

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

OFFICE OF LABOR RELATIONS
Petitioner

vs.

DOCKET NO. BCB-14-68

DECISION NO. B-6-68

SOCIAL SERVICE EMPLOYEES UNION
Respondent

DECISION AND ORDER

On May 7, 1968, Respondent filed a request for arbitration (A-16-68). On June 6, 1968, the Petitioner filed a petition pursuant to Section 7.3 of the Consolidated Rules of the Office of Collective Bargaining, opposing the request for arbitration on the ground that the grievance is not a proper subject, for arbitration and that "there was no submission to Step III and we did not agree to a Waiver of a Step III Review". On June 18, 1968, Respondent filed an answer to the petition, alleging that the grievance is arbitrable and that it had "proceeded to Step III via an appeal..." On June 21, 1968, Petitioner filed a reply in which, in substance, it again contended that the Respondent had failed to proceed to Step III of the grievance procedure as required by the parties contract. In view of our disposition of this matter, we do not decide the factual issue framed by the pleadings.

The grievance herein concerns the alleged improper denial of a provisional appointment of a Caseworker in the Department of Social Services to the title of Senior Caseworker. Apparently, Respondent contends that such denial was occasioned by the grievant's released time behalf of his collective bargaining representative. It bases its claim for relief upon, inter alia, Article XIX, Section 5, and Article XXI, second paragraph, of the parties' collective bargaining agreement.

Article XIV, Section 1, of the current contract provides, among other things, that an arbitrable grievance is created by:

- "1. A claimed violation, misinterpretation, inequitable application, or non-compliance with the provisions of this contract or of any supplemental agreement."

2. Claims...of a violation., misinterpretation or inequitable application of existing policy, orders, rules and regulations, or then existing practice, applicable to the Department of Social Services or its employees or the Union "

Article XIX, Section 5, reads:

"Time spent by Union officials and representatives in the conduct of Labor relations shall be governed by the provisions of Mayor's Executive Order No-38 of May 16, 1967."

The second paragraph of Article XXI states, in pertinent part:

"The Department agrees to continue its policy of not discriminating against any employee covered by this contract on the basis of...participation in or association with the activities of any union or other employee organization.

Thus, it is plain that the Respondent's contention that the Department improperly refused to appoint the grievant, provisionally, to the position of Senior Caseworker is a "grievance" within the meaning of Article XIV, Section 1 (1) and (2), of the parties' contract. Since the dispute is embraced by the parties' collectively bargained definition of grievance, it is also a grievance within the meaning of the New York City Collective Bargaining Law. Section 1173-3.0(o) of the statute provides, inter alia, that:

"Notwithstanding the provisions of this subsection,, the term grievance shall include a dispute defined as a grievance... by a collective bargaining agreement..."

As to the issue raised by the Respondent's alleged failure to submit the grievance to Step III of the parties' grievance procedure, it is our view that this issue is one of "procedural arbitrability" and that under the rule of John Wiley & Sons Inc. v. Livingston, 376 U.S.543 (1964) LRRM 2769, questions of "procedural arbitrability" are to be resolved by the arbitrator.

The rationale for this approach was soundly stated by the U.S. Supreme Court in the Wile decision. We can do no better than quote it below (59 LRM at 2775):

"Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract..."

"Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration... It would be a curious rule which required that intertwined issue of "substance" and "procedure" growing out of a single dispute and raising the same question on the same facts had to be, carved up between two different forums, one deciding after the other, Neither logic nor considerations of policy compel such a result."

"Once it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear upon its final disposition should be left to the arbitrator."

In New York., in the leading case of In re Long Island Lumber Co., 15 N.Y. 2d 380 (1965)., Judge Burke reviewed the federal law on the subject of "procedural arbitrability" and concluded (15 N.Y. 2d at 387):

Questions of timeliness and compliance with step-by-step grievance procedures, prior to formal and final binding arbitration, are questions of "procedural arbitrability". Now it is clear that such questions must be left to the arbitrator.

Accordingly, we find that the grievance is a proper subject for arbitration., and that the question of whether Respondent has complied with the contractual prerequisites for invoking arbitration also is appropriate for arbitral determination.

O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law,, it is hereby

ORDERED, that this proceeding be, and the same hereby is, referred to Walter Eisenberg, the individual previously designated by the parties to serve as arbitrator for the duration of their contract.

DATED: New York, N.Y.
September 4, 1968

ARVID ANDERSON
CHAIRMAN

SAUL WALLEN
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD SILVER
MEMBER