SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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LEE SAUNDERS, as Administrator of District Council 37, American Federation of State, County, and Municipal Employees, AFL-CIO, JAMES BUTLER, as President of Local 420, and ALBERT DIOP, as President of Local 1549, both of District Council 37, American Federation of State, County, and Municipal Employees, AFL-CIO,

INDEX NO. 103467/99

Petitioners,

-against-

DECISION

STEVEN C, DeCOSTA, as Chairman of the New York City Office of Collective Bargaining, RUDOLPH GIULIANI, as Mayor of the City of New York, and JAMES F. HANLEY, as Commissioner of the New York City Office of Labor Relations, and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.
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THE HONORABLE LOTTIE E. WILKINS

This proceeding was commenced, pursuant to Article 75 and 78 of the Civil Practice Law and Rules ("CPLR"), by Lee Saunders, as Administrator of District Council 37, James Butler, as President of Local 420, and Albert Diop as President of Local 1549 (collectively "DC 37" or "Union"). The Union seeks a judgment annulling a determination rendered by the Board of Collective Bargaining

("Board") in Decision No. B-1-1999. That decision dated February 4, 1999 denied arbitration of grievances brought on by the petitioner.

The Union filed two (2) requests for arbitration with the Office of Collective Bargaining ("OCB") on February 27, 1998. The first of the requests, docketed as A-7186-98, concerned the "announced decision of [HHC] to discontinue the provision of office space for union purposes." The second of the requests docketed as A-7187-98, concerned the "announced decision of [HHC] to discontinue release time for certain individuals within [HHC]."

The OCB is a neutral, administrative agency charged with administering and enforcing the provisions of the New York City Collective Bargaining Law (hereinafter "the NYCCBL"). New York City Administrative code, Title 12, Chapter 3. The OCB includes two (2) adjudicative boards, the Board of Collective Bargaining (the board herein) and the Board of Certification. The Board of Collective Bargaining is a neutral tripartite body, made up of two (2) City representatives appointed by the Mayor of the City of New York, two (2) Labor representatives designated by the municipal labor unions, and three (3) Impartial members who are elected by a unanimous vote of the City and Labor members. The Board is responsible for carrying out the duties delegated to it under the NYCCBL.

The NYCCBL §12-309a(3) vests the Board with the power and duty "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedures pursuant to §12-312 of [the NYCCBL] ..." On the request of a public employer or a public employee organization which is a party to a grievance. The

statutory role of the quasi-judicial Board in arbitrability disputes under the NYCCBL, like that of the courts under Article 75 of the CPLR, is to decide questions of substantive arbitrability.

DC 37 certified as the collective bargaining representative of the HHC employees involved in the instant matter; Locals 420 and 1549 are affiliated locals of DC 37. DC 37, The City, and HHC are parties to numerous collective bargaining agreements, four (4) of which cover the employees relevant to this case: the Municipal Coalition Memorandum of Economic Agreement ("MCMEA"), the Institutional Services Unit Agreement, the Clerical Unit Agreement, and the Hospital Technicians Unit Agreement. The MCMEA was negotiated by the City and the coalition of Municipal Unions, which includes DC 37. Therefore, employees represented by DC 37 are covered by both the MCMEA and the individual unit agreement applicable to their title.

Locals 420 and 1549 have designated individuals to perform union duties pursuant to a grant of release time by the OLR under Executive Order 75 (hereinafter, "EO-75"). EO-75 allows agency heads to make administrative determinations authorizing full-time, part-time and ad-hoc individual assignments for the purpose of conducting labor relations and granting leave without pay for that purpose, provided that approvals ("certificates") are granted in advance by authorized officials. The practice of release time permits employees, who are still paid by the government, to work on union business instead of government business.

