***Communications Workers of America*, 13 OCB 5 (BCB 1974) [Decision No. B-5-74 (Arb)], *rev'd in part*, *Burnell v. Anderson*, N.Y.L.J., Nov. 26, 1975, at 8 (Sup. Ct. N.Y.Co.)(Reversal rendered moot by amendment to CSL § 100(1)(d); *see Rockland County v. Rockland County Unit, CSEA*,74 A.D.2d 812 (2d Dep't 1980, *aff'd*, 53 N.Y.2d 741 (1981)).**

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

THE CITY OF NEW YORK

-and-

Petitioner

COMMUNICATION WORKERS OF AMERICA, AFL-CIO

-and-

CIVIL SERVICE BAR ASSOCIATION

Respondents

- - - - - - - - - - - - - - - - - - -X

DECISION NO. B-5-74

DOCKET NO. BCB-162-73
BCB-162-73

DECISION AND ORDER

The city's petitions herein contest the arbitrability of grievances, all of which arise in the Department of Social Services, filed by Communication Workers of America, AFL-CIO and the Civil Service Bar Association (hereinafter referred to respectively as CWA or the Union and CSBA or the Association). Since the pleadings and other supportive material filed by the parties in both the CWA and CSBA situations raise the same issues for decision by this Board, we issue the decision herein as a determination in both docketed matters.

## Positions Of The Parties

CSBA's request for arbitration alleges a violation Of Articles III (Salary), V (Productivity and Performance), and VI (Grievance Procedure) of the parties' collective bargaining agreement and, in essence, complains that certain attorneys who performed the functions and duties of the higher-titled positions of Senior Attorney and Supervising Attorney at the request of the Social Services' Administration, were never compensated for the performance of such higher-titled work.

The CWA request for arbitration alleges a violation of Article IX (Wages and Salaries) of the parties agreement, and, like the CSBA matter, complains that certain administrative employees in the Department of Social Services who assumed higher level duties in the positions of Office Manager, Assistant office Manager, Training Specialist, Site Manager, Administrative Assistant and Administrative Associate were never paid for such higher-level duties from the date said duties were assumed.

Both CSBA's and CWA's agreement with the city (Article VI, §2 and Article VIII, §2 respectively) provide for the final and binding arbitration of grievance in accordance with the Consolidated Rules of the Office of Collective Bargaining and both agreements define the term "grievance" pursuant to S1173-3.0(o.), as follows:

> " (A) A dispute concerning the application or interpretation of a tern, of this collective bargaining agreement;
>
> (B) A claimed violation, misinterpretation, or misapplication of rules or regulations, existing policy, or orders of the agency which employ the grievant affecting the terms and conditions of employment;
>
> (C) A claimed assignment of employees to duties substantially different from those stated in their job classifications;
>
> (D) A claimed improper holding of an open competitive rather than a promotional examination. "

The CSBA agreement adds to this definition

> "(E) A claimed wrongful disciplinary action Against an employee."

The city asserts in its petitions in both the CSBA and CWA matter that the unions are claiming that certain provisional appointments should have been effective earlier than they actually were and,

> "Respondent's claim, although couched in terms of a salary issue, in fact, concerns the effective date of certain provisional appointments."
>
> "Appointments are not effectuated pursuant to contractual relations but Civil Service Law."
>
> "A challenge to the effective date of a provisional appointment is not included in the contractual definition of the term grievance and therefore not arbitrable

With respect to CSBA's request for arbitration the city's petition further asserts that,

> "Respondent's request for arbitration alleges a violation of three Articles of the collective bargaining agreement. These Articles cover 13 pages."
>
> "The request for arbitration being too vague and ambiguous does not permit appropriate analysis and response."

On this latter allegation, CSBA answers that it "proceeded through the various steps of the grievance procedure provided for in the contract" including a hearing before the city's Office of Labor Relations (OLR), that "documents and proofs were submitted and that "OLR . . . is fully aware of the nature of grievant's claim, position, legal arguments and equity of its cause."

