SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------x

In the Matter of the Application of

CITY OF NEW YORK,

Index No. 403336/00

Petitioner, Decision. Order and Judgment

For a Judgment under Article 75 and 78 of the Civil Practice Law and Rules

-against

BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK, STEVEN C. DECOSTA, as Chairman of the Board of Collective Bargaining of the City of New York, and the COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, and ARTHUR CHELIOTES, as President of the Communication Workers of America, Local 1180,

Respondents.

----------x

HON. MICHAEL D. STALLMAN, J.:

Petitioner City of New York brings this CPLR Article 78 proceeding to annul and enjoin enforcement of a determination of respondent Board of Collective Bargaining of the City of New York (the "Board"). Decision No. B- 13-2000, dated June 27, 2000 (the "Decision")[1]. The Decision held that a certain grievance, brought by respondent Local 1180 of the Communications Workers of America, AFL-CIO (the "Union"), is arbitrable. In addition, the City seeks, pursuant to CPLR 7503(b), to stay arbitration of the underlying grievance. Respondent Union cross-petitions, pursuant to CPLR 7503(a), to compel arbitration of that grievance.

[1] The City's notice of petition misidentifies the decision that the City seeks to have annulled as Decision No. B-2-2000.

Background

The Office of Collective Bargaining ("OCB") is the agency charged with administering the New York City Collective Bargaining Law ("CBL"). N.Y.C. Admin. Code, Title 12, Ch. 3. OCB includes two adjudicative bodies, respondent Board and the Board of Certification. The Board is a neutral, tripartite body, composed of two City representatives appointed by the Mayor, two labor representatives appointed by the municipal unions, and three impartial members elected by a unanimous vote of the City and labor representatives. CBL vests the Board with the quasi-judicial power "to make [on the request of a public employee or a public employee organization that is a party to a grievance] a final determination as to whether a dispute is a proper subject for grievance and arbitration procedures pursuant to § 12-312 of [the CBL] ...." CBL § 12-309(3). The Board's power under CBL § 12-309(3) is akin to the power of the courts under CPLR Article 75.

The Union is the duly certified collective bargaining representative of, inter alia, City employees in the title of Principal Administrative Associate l ("PAA"), employed by the City's Human Resources Administration ("HRA") at Income Support Centers ("ISC"). ISCs help indigent families and individuals to apply for, and receive, financial assistance. Under-care is a subdivision in each ISC. Each PAA employed in an Undercare section is responsible for supervising employees in the title Eligibility Specialist III ("ES-III"). Each ES-III has a caseload of up to 200 cases. Because the PAAs are responsible for the cases assigned to the ES-Ills under their supervision, the PAAs' caseloads depend on the number of ES-IIIs assigned to each PAA for supervision.

The City and the Union have long disagreed about the issues of "span of supervision"

(the number of employees supervised by each PAA) and "double coverage" (where one PAA does the work of an absent PAA in addition to his or her own work). In 1985, the Union filed an improper practice petition with the Board. The parties settled that case by agreeing to submit to the Board the issue of whether a "practical impact" (effect on workload) existed with respect to span of supervision and double coverage. In Decision No. B-36-86, the Board ordered a hearing on the practical impact issue. However, instead of proceeding to a hearing, the parties entered another stipulation of settlement, dated March 24, 1987 (the "Settlement").

The Settlement, entered during the collective bargaining agreement ("CBA") in effect from July 1, 1984 to June 30, 1987, established, as a pilot project, new procedures for double coverage and span of supervision. Inter alia, the Settlement provided that PAAs in Undercare sections would supervise no more than five or six ES-IIIs (i.e., 1,000 to 12,000 cases); when three or more PAAs in one Undercare group supervised six ES-IIIs, a new group would be created (i.e., an additional PAA would come into the Undercare section of that ISC.) Between 1987 and 1993, i.e., throughout the terms of the two CBAs immediately following the 1984-1987 CBA, HRA complied with the Settlement terms. The Settlement includes neither a generally applicable procedure for resolving disputes arising out of its terms, nor a procedure for resolving disputes concerning the particular terms that are summarized supra, and that are at issue here.