EO-75, titled "Time Spent on the Conduct of Labor Relations Between the City and its Employees and on Union Activity" reads, in pertinent part,

<u>General Provisions</u>

a. The head of the agency in which the affected union representative is employed shall continue to make the necessary administrative determinations, subject to the approval of the City Director of Labor Relations, under both Sections 2 and 3, including but not limited to those set forth below. The agency head:

(1) Shall make all full and part-time individual assignments and grant leaves-without-pay as authorized in writing by the City Director of Labor Relations and shall grant ad hoc assignments pursuant to this Order.

(3) All time spent on the conduct of labor relations granted pursuant to this Order including ad hoc, full and part-time assignments, and leaves of absence without pay, must be approved in advance by authorized officials.

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In December of 1997, Donna Lynne, then Senior Network Vice President of Corporate affairs for the New York City Health and Hospitals Corporation ("HHC") sent to James Hanley, Commissioner of the City's Office of Labor Relations ("OLR"), a list of employees who were being released to perform union duties by HHC facilities who did not appear to have been granted released time by OLR pursuant to Executive Order 75 (EO 75"). Shortly thereafter, Hanley sent a letter to Stanley Hill, then Executive Director of DC 37, which stated that, effective January 14, 1998, HHC would be discontinuing "unauthorized" release time. The letter went on to state that, unless employees had been issued certificates pursuant to EO 75, they would no longer be released to conduct union business and would be expected to return to work.

As part of its continued investigation into unauthorized release time, HHC also discovered that locals of DC 37 were utilizing office space at a number of its facilities without compensating the City for the space. Accordingly, at some point in early 1998, the City informed the Union that use of the office space would also be discontinued.

Over the next several weeks, the parties met to discuss the release time and office

space issues on at least two occasions. During the course of meetings, the deadline for the discontinuance of unauthorized release time for employees without EO-75 certificates was extended to February 24, 1998. The Union alleged that in these meetings the City stated that if the Union wished to maintain the status quo with respect to release time, it would have to pay the cost of any additional representatives whose release was not authorized under EO-75. According to the Union, the City also stated that the office space could no longer be used by the Union. In response, the Union alleged, it took the position that the discontinuation of the longstanding practices concerning release time and office space constituted the making of an economic demand forbidden by the MCMEA.

In pertinent part,

Section 3 of the 1995 MCMEA provides,
"No party to this 1995 MCMEA shall make additional economic demands during the term of the 19965 MCMEA or during the negotiations for the applicable Successor Separate Unit Agreement, except as provided in Sections 4(e) and 6. Any disputes hereunder shall be promptly submitted and resolved.

Section 4(e) of the 1995 MCMEA provides,
The general increases provided for in subsections 4(b)(I), 4(b)(ii), 4(b)(iii) or 4(d) may be subject to revision or modification in the successor Separate Unit Agreements, provided, however, that such revision or modification in wages or fringe benefits shall not result in any current or future cost increase or decrease as compared with the cost requires to pay the increases provided for in this Section 4.

Section 6, is titled "Annuity and Additional Compensation Funds." It covers the establishment of annuity fund for employees in active pay status at any time during the period of the first day of the fifteenth month through the last day of the twenty-sixth month of this 1995 MCMEA. Section 6(vi) reads,
For the purpose of Section 6(a), excluded from paid working days are all scheduled days off, all days in non-pay status and all paid overtime."

The City's version of what took place at these meetings was different. The City

alleged that DC 37 stated that it was prepared to bargain over release time and office space, but that the City responded that such an offer to bargain would amount to an economic demand that the MCMEA forbade. The City further maintained that, by indicating that the Union would have to pay the "unauthorized" representatives if it wished to maintain the status quo, it had not made an economic demand; rather, it had merely put the Union on notice that those individuals who had not been given a certificate by OLR for authorized paid release pursuant to EO-75 would be returned to work.

As the parties were unable to resolve their differences, the Union filed the aforementioned two (2) requests for arbitration with the Board in accordance with the provisions of §16 of the 1995 MCMEA.

