City v. CWA, 13 OCB 8 (BCB 1974) [Decision No. B-8-74 (Arb)]

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

Respondent

- -X

DECISION NO. B-8-74

DOCKET NOS. BCB-170-74
Bcb-172-74

DECISION AND ORDER

In BCB-170-74, Communications Workers of America, Local 1180, AFL-CIO, seeks to arbitrate a grievance that Vincent Mancuso, A Supervising Clerk in the Department of Social Services provisionally appointed to the higher title of Administrative Assistant, was ."subjected to a disciplinary procedure without representation by Union".The Union seeks" restoration of grievant to his previous position plus recovery of difference in pay. The Petition of the City of New York contends that the grievance is not arbitrable.

In BCB-172-74, the Union seeks to arbitrate a grievance that Anthony A. Vento, an Administrative Assistant in the Department of Social Services provisionally appointed to the higher title of Administrative Associate, was "subjected to

a disciplinary hearing without union representation." The Union seeks application of "Procedure No.2.10.1 Human Resources Administration'' and "restoration of grievant to his previous position plus recovery of difference in pay." The Petition of the City of New York contends that the grievance is not arbitrable.

The contract between the parties applies to various administrative titles including Administrative Assistant and Administrative Associate. The contract provisions cited by the Union provide, inter alia:

> "Article I, Section 1.
>
> The City recognizes the Union as the sole and exclusive collective bargaining representative for the bargaining unit set forth below...."
>
> "Article VI, Section 1.
>
> Definition: The term "grievance shall mean (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
>
> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, existing policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the rules and regulations of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration;
>
> (E) A claimed wrongful disciplinary action against an employee."

"Article VI, Section IV.

> In any case involving a permanent competitive employee ... upon whom the agency head has served written charges of incompetency or misconduct ... a conference with such employee shall be held .... The employee may be represented at such conference by a representative of the Union. . . " .

In addition, the Union cites the written procedures of the agency (NO.2.10.1, 73-32), claiming that these procedures are rules or regulations applicable to the agency which employs the grievants and that pursuant to the collective bargaining contract an alleged violation of these rules is an aribtrable grievance.

The written procedures cited by the Union provide a guide to the administrative and supervisory personnel of HRA of the steps to be followed where disciplinary action is required. They include keeping records of employee incompetency, conferences with employees, preparation of written charges and specifications and initiation of the action contemplated. The written procedures vary according to the civil service status of the employee to be disciplined: in the case of probationary, provisional and non-competitive employees with no permanent competitive civil service status there is no provision that a hearing be held prior to implementation of the disciplinary action.

The briefs and other papers submitted by the parties in BCB-170-74 indicate that grievant was on leave from his permanent civil service title of Supervising Clerk and had a provisional appointment to the higher classification of Administrative Assistant effective August 28, 1972. On September 14,1973, the grievant attended a meeting with his immediate supervisor and a Deputy Director of the Department of Social Services at which a number of matters were discussed including grievant's demotion. The demotion was effective October 29, 1973, when the grievant was returned to his permanent civil service position of Supervising Clerk. The meeting of September 14, 1973 was apparently held at grievant's request pursuant to a memorandum in which he requested a change of assignment.

The facts in BCB-172-74 are similar. The grievant, an Administrative Assistant in the Department of Social Services, was appointed to the provisional title of Administrative Associate in November, 1971. In June, 1972, and sometime prior to August, 1973, two uncomplimentary anonymous letters were sent to the Director of the Bureau of Medical Assistance by workers under his supervision at a local medical center. The grievant refused to discuss these letters with his supervisor and demanded that he be"allowed to face my accusers in the presence of my Union representative." On August 24, 1973, grievant attended a conference with his supervisors to

discuss his problems and work record. In September, 1973 grievant was returned to his permanent civil service title of Administrative Assistant, and, in October, he was transferred to another work location. Grievant contends that the August conference was a hearing at which he should have been afforded union representation and that the discussion of his problems with employees under his control was harrassment.

POSITIONS OF THE PARTIES

The City asserts that the grievances are not arbitrable because they seek "a review and reversal of a decision to terminate a provisional appointment, which determination is solely and exclusively within the province of management", and because the application of Article VI, Section 4 of the contract between the parties "is specifically limited to a permanent employee." The City's brief contains arguments and citations supporting the well-established proposition that a provisional employee has no tenure, may be removed at will, and is not entitled to a hearing under the Civil Service Law. The briefs also argue that the agency procedures cited by the Union do not apply in the instant cases because grievants were not "disciplined" and, assuming arguendo that they were disciplined, because provisional employees are not entitled to the benefit of the cited agency procedures.

