City v. L.768, DC37, 37 OCB 4 (BCB 1986) [Decision No. B-4-86 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

- between -

THE CITY OF NEW YORK

Petitioner

- and -

LOCAL 768, DISTRICT COUNCIL 37, AFSCME

Respondent

Decision No. B-4-86
Docket No. BCB-815-85
(A-2201-85)

DECISION AND ORDER

On September 30, 1985, the City of New York, appearing by its Office of Municipal Labor Relations (herein "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration -filed on August 10, 1985 by Local 768, District Council 37, AFSCME (herein "the Union"), on behalf of David Davidson, an employee of the New York City Department of Health. The Union filed an answer on October 25, 1985 to which the City replied on November 4, 1985.

The Union's request for arbitration states the issue as follows:

> Did the Department of Health violate Personnel Policy and Procedure No. 655-77 and-655-79, which implemented Local Law 74 of 1972, when the agency unreasonably denied the grievant's request for three weeks leave without pay pursuant to Sec. 5.1 of the Time and Leave Rules.

Paragraph 2 of the request for arbitration specifically alleges violations of both the Personnel Policy and Procedures (herein P.P.P.s) and the Time and Leave Rules.

Local Law No. 74 of the City of New York for the Year 1972 requires, inter alia, that employers make "reasonable accommodation" to the religious needs of employees, defining reasonable accommodation as

> such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden to show such hardship.

P.P.P. 655-77 (issued February 15, 1977) reiterates the employer's obligation to make reasonable accommodation for employees' religious observance, and states that, in accordance with Sec. 1-b(a) of Local Law No. 74,

> wherever it is practicable in the, agency's judgment arrangements should be made for time off for religious observance to be made up rather than charged to leave balance.

P.P.P. 655-79 (issued March 27, 1979) gets forth the City's policy with respect to religious observance as follows:

> Reasonable accommodations are to be made for the religious needs-of employees requesting time off for religious observance. Those employees who

> are granted leave for religious observance with no accrued annual leave or overtime balances may be advanced the leave time to be charged against future annual leave accruals.
>
> Adequate support staff must be scheduled to insure that the operations of all agencies and services to the public are not adversely affected.

Time and Leave Rules Section 5.1 reads, in pertinent part:

> Leaves of absence without pay for reasons not covered in the foregoing rules may be granted to permanent employees by the agency head not to exceed one year.

Article VI, Sec. 1 (B) of the contract between the parties, effective July 1, 1982 through June 30, 1984, includes in its definition of a grievance:

> 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 ....

BACKGROUND

The grievant, an orthodox Jew, used his entire annual leave allowance for purposes of religious observance. There is no allegation that any request for annual leave for this purpose has been refused the grievant by the Department of Health. On March 21, 1985 the grievant requested three

weeks of leave without pay (LWOP) in order to mother in California. His request, was denied, and the grievant filed the grievance which is the subject of the instant request.

THE CITY'S POSITION

The City does not challenge the arbitrability of the alleged violation of the Time and Leave Rules. It does, however, take the position that the request for arbitration should be denied insofar as it alleges violation of the cited P.P.P.s because the Union has failed to demonstrate a prima facie relationship between the P.P.P.'s statements of policy governing requests for time off for religious observance and the denial of LWOP requested for nonreligious purposes. The City cites Sec. 2.0 of the Leave Regulations for Employees Who Are under Career and Salary Plan, -which defines the annual leave allowance as:

> A combined vacation, personal business and religious holiday leave allowance ....

The City points out that the P.P.P.s set forth policy for accommodating employees' religious practices and that there is no allegation that the grievant has been denied any request for leave for this purpose. Inasmuch as the LWOP was admittedly requested for nonreligious purposes, the City argues, there

exists no relationship between the policy alleged to have been violated and the City's denial of the grievant's leave request. Thus, there is no basis for arbitration of this issue.

THE UNION'S POSITION

The Union takes the position that the distinction made by the City is "disingenuous." The union asserts that the grievant's request for LWOP was necessitated by the fact that he had exhausted his annual leave allowance in order to meet religious obligations and that the City's denial constitutes, in effect, a refusal to accommodate grievant's religious needs as called for in the P.P.P.s.