Section 16, titled "Resolution of Disputes" reads,

a. Subject to the subsequent provisions of this Section 16(b), any disputes, controversy, or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this 1995 MCMEA shall be submitted to arbitration upon written notice therefore by any of the parties to this 1995 MCMEA to the party with whom such dispute or controversy exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three (3) impartial members of the Board of Collective Bargaining pursuant to title 61 of the Rules of the City of New York. Any award in such arbitration proceeding shall be final and binding and shall be enforceable pursuant to Article 75 of the CPLR.

b. After incorporation of this 1995 MCMEA into an applicable Successor Separate Unit Agreement, any dispute, controversy or claim referred to in Section 16(a) which arises between the parties to such separate unit agreement shall be submitted in accordance with the dispute resolutions provisions of such applicable Successor Separate Unit Agreement except that any dispute, controversy or claim arising under Sections 8, 9, 13(a) or 13(b) shall be resolved pursuant to the Citywide or other similar applicable agreements with the Employers, and except as provided in Sections 16(a) and 16(d) below.

c. Any dispute, controversy or claim arising under Sections 8, 10, 11 and 17 shall continue to be submitted under Section 16(a) above.

d. The provisions of Sections 16(a) and 16(b) shall not apply to any dispute, controversy or claim arising under Sections 12, 13c or 15. Any dispute, controversy or claim arising under Section 13c shall be resolved pursuant to Paragraph 8 of Appendix B of the Severance Agreement, dated April 29, 1994.

e. The term of this Section 16 shall be from the date of execution of this 1995 MCMEA to the date of execution of any successor agreement(s) to this 1995 MCMEA.

The first of the requests concerned the "announced decision of [HHC] to discontinue the provision of office space for union purposes." The Union maintained that HHC's action constituted "a unilateral change in longstanding practices" and that the grievance should proceed to arbitration because "the withdrawal of this space" and the "suggestion that the Union pay to retain the space, constitutes an economic demand that is prohibited by Section 3 of the MCMEA." The second of the requests concerned the "announced decision of [HHC] to discontinue release time for certain individuals within [HHC]. As with the first request, the Union maintained that NNC's action constituted "a unilateral change in longstanding practices" and that the grievance should proceed to arbitration because NNC's "demand" that "the Union 'pay' to retain the status quo constitutes an economic demand that is prohibited by Section 3 of the MCMEA."

The City filed two petitions challenging the arbitrability of the two disputes. In its petitions, the City argued that the Union had failed to demonstrate a nexus between §3 of the MCMEA and the two (2) disputes. According to the City, the Union had not shown that the City had made any economic demands. The City argued that while it

stated that the only way to retain the unauthorized release time would be for the Union to fund it, the City made no economic demands of the Union.

In response to the City's petitions, the Union maintained that a past practice had existed for thirty (30) years of union representatives being given paid release time to engage in certain labor-management activities, and of office space being provided free of charge; it pointed out that the existence of these practices was not refuted by the City. The Union argued that the City's demand that it either pay to have the "unauthorized" Union representatives remain on release time or no longer have on-the-job representatives at the affected hospitals is an economic demand prohibited by the MCMEA, either because the Union would have to pay for services it was not previously required to expend monies on, or as a withdrawal of a benefit during the term of the agreement. For this reason, the Union argued, it demonstrated a nexus between the two (2) grievances and §3 of the MCMEA.)

The Hospital Technicians' contract and the Clerical works' Agreement reads in pertinent part:

Section I-Definition:
The term "grievance" shall mean:

a. A dispute concerning the application of interpretation of the terms of this Agreement:

b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer...

c. A claimed assignment of employees to duties substantially different from those stated in their job specifications;

d. A claimed improper holding of an open-competitive rather than promotional examination;

e. A claimed wrongful disciplinary action taken against a permanent employee...

f. Failure to serve written charges as required by Section 75 of the Civil Service Law ...

g. A claimed wrongful disciplinary action taken against a provisional employee ...