The Union's position is that the grievants seek affirmation of their right "to union representation in accordance with the contract, Executive Order and Departmental Procedures." The Union argues that the disputes come within the contractual definition of a grievance. The Union's Answers in both cases argue that both grievants are permanent competitive employees and are therefore entitled to their rights under the contract and agency procedures even though they were serving provisionally in higher titles. In BCB-170-74 the Union apparently contends that the City is estopped from opposing arbitration because it participated in the first steps of the grievance procedure.[1]

Article VI, Section I(E) refers to a "disciplinary action" and Section IV refers to "charges of incompetency or misconduct". Both parties have used the term "disciplinary action" in discussing grievants alleged rights under Section IV although it is not clear that all actions under Section IV would necessarily be "disciplinary". However, this variation in contract language has no bearing on our decision concerning arbitrability: the Board has held

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[1] It is well settled that the proper time to raise a question of arbitrability is when a request for arbitration is made and not before. The Board's policy is to encourage the City to participate in the grievance procedure even if a matter is of questionable arbitrability in the hope that it will be settled in the initial stages of the grievance procedure. (See Office of Labor Relations and City Employees Union, Local 237, I.B.T., Decision NO.B-20-72.)

that the question whether an employee was disciplined within the meaning of a contract term "is clearly a question for the arbitrator to decide." City of New York and Local 1180, CWA, AFL-CIO, Dec. No.B-25-72.

ARBITRABILITY

The contract between the parties defines a grievance as "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement; a claimed violation ... of the rules or regulations ... applicable to the agency which employs the grievant affecting the terms and conditions of employment ... a claimed wrongful disciplinary action against an employee."

The grievants herein assert that the employer has has violated the terms of the collective bargaining agreement and violated agency procedures by denying them union representation at an alleged disciplinary hearing.

The City does not deny that there is a contract between the parties, or that a controversy relating to the Interpretation thereof exists. Instead, the City asserts that the grievants are not entitled to any of the contractual benefits cited by the union. Clearly, this is a "dispute concerning the application or interpretation of the terms" of the contract, and it is therefore a grievance within the definition agreed upon by the parties.

It is well settled that the Board, in deciding questions of arbitrability, will not inquire into the merits of the dispute. The Board must determine whether a matter is arbitrable without speculating about the outcome of the case before the arbitrator.

In City of New York and SSEU. Local 371, DC 37, AFSCME. AFL-CIO, Decision No. B-4-72, the City argued that contract terms cited in the Union's request for arbitration were not intended to deal with the type of condition complained of. Instead, the City argued for an interpretation of the contract in its favor. The Board said:

> "The interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator and not for the forum dealing with the question of the arbitrability of the underlying dispute."

Whether the contract entitles the instant grievants to a hearing with union representation under the circumstances as alleged or as found to have occurred, and whether they are entitled to a remedy, are questions which go to the merits of the dispute and are, therefore, for the arbitrator. However, as to a remedy, if any, it must, of course, be consistent with applicable law. It is not the function of this Board to decide whether any of the cited contractual or agency procedures apply to permanent competitive employees who are serving in other assignments as provisional employees: that is clearly

a decision which calls for interpretation of the meaning of contract terms and therefore it must be left for the arbitrator.

This decision is consistent with the Board's long-established policy of determining arbitrability according to the standards developed by federal and New York State courts. In OLR v Social Services Union, Decision No.B-6-68, the Board adopted these ptandards as enunciated in John Wiley & Sons, Inc. v Livingston, 376 US 543 (1964), 55 LRRM 2769 and in In re Long Island Lumber Co., 15 NY 2d 380 (1965) and determined that it would decide only questions of substantive arbitrability. The standards adopted in 1968 have been adhered to in numerous cases.

The Board has consistently held that:

> "In determining arbitrability, the Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented." (OLR v SSEU, Dec. No.B-2-69. [2]

In City of New York v DC 37 Decision No.B-8-69, the Board indicated that it would not examine the merits of a dispute in applying its standard for determining arbitrability:

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[2] See also City of New York v DC 37, Decision No.B-8-69; City of New York and SSEU, Decision No.B-4-72.

> "It does not appear on the face of the matter that this claim is without foundation." Further examination of the issues and of the merits of the respective contentions of the parties must be left to the arbitrator."