CSBA denies that it has no contractual claim stating that it "grieves both as to salary and effective date of provisional appointments" and further answers that members of the Association (some twelve in number) employed by the Division of Legal Services of the Department of Social Services "were requested and/or directed by their superiors and administrative officers to assume duties, functions and responsibilities of higher titles" and wer e lead to believe that "the procedures necessary to effectuate such promotions had been initiated and approved," and that employees would be compensated in accordance with the pay scale for the higher titles as of the date they were assigned to and assumed such titles (July lst or 5th, 1972). CSBA states that, "The employees affected did assume such higher titles, responsibilities and dutiest but were not compensated in accordance with the pay scale for such higher titles."

Finally, by way of affirmative defense, CSBA argues that the city did not raise the issue of arbitrability in a timely manner since "(t)he Request for Arbitration was served upon the Petitioner on July 19, 1973. The Petition is dated August 24, 1973, and the Verification has no date."

CWA (as did CSBA) denies that it has no claim of grievance where employees were paid salaries in accordance with Civil Service provisional appointment dates and in its verified amended answer alleges that eight employees "were either promoted, appointed or otherwise assigned to higher level positions" on certain dates and "commenced performing the duties and functions of said higher level positions" on said dates, "but were not paid the appropriate salary of their higher level positions to which they were either promoted, appointed or assigned

CWA further answers that many of the grievants were specifically told they would receive retroactive pay on the dates they commenced the duties and functions of the higher level positions and that several grievants were informed they would receive retroactive pay to dates prior to those on which they actually began receiving the pay of the higher level positions.

CWA alleges that the city is not only in violation of Article IX of the collective bargaining agreement, but also 5115, 5131(2)(a) and other sections of the New York Civil Service Law, the "Regulations Establishing Alternative

Career and Salary Pay Plan Applicable to Career and Salary Plan Employees in Certain Classes of Positions Covered by Collective Bargaining Agreements" and amendments thereto, applicable case law, the policy of OLR and the policy of the Department of Social Services. CWA further alleges that the city has been arbitrary in treating these grievants differently from other employees who received retroactive pay in similar circumstances and that the City has been unjustly enriched by its actions.

Lastly, CWA alleges that the city is estopped from denying retroactive pay in the instant case and that the city waived its right to contest arbitrability by failing to timely object to the Board concerning the arbitrability of Case No. A-269-72, involving "an identical grievance between the same parties . . . and the same Department

The parties have, provided us with extensive memoranda containing numerous citations and after lengthy discussion and deliberation, and upon consideration of all materials presented, we render the following decision.[1]

## DECISION

We will first respond to the affirmative defenses raised by CSBA and CWA in their answers. Although the petition of the city challenging the arbitrability of these grievances was not filed with the Board until well beyond ten days following the filing of the requests for arbitration, none of said requests contained the ten day notice require- provided in Section 6.4 of our Revised Consolidated Rules. Thus, the city is not precluded from filing its petitions contesting the arbitrability of these matters and said petitions are considered timely and proper and in

[1] Although CWA's memorandum refers us to prior arbitration decisions awarding back pay where questions of appointment, promotion, or assignment were involved, the City did not appeal from those awards and therefore we find no court decisions to assist us in rendering our decision. See arbitration awards in OCB case Nos. A-16-68, A-74 & 75-69 and also see OLR Step III grievance decision dated August 12, 1971 involving an assignment to Supervisor II duties.

accordance with Section 7.3 of our rules.

The fact that the verifications accompanying the city's petitions are undated is not considered a fatal flaw by this Board. --he verifications did accompany the city's petitions as required by Section 7.5 of our rules and the Office of Collective Bargaining time stamp shows that verifi- cations and petitions were all received simultaneously on August 24, 1973.