The Board consolidated the two (2) cases and rendered its determination in Decision No. B-1-1999. The board held that the City's petitions challenging arbitrability should be granted and the requests for arbitration denied. In its decision, the Board applied its two part threshold arbitrability test and found that while the parties agreed to arbitrate their disputes, the Union had failed to establish that the grievances at issue were within the scope of the parties' agreement to arbitrate.

In pertinent part the Board's decision held that "We find that the Union has not met that burden. Although the Union claims a violation of the MCMEA, a substantial portion of its argument is directed toward its contention that the City wrongfully ended a past practice where representatives were given free office space in City buildings and release time. We find that the alleged discontinuation of that past practice forms the true basis for the Union's claims. That the Union alleges that the discontinuance of that practice constitutes the making of an economic demand does not change the true character of the Union's claim. Accordingly, we shall examine this claim as if it were brought as a claimed violation of past practice."

"We have long held that before we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation of past practice is within the scope of the definition of the term "grievance" which is set forth in the parties' agreement. In the instant matter, neither of the Locals' unit contracts, nor the MCMEA itself, includes an alleged violation of past practice in the definition of a grievance. Furthermore, the mere passage of time does not convert a past practice into a rule, regulation, written policy or order that may be grieved under the parties' unit contracts. Therefore, we hold that an alleged violation of past

practice may not serve as an independent basis for arbitration in the instant matter. Moreover, the assertion that the alleged violation of a past practice constitutes the making of an economic demand simply is not persuasive. Accordingly, we grant the petition challenging arbitrability filed by the City of New York."

On February 23, 1999 petitioners commenced this proceeding by Order To Show Cause. Justice Karla Moskowitz granted a temporary restraining order to the Unions preventing respondent HHC from requiring the employees "an unauthorized" work release time to return to work and further preventing HHC from discontinuing the Union's use of HHC Office space.

The City Board of Collective Bargaining (BCB) is empowered by statue to determine whether a dispute is the proper subject for a grievance and is arbitrable. The Board's decision is entitled to deference. New York City Dept. of Sanitation v. MacDonald, 627 N.Y.S.2d 619, 215 A.D.2d 324, leave to appeal granted 632 N.Y.S.2d 499, 86 N.Y.2d 706, 656 N.E.2d 598, affirmed 642 N.Y.S.2d 156, 87 N.Y.2d 156, 87, N.Y.2d 650, 664, N.E.2d 1218.

In other words, the Board's function is to decide 1) whether the parties involved in a dispute are in anyway obligated to arbitrate their controversies, and if so, 2) whether the obligation to arbitrate is broad enough in its scope to include the particular controversy at issue before the Board. The Board cannot create a duty to arbitrate where none exists, nor can it enlarge a duty to arbitrate beyond the scope established by the parties in their collective bargaining agreement. Thus, the proponent of arbitration must demonstrate 1) that the parties involved agreed to arbitrate the type of dispute at issue therein, and 2) that a nexus or a reasonable relationship exists between the dispute and

contractual source of the right involved. Unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, doubts should be resolved in favor of coverage. United Steelworkers of Am. V. Warrior & Gulf Navigation Co. 363 U.S. 574.

The Court's function is limited to ascertaining whether the party seeking arbitration is making a claim which on its fact is governed by the contract. Steelworkers v. Warrior and Gulf Navigation Co. 363 U.S. 574. The merits of the grievance or even an apparent weakness are not the Court's concern and are not a factor in the Court's threshold determination. Matter of Board of Education of Water Town City School District v. Water Town Educ. Assn. 74 N.Y.2d 912; Matter of Franklin Cent. School Teachers Assn. 51 N.Y.2d 356, CPLR 7501. This Court confronted with a contest of this kind should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the [MCMEA]. If there is none, the issue, as a matter of law, is not arbitrable. If there is, the Court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [MCMEA] and then whether the subject matter of the dispute fits within them...." In the matter of the Board of Education of Water Town City School District v. Water Town Education Assn. Supra.