Thus, the standard adopted by the Board requires that a matter be sent to arbitration if the parties are in any way obligated to arbitrate their controversies, if the obligation is broad enough to include the particular controversy and if the claim does not appear without merit on its face.

The Board restated its holding that questions of substantive arbitrability were for the Board in City Of New York v Captains Endowment Assoc., Dec. No.B-19-72:

> "Substantive questions of arbitrability such as whether or not there is a contract between the parties, whether or not a contract between the parties by its terms obligates them to submit their disagreements to arbitration, whether or not an agreement to arbitrate covers a particular subject matter which is in dispute, are questions which ... are properly within the jurisdiction of this Board."

We perceive no compelling reasons for departing from our established policy.

CIVIL SERVICE LAW

The City has raised the applicability of the Civil Service Law. However, the grievants are not asserting rights under the Civil Service Law: They are asserting claimed rights under a contract bargained between the parties. The City's contention that such claims, if proven, would have no merit under the Civil Service Law, is not relevant here.

CONSOLIDATION OF CASES

Both of the petitions challenging arbitrability in these cases raise the same questions for the Board. In each case, the Union, CWA, Local 1180, AFL-CIO, seeks to arbitrate the question whether a permanent competitive civil service employee who has been given a higher provisional title and then later returned to his permanent title, must be given a hearing with union representation when this "demotion" occurs. The City contends that its right to return provisional employees to their permanent titles is unfettered and that no hearing need be held. The City of New York requests that the two cases be "consolidated by the Board for purposes of its determination". Section 13.12 of the Board's Rules provides that: "Two or more proceedings may be consolidated or severed by the Board on notice stating the reasons therefor, with an opportunity to the parties to make known their positions". The Union has acknowledged the

City request for consolidation and has opposed it. However, the Union has not stated the grounds for its opposition nor presented any argument in support of its position. The

Board has previously stated that:

> "Consolidation is proper where there is a plain identity between the issues involved in two or more controversies and a substantial right of one of the parties is not prejudiced by consolidation. (See Symphony Fabrics Corp v Bernson Silk Mills, 12 NY 2d 409, 240 NYS 2d 23; Vigo Steamship Corp. v Marship Corp., 26 NY 2d 157, 309 NYS 2d 165.)
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> "The parties in each of the three arbitrations herein are identical; the underlying issues are the same, and the Union has not alleged or established that a substantial right of the Union would be prejudiced by consolidation. We shall, therefore, order the arbitrations consolidated for hearing."

(City of New York and New York City Local 246, SEIU; Decision No.B-18-71.)

In the instant case, the parties are identical, the issues of contract interpretation are the same and the Union has not alleged that a substantial right would be prejudiced by consolidation. Therefore, the two cases are determined jointly herein by the Board and we shall order them consolidated for arbitration.

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

ORDERED, that the Respondent's requests for arbitration be, and the same hereby are, granted; and it is further

ORDERED, that the cases shall be, and the same hereby are, consolidated for hearing by an arbitrator.

DATED: New York, N.Y
JULY 2, 1974

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

HARRY FRUMERMAN
M e m b e r

I concur -EDWARD SILVER
M e m b e r

I dissent- THOMAS J. HERLIHY
M e m b e r

CONCURRING OPINION OF EDWARD SILVER

I join with the majority.

Unless and until the Board changes its prior determinations that it will refer to an arbitrator questions of contract interpretation which are subject to the arbitration provisions of a collective bargaining contract, I feel it only appropriate to follow those decisions.

DISSENTING OPINION OF THOMAS J. HERLIHY

The Union in both of these cases bases its grievance mainly on Article VI, Section IV of its contract which affords certain contractual rights to permanent competitive employees.

In both of the cases their employees had been granted a leave of absence without pay from their permanent competitive status to enable them to accept provisional appointments in a higher title with the normal terms and conditions under which provisionals are hired. Their right to return to their former title is guaranteed by law.

The contract is silent on protection to provisional employees comparable to that offered to permanent competitive employees in the Article cited.

The Board has long followed the practice of approving all requests for arbitration based on an alleged" or "claimed" violation of contract regardless of how tenuous the allegation or claim is. I believe the time has come for the Board to take another look at its policies in this area. It may well be that the Board should consider whether the grievance has a reasonable and substantial relationship to the clause or contract term that is allegedly being violated.

Because I know that both the City and the Union in the negotiations of this contract were represented by persons with a sound knowledge of the terminology of the Civil Service system within which we operate, and that both parties at that time knew precisely what is meant by a."permanent competitive employee," I must therefore dissent on the decision to send the grievance to arbitration.

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