OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-19-74

Petitioner, DOCKET NO. BCB-177-74

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent
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DECISION AND ORDER

District Council 37, AFSCME, AFL-CIO, the certified representative of a unit of employees including various recreational titles, requests arbitration of its grievance that the City failed to pay assignment differentials, effective 7/1/72, and Wage increases effective 1/1/74, to employees in recreational titles covered by a collective bargaining agreement for the period 1/1/72 to 12/31/74. The remedy requested is "retroactive payment with interest and current payment."

The City contests arbitrability on the ground that the contract does not require the payment of interest with retroactive payments, and on the further ground that the question of interest is a matter for City-wide negotiations.

The Union argues that the question of "the particular remedy which is appropriate for a particular violation of a contract" is for the arbitrator "unless the contract itself limits his power to provide a remedy."

The Contractual Provisions

Article III of the unit contract provides for the wages and other benefits to be paid to employees covered by the contract. Article VI, Section l(A) of the contract defines a grievance as "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement."

Article XVI, Open Items, of the 1970-73 City-wide contract provides:

> "The parties agree that the following items submitted by the Union shall remain open for further negotiation upon the request of the Union:
>
> "a. All wage increases resulting from collective bargaining settlements shall be paid within 30 days after they are scheduled, or within 60 days after the settlement of the contract, whichever is later. Increases not paid within these times shall draw interest at the rate of one percent per month from the schedule date."

Article IX, Section 10 of the 1973-76 City-wide contract provides:

> "The City shall make every reasonable effort to expedite the payment of agreed-upon wage increases, overtime compensation, shift differential pay, premium pay, and employee out-of-pocket expenses, and the Union shall be kept apprised of all progress. If the Union is dissatisfied with the City's effort in these areas, the Union may at any subsequent to July 1, 1974, upon 30 days' notice to the City, re-open its demands number 8, 16, 17, 18 and 24 as listed in Appendix C."

Demands 16 and 18, which are relevant to the instant case, provide:

> "All wage increases resulting from collective bargaining settlements shall be paid within thirty (30) days after they are scheduled, Or within sixty (60) days after the settlement of the contract, whichever is later. Increases not paid on time shall draw interest of one percent (1%) per month."
>
> "Demand No.18
>
> All night shift, weekend and assignment differential payments shall be paid within thirty (30) days after they are earned. Such differentials not paid within thirty (30) days shall draw interest of two percent (2%) per month.

Thus, the question of interest on "wage increases" was an open item under the 1970-73 City-wide contract, and the question of interest on "wage increases" and "assignment differential payments" is an open item under the current City-wide contract for which a bargaining notice has been filed (No. 747-74).

Discussion

Section 1173-4.3a(2) of the NYCCBL provides that it matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated" with the City-wide bargaining agent. Pursuant to that provision, the City-wide contract provides for the payment of night shift differentials and overtime payments. However, unit representatives negotiate

unit contracts, such as the one in the instant case, providing for wage increases and assignment differentials based on the duties being performed.

Despite the fact that wage increases and assignment differentials are negotiated on the unit level, the City and the City-wide representative bargained and reached agreement concerning the prompt payment of wage increases and premium pay. Furthermore, the demands subject to reopening by the City-wide representative under the current City-wide contract include the imposition of interest on late payments of wage increases and assignment differential payments. The City maintains that the unit representative herein is bound by the City-wide agreement concerning prompt payment of wage increases and premium pay, and is precluded from demanding retroactive payments with interest because of the reopening of negotiations on these matters at the City-wide level.

The City does not contend that, apart from the demand for interest, the grievance is not arbitrable under the NYCCBL and the Board's prior decisions on arbitrability.

In Decision No. B-14-74,[1] the Board rejected the City's contention that the provisions of the City-wide contract denoting the demands for interest on overdue payments as "open items" subject to further negotiation precluded an arbitrator from considering an award of interest in fashioning the appropriate remedy where the union sought overdue payments of night differentials and overtime pay. The Board said:

> "In the instant case, the parties have bargained on the subject of interest without reaching any agreement other than agreement to bargain further. The Parties have done nothing to date which would tend to limit, it the general Powers of an arbitrator, dealing with a dispute under their contract, to consider interest. It is this fact which mandates our decision that the matter is arbitrable. The fact that the parties have bargained on the subject of interest, Pursuant to a union demand and that agreement has not been reached may or may not have significance to the arbitrator in determining whether or not an award of interest would be an appropriate remedy herein, assuming that any remedy is warranted. For purposes of this Board's determination of the arbitrability of the issue, however, those facts are irrelevant."

[1] City of NY and DC 37.

Thus, we have held that nothing in the 1973-1976 City-wide contract probhits an arbitrator from considering an award of interest in fashioning an appropriate remedy under that contract.