In the matter at bar there is no disagreement as to the first step concerning the arbitrability of the dispute in question. However, as concerns the reasonable relationship test the Court is not persuaded by the Union's argument that the City's discontinuance of the uncompensated use of HHC facilities for Union activities and "unauthorized" Union representatives are economic demands prohibited by the

MCMEA, either because the Union would have to fund or pay for services it was not previously required to expend monies on, or as a withdrawal of a benefit during the term of the agreement. While the form of the grievances appear to be couched in economic terms, their true substance is that the City's longstanding past practice of providing free office space for Union activities and unauthorized release time positions in excess of the numbers provided for in EO-75 created an enforceable contract right. In reaching a determination the Court will not exalt form over substance.

"Turning, therefore, to the merits, we must consider whether the City's past practice of "unauthorized release time" creates a basis for the remedy that petitioner seeks - namely, the right to compel the City to continue providing the same level of the disputed benefits to its employees as it has in the past. Under New York's "Taylor Law" (Civil Service Law, art. 14, §§200-215), the City, as a public employer, is statutorily obligated to negotiate in good faith with the bargaining representative of its current employees regarding the "terms and conditions of employment" .(Civil Service Law §204[2]; §209-[1]). Pursuant to this duty to negotiate, where a past practice between a public employer and its current employees is established, involving a mandatory subject of negotiation, the Taylor Law would bar the employer from discontinuing that practice without prior negotiation (see, Matter of Incorporated Vil. of Hempstead v. Public Empl. Relations Board., 137 A.D.2d 378, 383, 529 N.Y.S.2d 219, Iv. Denied 72 N.Y.2d 808, 534, N.Y.S.2d 666, 531 N.E.2d 298; matter of Unatego Non-Teaching Assn. V. New York State Pub. Empl. Relations Bd. 134 A.D.2d 62, 64, 522 N.Y.S.995, lv. Denied 71 N.Y.2d 805, 529 N.Y.S.2d 76, 524 N.E.2d 430; see also, Matter of Incorporated Vil. of Lynbrook v. New York State Pub. Empl. Relations Bd., 48 N.Y.2d

398, 402, n. 1, 423 N.Y.S.2d 466, 399 N.E.2d 55).

"[Authorized release time and salary payments] for employees can be a form of compensation, and thus a term of employment that is a mandatory subject of negotiation (see, Association of surrogates & Supreme Ct. Reporters within City of N.Y. v. State of New York, 78 N.Y.2d 143, 154, 573 N.Y.S.2d 19, 577 N.E.2d 10; Matter of Glens Falls Firefighters Union v. City of Glens Falls, 30 PERB Para. 4506; Matter of Triboro Bridge & Tunnel Auth. V. Bridge & Tunnel Officers Benevolent Assn., 29 PERB Para.3012; Matter of City of Cohoes v. Cohoes Police Benevolent & Protective Assn., 27 PERB Para. 3058). Therefore, a past practice concerning [authorized release time and salary payments] for employees even where unrelated to any specific contractual provision, cannot be unilaterally modified by the public employer." See Aeneas McDonald Police Benev. v. Geneva, 92 N.Y.2d 3326, 680 N.Y.S.2d 887.

The issue at hand concerning ["Unauthorized release time"] is distinguishable. "A past practice, independent of any contract term, may be relied upon by an arbitrator in resolving disputes which have been submitted under the grievance machinery of a collective bargaining agreement. 'Arbitrators may do justice' and 'are not bound by principles of substantive law or rules of evidence' (Lentine v. Fundaro, 29 N.Y.2d 382, 386, 385, 328 N.Y.S.2d 418, 278 N.E.2d 633). Thus, when interpreting a collective bargaining agreement, an arbitrator may consider parol evidence even where the agreement is unambiguous, such that "the award may well reflect the spirit rather than the letter of agreement: (Rochester City School Dist. v. Rochester Teachers Assn., 41 N.Y.2d 578. 582, 394 N.Y.S.2d 179, 362 N.E.2d 977; see, Lentine v. Fundaro, supra, at 385, 328 N.Y.S. 2d 418, 278, N.E.2d 633; United Steelworkers of America v. Warrior

Gulf Na. Co., 363 U.S. 574, 581-582, 80 S.Ct. 1347, 4 L.Ed2d 1409)." Aeneas McDonald Police Benev. v. Geneva, supra.