CWA claims that the city by failing to contest arbitrability in a case involving "an identical grievance" between the same parties is thereby precluded from challeng- ing the arbitrability of the instant matter. CWA offers us no support for its contention and we find no merit in its claim. Assuming that the case before us is identical to the case cited by CWA (and more likely than not there are distinguishing factors where several grievants and different titles are involved in each case), we shall not here apply an estoppel where the stated policy of the NYCCBL favors and encourages the use of final, impartial arbitration for the resolution of grievances between municipal agencies and cert-

ified employee organizations.[2] he fact that arbitrability is not raised as an issue in one case should not preclude the issue from being raised in other similar cases which might arise in the future.

Concerning the city's contention that CSBA's request for arbitration is "too vague and ambiguous" for response, we find that the request for arbitration and all of the grievance procedure steps preceding said request have made, or should have made,the city fully aware of the contract dispute herein and CSBA's position as it relates thereto.

Since OLR, by way of its supportive memorandum, concedes that an out-of-title grievance is arbitrable and limits its challenge to arbitrability solely to the remedy sought, the remainder of our decision is addressed to the remedy question.

The city's basic argument is that permitting grievants to recover back pay without their having been appointed or promoted to higher positions pursuant to Civil Service Law and Rules would be an unlawful remedy in excess of the arbitrator's authority. To begin with we believe it

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[2] §1173-20 Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in con-
tract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

should be noted that this contention is not based upon a reading of the plain language of the unions' requests for arbitration but upon the city's interpretation of that language. We note that the requests for arbitration filed by CSBA and CWA do not request that grievants be "appointed" or promoted" to particular Civil Services titles, but that they be accorded a remedy for "higher title functions" or "higher level duties" for the periods of time in which performed. In any case, we neither adopt nor reject the city's interpretation of the unions' demands for we be lieve that an even more fundamental error is intrinsic to the city's arguments with regard to the nature and quality of the remedy sought by the unions. 'he error lies in the city's failure to make a distinction between the alleged impermissibility of the remedy sought and the arbitrability of the underlying alleged contract breach; for it is the general rule that arguments addressed to questions of remedy are not a bar to the arbitrability of the grievance and the propriety of the remedy sought is to be considered by the arbitrator.

As stated by the U.S. Supreme Court in United Steelworkers v Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423, 2425 (1960),

> "When an arbitrator is commissioned to interpret and apply the collective bar- gaining agreement, ne 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. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency...."

This Board finds it appropriate to adopt the reasoning of the courts when faced with a broad arbitration clause.

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, When it was his judgment and all that it connotes that was bargained for.
>
> "The courts therefore have no business weighing the merits of the grievance.... ..hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." United Steelworkers v. American Mfc. Co., 363 U.S. 564, 46 LRRM 2414, 2415-2416 (1960).

The position taken herein is consistent with prior decisions of the Board. In Decision No. B-24-72 we held arbitrable a grievance alleging "a claimed assignment of employees to duties substantially different from those stated in their job classification."

> "The grievant clearly asserts that he performed a job for eleven months in an out of title capacity. Therefore, he has a contractual right to arbitrate that claim and seek a remedy." (Underline supplied)

And the Bcard adopted the following policy in B-9-71:

> "With exceptions which the Board will determine on a case-by-case basis all matters submitted to an arbitrator for resolution by the parties lie exclusively within his jurisdiction . . . . In the instant case, the issue of the propriety of the involuntary transfer of the grievant is, concedely, arbitrable and resolution of the issue should be made by the adjudicator and in the forum selected by the parties." (Underline supplied)

Similarly, in B-11-69 the union sought to arbitrate the elimination of promotion opportunities and failure to make appointments. The Board held such matters were not arbitrable within the statutory definition of grievance, but added by way of dicta,

> "Our determination does not affect respondent', right to process grievances for out-of-title work, or to arbitrate the question of relief from out-of-title work." (Underline supplied)

Finally, the City in B-2-69 did not raise Civil Service Law as a bar to a back pay remedy for out-of-title work; 1iowever, it alleged that out-of-title work might violate Section 61 (appointments and promotions) of the Civil Service Law, _`-ut not constitute a contract violation. The Board found the matter arbitrable leaving the question of remedy for the arbitrator to decide.