In 1993, the Union filed grievances on behalf of PAAs working at four different ISCs. The grievants claimed that HRA was violating both of the above-described provisions of the Settlement, by failing to hire PAAs in sufficient number to allow HRA to comply with those provisions. Specifically, the grievants claimed that they were routinely double covering vacant Undercare groups, rather than double covering only when another PAA was temporarily absent, thereby causing a practical impact. As a

consequence, the grievants claimed, they were supervising far more ES-IIIs than permitted under the Settlement. Although, at the time that the grievances were filed, a CBA running from October 1, 1990 to December 31, 1991 was in effect, all the grievants specified, on the grievance forms, that the settlement was the contract that they claimed had been violated. Between August 1993 and November 1993, the grievances were denied at Steps II and III of the grievance procedure set forth in the 1990-1991 CBA, on the ground that double coverage by PAA supervisors at the ISCs was not prohibited.

On June 13, 1994, the Union filed its Request for Arbitration, where, for the first time, the Union specified Article VI, § I(C) of the 1990-1991 CBA, the terms of which remained in effect at that time, as the contractual section alleged to have been violated. That contractual provision allows grievances based on a claim that employees have been assigned to "duties substantially different from those stated in their job specifications." Verified Petition, Exh. E, at 14. On November 21, 1994, HRA filed a petition with OCB, pursuant to Title 61 of the Rules of the City of New York, Section 1-07(c), challenging the arbitrability of the grievance.

In its Decision, the Board held that the Union was precluded from arbitrating a claim under Article VI, § I(C) of the 1990-1991 CBA, because the Union had failed to raise that claim at the lower steps of the grievance procedure. However, the Board held that, by alleging a violation of the 1987 Settlement at those steps, the Union had invoked Article VI, § I(A) of the 1990-1991 CBA, which includes, within the meaning of the term "grievance," "[a] dispute concerning the application or interpretation of the terms of this Agreement."

Significantly, the Board noted that the City, in its pleadings, had failed to object to the Union's implicit assertion that violations of the span of supervision and double coverage provisions of the Settlement could be grieved under the grievance procedure

set forth in the CBA. On the merits, the Decision held that the Settlement had become incorporated into the 1984-1987 underlying CBA, that it had been carried forward into subsequent CBAs, and that, therefore, the grievance fell within the scope of the parties' agreement to arbitrate, as set forth in Article VI of the 1990-1991 CBA.

I

Collective Bargaining Law Section 12-302 provides:

> [I] t is hereby declared to be the policy of the city to favor and encourage ... on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arhytration of grievances between municipal agencies and certified employee organizations.

The Board applies a two-part test to determine whether a particular grievance is arbitrable. Initially, the Board ascertains whether the CBA includes a provision providing for the arbitration of disputes. If so, the Board determines whether the dispute falls within the scope' of the arbitration provision. See, New York City Dept. of Sanitation v MacDonald, 87 NY2d 650 (1996). The City does not dispute that the terms of the 1990-1991 CBA remained in effect when the grievance was filed, or that the 1990-1991 CBA includes a broad arbitration provision.

The City argues, however, as it argued to the Board, that the Settlement does not contain any provision for arbitration. Neither the Board nor the Union disagrees with that contention, which, in any event, is clear from the text of the Settlement. The City further argues that the Settlement was not incorporated in the then-underlying CBA, and therefore that it was not incorporated in the two subsequently negotiated CBAs. The City's contention is belied by the Board's undisputed finding that the City continued to comply with the substantive terms of the Settlement, until it expressly repudiated the Settlement in 1993,

although those terms were not expressly included, or referred to, in either of the CBAs that the parties negotiated after 1987, and, indeed, were not addressed in the negotiation of those CBAs. The City's continued compliance with the terms of the Settlement, until 1993, was, in fact, fully consistent with the Board's long-held position that, generally, a stipulation of agreement becomes part of the underlying CBA (New York City Health and Hosps. Corp. v. Committee of Interns and Residents, Decision No. B-6-76), and that such stipulations remains binding, after the expiration of the coextensive CBA, so long as neither party gives notice that the agreement is to expire, and so long as both parties conduct themselves as though the stipulation remained binding upon them (City of New York v Uniformed Fire Officers Assn. and Uniformed Firefighters Assn.,Decision No. B-17-71).

The City further argues that, even if the terms of the Settlement remained binding until 1993, they did so solely by virtue of the continued effectiveness of the Settlement, not by virtue of the 1990-1991 CBA. Accordingly, the City concludes, a claimed violation of the Settlement is not arbitrable pursuant to that CBA.