The Board has consistently followed the rule that the question of remedy is for the arbitrator.[2] Once a claim has been found arbitrable, the Board may not inquire into the merits of the grievance: the entire matter is submitted to the arbitrator, including the question whether the remedy requested, or any other remedy, is appropriate. Our decisions have been consistent with the holding of the United States Supreme Court in United Steelworkers v. Enterprise Wheel and Car Corp., 363 US 593, 47 LRRM 2723, 2725 (1960):

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies''

[2] City of NY and Local 371, Dec. No. B-9-71; City of NY and CWA, et al., Dec. No -5-74; City-of NY and DC 37., Dec. No. B-14-74.

We have further found, consistent with court decisions, that an award of interest is "within the broad discretion of an arbitrator in fashioning appropriate relief." [3]

In summary, our decisions have held that the power to fashion an appropriate remedy, which may or may not include interest, belongs solely and inherently to the arbitrator and is subject only to the limitations which the arbitrator may find in the applicable contract or contracts and in any applicable laws.[4] In each particular case, the arbitrator has the duty to fashion, a remedy required by the facts of that case and by the language of the contract. The remedy, insofar as it deals with direct redress of the alleged wrong grieved against, must draw its "essence from the collective bargaining agreement and the arbitrator's function is to apply his knowledge of a particular situation to a particular agreement. [5]

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[3] Steelworkers v. U.S. Gypsum Co., 79 LRRM 2833., 2838 (ND Ala., 1972), quoted in Dec. No. B-14-74. See also Cloak, Suit & Dressmakers v. Senco., Inc., 69 LRRM 2142 (D Mass., 1968); Textile Workers, Local 179 v. Western Co. 86 LRRM 2C39 (ED Miss., 1974).

[4] For example, §3-d of the General Municipal Law and §220.8-c of the Labor Law provide for the payment of interest in certain cases.

[5] Steelwokers v. Enterprise Wheel & Car Corp., 40 LRRM 2423.

The right of a grievant to request interest and the power of an arbitrator to grant it have a source other than the contract, however. In order to sustain a grievance, the arbitrator must find that there has been a denial of a right covered by the contract; he must determine that the "essence" of the contract has not been adhered to; he may not create new substantive rights by inference or otherwise. In granting interest in connection with a money award, however, the arbitrator requires no such contractual mandate for the power to do so is inherent in his function. Total contractual silence on the matter of interest in no way affects this inherent power.

Specific treatment of the subject of interest may be included in any contract containing an agreement to submit disputes arising under the contract for arbitration. As an aspect of the mandatorily bargainable subject of grievance and arbitration procedures, it is, itself, a mandatorily bargainable subject upon the demand of any party to negotiations for a collective bargaining agreement. The effect of such bargaining is to change an existing condition rather than to

create a new one. For even in the absence of contract language as to interest, any arbitrator empowered to make an award of money is vested with the inherent power to grant interest; and any contract provision with regard to interest will necessarily have the purpose and affect of increasing or decreasing or otherwise altering the bounds of that inherent power. It follows that in any dispute where no contractual provision as to interest exists, the demand for interest is addressed to the discretion of the arbitrator rather than to a contract right. In the instant matter, the Union does not allege that any contract provision specifically entitles them to interest. The City, on the other hand, does not allege that any contract provision bars such relief. Instead, it maintains that because there has been and continues to be an effort to reach an agreement at the City-wide level of bargaining which would contractually define the rights of the parties with regard to interest[6] in arbitration awards and because such agreement has not been reached, the Union is attempting to obtain in arbitration. what it failed to obtain in negotiation. We find that that is not the case. In the absence of a

[6] Although the question of appropriate level of bargaining of the subject of interest is not directly presented here, we hold that it is an appropriate subject of bargaining at the City-wide level. This ruling is consistent with our prior determination in City of N.Y. and SSEU

Footnote 6 (cont'd)

Decision No. B-11-68 (pay practices are City-wide matters because City employees are paid centrally through the Comptroller's Office); City of N.Y. and D.C. 37, Decision No. B-4-69 (demands for prompt payment of differentials and overtime are not bargainable on a unit level); and D.C. 37 and City of N.Y., Decision No. B-1-70 (demands for interest on wage increases not paid within 60 days are bargainable on a City-wide level).

We note that there are now pending before us a number of cases in which the right of a unit representative to invoke arbitration as to rights created by the City-wide contract is at issue. Leaving the disposition of the broader questions presented in those cases to another decision, we, nevertheless, hold that as to the specific subject matter of interest, any provision relating thereto in a City-wide contract would necessarily be relevant and controlling in any arbitration potentially involving the award of money, regardless of the source of the underlying grievance or the identity of the grieving union.

contractual limitation upon the arbitrator's inherent power to grant interest, a party seeking a money award may address a demand for interest to the discretion of the arbitrator. In the exercise of that discretion, in this as in any other such case, the arbitrator is, of course, free to determine what significance, if any, the history of bargaining regarding interest should have upon his decision whether or not to grant interest, assuming that any award in favor of the is warranted.

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 of the City herein be, and the same hereby is, denied; and it is further

ORDERED, that the request of the Union for arbitration be, and the same hereby is, granted.

DATED: New York., !I.Y.
November 12, 1974

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

THOMAS J. HERLIHY
MEMBER

JOSEPH SOLAR
MEMBER

EDWARD F. GRAY
MEMBER