

City v. DC 37, 11 OCB 5 (BCB 1973) [Decision No. B-5-73 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-5-73

-and-

DOCKET NO. BCB-145-72

DISTRICT COUNCIL 37,  
AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

The City's petition herein contests the arbitrability of a grievance filed by the Union on behalf of Hearing Reporters employed in the Office of the New York County District Attorney.

The request for arbitration alleges the employer has violated Article IV, §1(A) and §1(B) of the City-wide contract by failing to pay over-time compensation to Hearing Reporters, and seeks payment retroactive to July 1, 1972. The request is brought under Article XIV of the City-wide contract which provides that grievances under the contract shall be processed through the grievance procedure set forth in Executive Order 52.

The City asserts that the grievance is not governed by the grievance procedure of the City-wide contract because the District Attorney's election of OCB coverage specifically omitted coverage from negotiated grievance procedures. The City further

argues that the District Attorney did not elect to be covered by the Executive Order's grievance arbitration procedures, and that the NYCCBL does not give the Union the right to arbitration.

The Union asserts that the City's position is against the public policy "which holds that disputes between public employees and the public employer should be settled by binding arbitration rather than strikes." The Union also argues that the District Attorney has agreed that the claims for overtime are warranted but that the Bureau of the Budget has refused to provide the funds. Therefore, the Union argues, "the grievance is essentially against the Office of the Bureau of the Budget, which is bound by the City-wide contract and the binding arbitration provisions thereof." Further the Union asserts that the D.A.'s election has the effect of making the grievance procedures of E.O. 52 and the City-wide contract applicable to the employees.

On November 13, 1968, District Attorney Frank Hogan elected to make the NYCCBL applicable to the employees of his office subject to certain limitations. The pertinent provisions of the election state:

"2. The N.Y. County District Attorney's Office consents to be bound by the results of collective bargaining between the City (through the Office of Labor Relations) and

representatives of employees certified or designated by the Board of Certification in a bargaining unit which may consist of employees of the City and employees of the New York County District Attorney's Office in non-unique (City-wide) titles, except as to matters relating to discipline and grievances.

"The results of such collective bargaining shall be binding with respect to all matters within the legal authority of the City to bargain, fiscal matters (including fiscal matters which must be uniform in application to all employees), and pension matters in accordance with section 5a(2) and (5) of the Mayor's Executive Order No. 52 except as to matters relating to discipline and grievances.

" 4. For the purpose of resolving grievances, the N.Y. County D.A.'s Office consents to the applicability of the grievance procedures set forth in Local Law 53-1967 and the regulations thereunder, (including the definition of the term 'grievance'), concerning its employees in non-unique titles, except as to matters relating to discipline; and further provided that the decision of any arbitrator, arbitration or impasse panel shall be advisory only and shall not be binding upon the D.A.

"The foregoing shall not prohibit or preclude the N.Y. D.A.'s Office from (1) invoking or utilizing any other grievance procedure to which it was agreed, or may agree upon, in direct negotiations with the Union . . . or (ii) agreeing to the definition of the term 'grievance' in an agreement with the Union . . . ."

Section 1173-3.0o of the NYCCBL defines the term "grievance" but it does not provide a procedure whereby grievances may be brought to arbitration. Section 1173-8.0 of the Law requires the Board of Collective Bargaining to maintain a register of arbitrators, provides for costs of arbitration and waivers, contains provisions prohibiting strikes, expresses a policy encouraging arbitration and further provides:

"b Executive orders, and collective bargaining agreements between public employers and public employee organizations, may contain provisions for grievance procedures, in steps terminating with impartial arbitration of unresolved grievances. Such provisions may provide that the arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with the applicable law governing arbitration, except that awards as to grievances concerning assignment of employees to duties substantially different from those stated in their job classifications, or the use of open competitive rather than promotional examinations shall be final and binding and enforceable only to the extent permitted by law."

Thus, it is clear that there is no "grievance procedure" in the law as implied by the terms of the D.A.'s election, but that such procedures must be contained in a contract or an applicable Executive Order.

Although the language of the election states that no contractual provision for grievance arbitration may be binding for employees of the District Attorney's Office and, therefore, the instant grievance cannot be arbitrated pursuant to Article XIV of the City-wide contract, it follows from §4 of the election that the District Attorney intended to be covered by some grievance procedure. The election states that the District Attorney "consents to the applicability of the grievance procedure set forth in Local Law 53-1967 and the regulations thereunder . . . ." We find that the term "regulations" includes Executive Order 52 and its grievance procedure. Our interpretation is supported by the language of the second paragraph of §4 quoted above which reserves the D.A.'s right to negotiate "any other grievance procedure." The use of the phrase "any other" implies that some procedure is applicable. Therefore, we find that the District Attorney of New York County has elected coverage of the grievance procedure set forth in Executive Order 52 and that such procedure culminates in advisory arbitration.

We must further decide whether the Union's claim herein is within the definition of grievance set forth in §1173-3.0o of the NYCCBL. Section 2 of the election binds the District Attorney to

"the results of collective bargaining between the City . . . and representatives of employees . . . designated by the Board of Certification in a bargaining unit which may consist of employees of the City and employees of the New York County District Attorney' s Office in non-unique (City-wide) titles . . . . The election further states that "the results of such collective bargaining shall be binding with respect to . . . fiscal matters (including fiscal matters which must be uniform in application to all employees) . . . ." District Council 37 is the union designated by the Board of Certification to bargain for employees on matters which must be uniform in application to all employees. The results of the bargaining between the City and District Council 37 are embodied in the City-wide contract and include the provisions of Article IV governing overtime pay -- a fiscal matter -- which the Union alleges have been violated. Both parties have proceeded before us on the basis that Hearing Reporters are covered by Article IV of the City-wide contract relating to overtime pay. We find that Article IV of the City-wide contract applies to Hearing Reporters in the New York County District Attorney's Office.

The Union alleges that Hearing Reporters have not been paid overtime compensation as required by Article IV of the contract. That is "a dispute concerning the application or interpretation of the

terms of a written collective bargaining agreement . . . " with the statutory definition of a grievance.

As to the Union's assertion that the grievance is essentially against the Bureau of the Budget, we note that the Hearing Reporters grieving herein are employed by the Office of the New York County District Attorney and not by the Bureau of the Budget. Pursuant to §1173-4.0c of the NYCCBL, the District Attorney elected limited OCB coverage for his employees.

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 Union's request for arbitration is granted to the extent that the arbitration award shall be advisory, and it is further

ORDERED, that the City's Petition is dismissed.

DATED: New York, N.Y.  
APRIL 30, 1973.

ARVID ANDERSON  
C h a i r m a n

ERIC J. SCHMERTZ  
M e m b e r

WALTER L. EISENBERG  
M e m b e r

HARRY FRUMERMAN  
M e m b e r

MORRIS IUSHEWITZ  
M e m b e r

THOMAS J. HERLIHY  
M e m b e r

griev-