. B-

16-98 at 7.

Here, the Union cites only to the section of the contract which defines the term "grievance" and does not specify a substantive contractual provision as the source of the alleged right to union representation during supervisory conferences. Furthermore, the Union has presented no factual allegations or argument to indicate that attendance at such supervisory conferences constitutes discipline within the meaning of the contract. Thus, although a supervisory conference may lead to disciplinary action, the Union has not explained how the mere attendance of an employee at a supervisory conference is an act of "discipline" which is grievable. We observe that there is no allegation that Colella was charged with incompetency or misconduct, as contemplated by Art. V, § 1. We therefore grant the City's petition challenging arbitrability. __

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-2312-02 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 Local Union No. 3, International Brotherhood of Electrical Workers, docketed as A-9523-02, be, and the same hereby is, granted as to the issue of whether Brian Colella was not compensated for overtime work, and dismissed as to the issue of denial of union representation during supervisory conferences.

Dated: April 22, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER

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MEMBER

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MEMBER