Recent expressions of the N.Y. Court of Appeals, we believe, support the approach this Board has taken to arbitration. With regard to a specific contract clause providing for the arbitration of disputes concerning disciplinary action taken against tenured teachers, the Court states,

> "It is of more than passing significance that the Taylor Law explicity vests employee organizations with the right to represent public employees not only in connection with negotiations as to the terms and conditions of employment but also as to 'the administration of grievances arising thereunder.' Indeed it is the declared policy of this State to encourage 'public employers and ***

> employee organizations to agree upon procedures for resolving disputes ' And aribtration is, of course, part and parcel of the administration of grievances". Board of Education of Huntington v. Assoc. Teachers of Huntington, 30 N.Y. 2d, 122 (1972).

Concerning the school board's duty to bargain the Court in Huntington found, "Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one', and there is, no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitely prohibits the public employer from making an agreement as to a particular term or condition of employment."

In many ways the Court in Huntington has echoed the rationale of the Steelworkers Trilogy.

> "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.
>
> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore tome within the scope of the grievance and arbitration provisions of the collective Agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process." United steelworkers v. Varrior & Gulf Navigation Co. 363 U.S. 574, 46 LRRM 2419 1960)..

We find it noteworthy that the Court of Appeals in deciding Assoc. Teachers of Huntington v. Board of Education of Huntington, 33 N.Y. 2d # 229 1%1973) saw fit to refer to the dissenting opinion of Justice HopUns in the court below that arbitration is considered so preferable a means of settling labor disputes, it can be said that public policy impels its use.

In Antonopoulou v. Beame, 32 N.V. 2d 126 (1973) the Court of Appeals considered whether the payment of public monies pursuant to a grievance settlement awarding back salary for a period when no services were rendered constituted a gift of public funds in violation of Article VII, Section 1 of the State Constitution. The Court agreed with the dissenting opinion in the court below rejecting the "gift" theory and finding that

> "The grievance award was a bargained-for, contractualright, as binding as though set forth in the contract itself.... [i]t is no more a gift than any other award of damages for unlawful deprivation of an opportunity afforded by contract."

Whether or not a matter is arbitrable depends upon whether the parties are subject to the arbitration process for resolving contract grievances and whether the particular grievance alleged is within the scope of that agreement to

arbitrate. if the answer to both of those questions is IlYes", the matter is arbitrable. Ordinarily the parties then appear before an arbitrator where they present their respective arguments as to procedural arbitrability, if any, as to the merits of the underlying grievance, and as to remedy. In the instant case there is apparently no question as to procedural arbitrability; as to the merits ofthe underlying grievance, the city apparently concedes arbitrability and to some extent does not contest the facts alleged in support of the grievance. Thus, the only major point at issue before us is the matter of remedy. 1.'either these facts nor the possibility (which the city sees)that the arbitrators award might be in violation of law or otherwise in excess of his authority, constitute a basis for departure from the general rule stated above that the question of remedy should be resolved by an arbitrator rather than by this Board.

We are reluctant to join the city in speculating as to what the arbitrator's award might be in this matter but do so in order to dispel any impression which might derive from our failure to respond to the city's contentions in this regard. --e can conceive of a number of alternatives to which an arbitrator might resort in resolving this matter. Taking the city's speculation first, it is possible that an arbitrator might find for the unions and award back pay after due consideration of the arguments of the parties concerning the

applicability of the Civil Service Law. The arbitrator might decide that the back pay remedy sought is improper and devise a completely different remedy. There are numerous decisions where arbitrators have found violations of contract without issuing orders or a remedy; and, in others, arbitrators have issued orders to cease and desist without any further remedy.

Of course, an arbitrator's award may not violate the law. Therefore, regardless of what the arbitrator's award might be, each of.the parties has the right by operation of law to challenge any award which it believes to be in violation of law or in excess of the arbitrator's authority.

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

ORDERED, that the respondents requests for arbitration be, and the same hereby are, granted.

DATED: New York,
March 18. 1974

ARVID ANDERS0N
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

HARRY VAN ARSDALE, JR.
MEMBER

HARRY FRUMERMAN
MEMBER