While bearing that principle in mind a review of the evidence demonstrates that no collective bargaining agreement between the City and its employees addresses "unauthorized" release time. Nor is an alleged violation of a past practice within the scope of the definition of the term "grievance" which is set forth in the parties agreement.

As such petitioners now asserted reliance upon EO-75 as evidence of negotiated terms of employment for "unauthorized" release time is misplaced. Moreover, a municipal resolution is, in general, a unilateral action that is temporary in nature and, thus, it does not create any vested contractual rights. (Matter of Jewett v. Luau-Nyack Corp., 31 N.Y.2d 298, 306, N.Y.S.2d 874, 291 N.E.2d 123). Furthermore, petitioner has failed to put forth any evidence, beyond the language of EO-75 that might establish either that an independent agreement to fund or pay for "unauthorized" release time supported by, consideration existed, or that any one of the collective bargaining agreements between the parties is ambiguous on the issue of "unauthorized" release time for excess or additional union representatives and thus susceptible to interpretation by parol evidence (cf., Myers V. City of Schenectady, 244 A.D.2d at 847, 665 N.Y.S.2d 716, supra).

Therefore, under these circumstances the unilateral elimination by the City of “unauthorized" release time is not an arbitrable issue.

Given the aforementioned considerations and absent any reference to a specific agreement, the City's unilateral withdrawal of free office space in City buildings for

Union activities is similarly not an arbitrable issue.

The Union’s reliance on the cases Board of Education of Connetquot Central School District of Islip v. Connetquot Teachers Association and Essex County Board of Supervisors v. Civil Service Employees, 67 A.D.2d 1047,413 N.Y.S.2d 772 is misplaced.

Those two (2) cases involved extremely broad arbitration clauses. Unlike the case at bar, the arbitration clauses in Connetquot and Essex were broad enough in scope to encompass virtually between the parties. The parties there had agreed to arbitrate “any grievance arising out of an employment relationship or a contractual application." In contrast to the limited scope of the arbitration clause and the definitions of grievance set forth in the MCMEA and local contracts at bar, the parties in Connetquot and Essex "defined" a grievance as "any claimed violation; misinterpretation or inequitable application of the existing law, policies, rules, procedures, regulations, or administrative orders and, in addition work rules affecting the School District which relate to or involve employee's health or safety, physical facilities, materials or equipment furnished to employees or supervision of employees." In Essex county the parties defined a grievance as "a claim by an employee or group of employees or employer in the negotiating unit based upon any event or condition affecting their welfare and/or terms and conditions of employment."

Finally, the Court finds meritless the Union's position that the Board's decision was arbitrary because it ignored specific contract language, S.3 of MCMEA and Article XVII of the Institution-al Services Unit Agreement. The Board analyzed the former provision and, for the reasons stated, rejected it as a basis for these disputes proceeding to arbitration. With respect to the latter provision there is no mention that it was raised

in the meetings between the parties, in the requests for arbitration or in the answers to the petitions challenging arbitrability. As such, petitioner may not now raise for review new matters in this Article 78 proceeding which were not raised in the Administrative proceeding under review. Hennekens v. State Tax Commission, 114 A.D.2d 599, 494, N.Y.S.2d 208. The Court's review of the challenged determination is limited to the record that was before the administrative agency.

Based upon the foregoing, the Board's decision was reasonable, proper and consistent. The Court will afford it due deference.

Accordingly, the petition is dismissed and the temporary restraining order is vacated.

This constitutes the decision and judgment of the Court.

Dated: July 7, 1999

LOTTIE E. WILKINS, J.S.C.

Saunders.dec