City v. L. 1183, CWA, 13 OCB 3 (BCB 1974) [Decision No. B-3-74 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - - - - - - - - - - - - - - - X

THE CITY OF NEW YORK

Petitioner DECISION NO. B-3-74

-and- DOCKET NO. BCB-163-73

LOCAL 1183, COMMUNICATION WORKERS
OF AMERICA, AFL-CIO

Respondent
- - - - - - - - - - - - - - - - - - - X

DECISION AND ORDER

The Union requested arbitration of grievant's claim that an "unduly severe penalty of two weeks suspension and disparate treatment" had been imposed by the Board of Elections on the grievant for refusing to work over-time. The Union seeks "restoration of pay" for the grievant.

The Board of Elections contends-that the grievance is not arbitrable because under the terms of the Board's election of OCB coverage the Board of Elections is not bound by any agreement negotiated by OLR concerning disciplinary actions. It further maintains that the contract between the parties does not contain any pro-visions placing disciplinary matters within the scope of the negotiated grievance procedure. The City argues that

during negotiations for the current contract the union unsuccessfully sought a provision defining a grievance as "a claimed unjust dismissal or other disciplinary action." The affidavit of Adam Klein of the office of Labor Relations, alleges that during the negotiations he reminded the union that "disciplinaries including dismissal were not included in the language and were not to be implied by any other language therein." According to Klein, the union agreed. The Union has not disputed the affidavit.

The Union argues, in substance, that the penalty imposed on the grievant was "contrary to the existing policies and practices of the Board of Elections, in that on prior occasions employees who refused to work over-time under similar circumstances were not suspended." The Answer further contends that while the election of the Board of Elections "specifically excepts 'matters relating to discipline and grievances' from any collective bargaining agreement to which the Board of Elections may become a party, the extant Collective Bargaining Agreement nevertheless expressly provides for a grievance procedure under Article VIII thereof. (Underscoring added) Accordingly,.

the said (election] has no binding effect upon either Petitioners, Respondent or both."

The election of OCB coverage by the Board of Elections, dated May 8, 1970, provides, in pertinent part:

> "1.(a) The Board of Elections consents to be bound by the results of collective bargaining between the City ... and representatives of employees ... except as to matters relating to discipline and grievances.

The contract between the parties, dated March 9, 1973 and executed by the Union, the Corporation Counsel, the Director of the office of Labor Relations and the President of the Board of Elections, provides:

"Article VIII 1-GRIEVANCE PROCEDURE
Section 1, -Definition: The term 'grievance' shall mean

> (A) A dispute concerning the application or interpretation of the terms of (i) this collective bargaining agreement
>
> (B) A claimed violation, misinterpretation, or misapplication of the rules or regualtions, existing policy, or orders of the Board of Elections issued pursuant to its authority under Section 36 of the Elections Law in reference to the terms and conditions of employment."

We find that the language of the 1970 election of NYCCBL coverage by the Board of Elections excluded "discipline

and grievances" from the subjects which the Board was mandatorily required to bargain with a representative of its employees. [1] Subsequently, the parties signed a contract which provided for the resolution of grievances, but which, despite Union demands, did not refer to the resolution of disputes over disciplinary action.

Thus, the effects of the Board's election have been amended to the extent of bringing the subject of grievances within the scope of bargaining for purposes of the current contract between the parties. The specific reservation by the employer of the right not to bargain on grievances was waived in the bargaining for that contract. The waiver cannot be expanded by inference and cannot be extended to include other subjects with regard to which the Board reserved a right not to bargain. The effect of the election so far as it deals with subjects of bargaining, is to make permissive certain otherwise mandatory subjects of bargaining. They are bargainable at the option of the employer. To hold

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[1]Compare Decision No.B-5-73 where the election of OCB coverage by the New York County District Attorney excluded binding arbitration of grievances.

that consent by the employer to bargain on any one such subject is a consent to bargain on all or a waiver of all reserved rights would have the effect of discouraging bargaining on permissive subjects, would not be in the interests of sound labor relations and would be inconsistent with the expressed policy of this Board.[2]

The grievance herein seeks to arbitrate a "penalty of two weeks suspension" which clearly constitutes a disciplinary action by the employer. Under the terms of the election of OCB coverage and the provisions of the collective bargaining agreement negotiated by the parties, we are constrained to find that the complained of disciplinary action is not arbitrable. We shall grant the City's petition contesting arbitrability and deny the Union's request for arbitration.

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[2] See Decision NO.B-11-68 for a discussion of mandatory and permissive subjects of bargaining

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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 City's Petition be, and the same hereby is granted, and it is further

ORDERED, that the Union's request for arbitration be and the same hereby is dismissed.

Dated: New York, N.Y.
February 1, 1974

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

THOMAS J. HERLIHY
Member

EDWARD SILVER
Member

ERIC J. SCHMERTZ
Member

HARRY FRUMERMAN
Member

HARRY VAN ARSDALE, JR.
Member