Each of the 36 grievants listed the Settlement as the contract that he or she claimed had been violated (See, Verified Petition, Exh. D), and one of the grievants also alleged that the claimed violation of the Settlement constituted a violation of the CBA. Id. at 3. The Settlement itself provides neither for grievances nor for arbitration. Yet, as the Board indicated in its Decision, the City participated, without objection, in the individual grievances that are now sought to be arbitrated, pursuant to the grievance procedures set forth in Article VI of the 1990-1991 CBA. Accordingly, the City's participation in the Step II and Step III grievances necessarily, albeit implicitly, acknowledged that a complaint alleging a violation of the Settlement constitutes a "grievance," within the meaning of Article VI, § 1(A) of the 1990-1991 CBA. It necessarily follows from that acknowledgment that a dispute arising out of the terms of the Settlement constitutes "[a] dispute concerning the application

or interpretation of the terms of this Agreement" (Verified Petition, Exh. E, at 14), i.e., that the Settlement had been incorporated into the 1990-1991 CBA.

Finally, the City contends that the Settlement bars arbitration. That contention is untenable. Paragraph four of the Settlement provides that the progressive expansion of the pilot policy would be monitored by a joint committee of HRA, the Office of Municipal Labor Relations and the Union. Paragraph five provides:

> [the City agrees to employ five (5) floating [PAA] supervisors to assist with the supervision of the workers in the absent [PAA] supervisor's group. If problems arise in the implementation of the floaters program, the Union may refer the issues to a Labor-Management Committee at HRA. If these issues cannot be resolved in Labor-Management [sic], the Union may refer the issues to the Office of Municipal Labor Relations. The selection of floaters will be discussed in Labor-Management Committee meetings between [HRA] and the [Union].

The sixth paragraph contains provisions concerning the training of personnel in the Undercare sections. Nothing in these three paragraphs either provides for, or bars, arbitration of claims that the City has violated the span-of-supervision and double-coverage provisions that are set forth, respectively, in paragraphs two and three of the Settlement.

Accordingly, it was neither arbitrary nor irrational for the Board to conclude that the terms of the Settlement had been incorporated in each CBA negotiated during the time that the City continued to comply with the Settlement, and, accordingly, that the Union's request for arbitration should be granted, pursuant to Article VI of the 1990-1991 CBA. Because a determination by the Board as to the arbitrability of a grievance may not be upset unless it is arbitrary and capricious or an abuse of discretion (New

York City Dept. of Sanitation v MacDonald, 87 NY2d 650, supra), the City's petition must be denied.

II

The City contends that the Union's cross-petition must be denied because parties, whose agreement is subject to the Taylor Law, may not be compelled to arbitrate, unless they have agreed to do so expressly, directly and unequivocally. See Matter of Arbitration Between South Colonie, Cent. School Dist. v South Colonie Teachers Assn., (46 NY2d 521 [1979]). The City contends that the parties here have not so agreed. In South Colonie, supra, the grievance issue, that appeared to be embraced by the agreement's definition of arbitrable disputes, also fell within a specific limitation provision that excluded a certain class of disputes from arbitrability. The Court of Appeals thus held that it was impossible to conclude that the parties' agreement to arbitrate the dispute at issue was "express, direct and unequivocal." Id at 526 (internal quotation marks and citation omitted).

Here, in contrast, the 1990-1991 CBA broadly provides for the grievance and arbitration of “[a] dispute concerning the application or interpretation of the terms of this Agreement." Verified Petition, Exh. E, at 14. Although the CBA provides for differing grievance procedures for certain types of disputes, it affirmatively provides for arbitration of all of them. See, Verified Petition, Exh. E, at 14-20. Moreover, Article VI(12) provides that "[t]he grievance and arbitration procedure contained in this Agreement shall be the exclusive remedy for the resolution of disputes defined as 'grievances' herein." Id., at 20. The definition of "grievance" in Article VI(1)(A) is so broad that it is not even limited to the express substantive terms of the CBA (Cf., Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak v Barni,49 NY2d 311 [19801), but includes, as well, the grievance and arbitration provisions set forth in Article VI. Consequently, the scope of those provisions

"is itself a matter of contract interpretation and application, and hence it must be deemed a matter for resolution by the arbitrator." Id at 314 (citations omitted); see also, New York City Dept. of Sanitation v MacDonald, supra, 87 NY2d, at 657-658. Accordingly, the Union's cross-petition must be granted.

Conclusion

Accordingly, it is hereby

ADJUDGED that the City's petition is denied; and it is further

ADJUDGED that the Union's cross petition is granted; and it is further

ORDERED that the City and the Union are directed to proceed to arbitration. The foregoing constitutes the decision, order and judgment of the Court.

Dated: New York, New York

January 1, 2001