DISCUSSION

As we have long held, the Board's function in determining arbitrability is to decide whether the parties are in any way obligated to arbitrate their controversies and if so whether the obligation is broad enough to include the particular controversy.[1] There is no dispute that an alleged violation of the P.P.P.s herein fails within the parties contractual definition of a grievance. Rather, the City challenges arbitration on the basis that there is no nexus between the

[1] Decision No. B-2-69.

City's act (denial of LWOP for nonreligious purposes) and the alleged violation of P.P.P.s (refusal to accommodate religious needs). The issue presented for resolution by the Board, then, is whether there is a relationship between the act complained of in the grievance and the source of the alleged right which is sought to be enforced in arbitration.

The Board has long held that:

> the grievant, where challenged to do so, has a duty to show that the statute, departmental rule or contract provision he invoked is arguably related to the grievance to be arbitrated.[2]

We find that the Union herein has failed to establish an arguable relationship between its claim that the City failed to accommodate the grievant's religious needs in violation of the P.P.P.s and the City's denial of LWOP requested for a nonreligious purpose. The Union argues that the LWOP' request was caused by grievant's religious practices (in that he had-used up his annual leave for that purpose)-and, that the City is therefore obliged, to consider his request for leave for any purpose in the light of the P.P.P.s. Thus, the Union claims, refusal of LWOP is tantamount to refusal of religious leave. We find, however, that the gravamen of the P.P.P.S

[2] Decision Nos. B-1-76, B-8-81, B-8-82.

cited herein concerns only the accommodation of employee requests for leave for religious observance; there is no mention of and no right created with respect to leave for any other purpose. Thus, there is no prima facie demonstration of the substantive relationship necessary to support the Union's request for arbitration. This Board cannot create a duty to arbitrate where none exists nor can it expand the obligation to arbitrate beyond the scope established by the parties in their contract.[3] Accordingly, we find that the claim based on an alleged violation of P.P.P.s No. 655-77 and 655-79 is not arbitrable.

In reaching this conclusion, we have considered the prior Board decisions relied upon by the Union, and find them in apposite to the instant case. Decision No. B-15-80 is cited for the proposition that "doubtful cases should be resolved in favor of arbitration." The cited case does reaffirm the Board's policy, and that of the New York City Collective Bargaining Law, to encourage the settlement of disputes through arbitration. It does not, however, abandon the requirement of a prima facie relationship between the act complained of and the source of the alleged right, whether

[3] Decision Nos. B-12-77, B-20-79, B-28-82.

this is expressed in terms of a prima facie relationship, a sufficient relationship, a colorable claim or a nexus. On the facts of the case, the Board found in B-15-80 that there was a sufficient connection between the issue raised (denial of "line of duty" designation for injuries suffered by Police Officers when technically off duty) and the provisions of the Patrol Guide alleged to have been violated, based upon specific references in the Patrol Guide to injuries received "whether on or off duty." We find no such specific reference to LWOP in the documents cited herein. The Union also quotes language from B-9-83 to the effect that the Board, when deciding issues of arbitrability, must decide only whether the request presents a colorable claim. In that case, the Board found that a departmental rule defining responsibilities of supervisory personnel provides an insufficient basis to support a request for arbitration of the grievant's denial of overtime because "Rule 46, on its face, does not address the subject of overtime." The leap required in that case to make the connection that the City's failure to maintain adequate levels of supervision resulted in the denial of overtime to the grievant -is comparable to the leap required to make the connection in this case -- that because the employer must accommodate employees with respect to religious leave, it must accommodate requests for other types of leave as well.

We note, however, that the Union may still arbitrate the issue whether the grievant's LWOP request was unreasonably denied pursuant to Section 5.1 of the Time and Leave Rules, inasmuch as the City challenges the arbitration request only insofar as it is based on a violation of the P.P.P.s.

O R D E R

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 filed by the City of New York be, and the same hereby is, granted to the extent that the request for arbitration is based upon a claimed violation of P.P.P.s No. 655-77 and 655-79.

DATED: New York, N.Y.
January 22, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
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EDWARD SILVER
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