City v. L. 1182 & City v. L. 237, CEU, 15 OCB 19 (BCB 1975) [Decision No. B-19-75 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

CITY OF NEW YORK, DECISION NO. B-19-75

Petitioner

-and- DOCKET NO. BCB-187-74

COMMUNICATION WORKERS OF AMERICA, AFL-CIO; Local 1182,

Respondent

CITY OF NEW YORK,

Petitioner DOCKET NO. BCB-189-74
BCB-195-74
BCB-196-74

-and-

CITY EMPLOYEES UNION, LOCAL 237, I.B.T.,

Respondent

DECISION MID ORDER

Requests for Arbitration:

These four arbitrability cases present the question whether a unit representative may grieve under the City-wide contract between D.C. 37 and the City of New York.

In BCB-187-74, CWA filed a group grievance pursuant to the grievance procedure of its contract with the City covering Parking Enforcement Agents alleging that the City had violated Article V, Section 17, paragraph C Of the City-wide agreement, in that it refused to grant summer hours to Traffic Control Agents. The City's Petition contesting arbitrability alleged that the

Union's claim is not a grievance under the contract between CWA and the City, and that CWA has no standing to bring a grievance to arbitration pursuant to the City-wide contract. The Union's Answer alleges that a violation of the City-wide contract is a grievance within the meaning of the unit contract between CWA and the City, and further alleges that CWA is "authorized to act in this matter as in past matters of arbitrability relating to City-wide issues in conjunction with and agent for" D.C. 37. To support this argument, CWA offers a letter dated August 21, 1974 from Counsel to D.C. 37 which authorizes CWA "to act as the agent of District Council 37" in connection with the arbitration. The letter states:

> "This authorization is required because of the new language contained in Article XIV, §2, Step IV of the City-wide Contract which provides that only District Council 37 may bring a matter arising under this contract to an impartial arbitration."

The City's Reply asserts that any past practice under prior City-wide contracts was "specifically changed through negotiations" between the City and D.C. 37, and that the 1973-1976 contract specifies that only D.C. 37 may arbitrate under that contract. The City argues that the August 21 letter purporting to authorize CWA to act as the agent of D.C. 37 in arbitrating grievances under the City-wide contract "is of no

legal significance" since the contract "prohibits District Council 37 from so authorizing any other union, as does the New York City Collective Bargaining Law." Attached to the Reply is an affidavit by Anthony C. Russo, First Deputy Director of OLR, averring that he was a chief negotiator in the drafting of the City-wide contract, and that

> "the parties intentionally agreed upon a change in language from the prior City-wide contract, whereby no longer could District Council 37's 'designee' invoke the arbitration procedures but rather arbitration could be invoked 'solely' by District Council 37. In point of fact, District Council 37's own original demands for the 1973-76 City-wide contract contained the described change of language ultimately agreed upon and incorporated into the contract."

In BCB-189-74, Local 237, IBT, filed a request for arbitration pursuant to the grievance procedure of the City-wide contract alleging a violation of the summer hours provision in that the Taxi and Limousine Commission failed to grant a shortened work day to employees in certain Taxi and Limousine inspectorial titles. The City's Petition challenging arbitrability alleges that:

> "Respondent has no standing to assert a violation of the 1973-76 City-Wide Contract since Article XIV, Section 2, Step IV of that Contract specifies that 'solely' District Council 37 may bring a grievance to arbitration, and not,

> as had been the case under the 1970-1973 City-Wide Contract, District Council 37 'or its designee'."

In BCB-195-74 and BCB-196-74, Local 237, IBT, citing the grievance procedures of Article XIV of the City-wide contract alleges a violation of Article 6 of the unit contract and seeks to have expunged certain punishments imposed on two Senior Special Officers by the Department of Social Services. The City' Petitions challenging arbitrability allege that Local 237 may not grieve pursuant to Article XIV "because the Request for Arbitration fails to state a dispute concerning the application or interpretation of the City-Wide Contract" and "only District Council 37, AFSCME, AFL-CIO, may appeal an unsatisfactory Step III decision when such decision concerns the application or interpretation of the City-Wide Contract."

The Contract Provisions:

Article XIV of the 1970-1973 City-wide contract between D.C. 37 and the City provided:

> "Adjustment of Disputes:
> Any grievance concerning matters covered by this agreement shall be governed and controlled by (1) Local Law 53 of 1967, including any amendments thereto; and (2) the rules, regulations and procedures of the Board of Collective Bargaining governing the processing and resolution of grievances, including arbitration.

> Any grievance concerning matters covered by this agreement shall be processed through the grievance procedure set forth in Executive Order No. 52 dated September 29, 1967, including any amendment thereto, provided that any such grievance may be presented and processed by the employee or District Council 37 or its designee but only District Council 37 or its designee shall have the right to invoke and utilize the arbitration procedure provided by such executive order."

Article XIV of the 1973-1976 City-wide contract provides:

> "Adjustment of Disputes:
> Section 1
> Definition: The term "grievance" shall mean a dispute concerning the application or interpretation of the terms of this collective bargaining agreement.
>
> Section 2
> The grievance procedure shall be as follows:
>
> Step I
> The employee and/or the union shall present the grievance verbally or in the form of a memorandum to the person designated by the agency head for such purpose, not later than 120 days after the date in which the grievance arose. The employee may also request an appointment to discuss the grievance. The person designated to hear the grievance shall take any steps necessary to a proper disposition of the grievance and shall reply in writing by the end of the third work day following the date of submission.

Step II
An appeal from an unsatisfactory decision at Step 1 shall be presented in writing to the agency head or his designated representative, who shall not be the same person designated in Step 1. The appeal must be made within five working days of the receipt of the Step I decision. The agency head or his designated representative, if any, shall meet with the employee and/or the Union for review of the grievance and shall issue a decision in writing by the end of the tenth work day following the date on which the appeal was filed.

Step III
An appeal from an unsatisfactory decision at Step II shall be presented by the employee and/or the Union to the City Director of Labor Relations in writing, within 10 working days of the receipt of the Step 11 decision. Copies of such appeals shall be sent to the agency head. The City Director of Labor Relations, or his designee shall review all appeals from Step II decisions and shall answer such appeals within 10 working days following the date on which the appeal was filed.

Step IV
An appeal from an unsatisfactory decision at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within 15 working days of receipt of the Step 111 decision. In addition, the City shall have the right to bring directly to arbitration any dispute between the parties concerning any matter defined herein as a'grievance.' The City shall commence such arbitration by submitting a written request therefor to the Office of Collective Bargaining. A copy of the notice requesting impartial arbitration shall

be forwarded to the opposing party. The arbitration shall be conducted in accord with the Consolidated Rules of the Office of Collective Bargaining. The costs and fees of such arbitration shall be borne equally by the Union and the City. The decision or award of the arbitrator shall be final and binding in accord with applicable law and shall not add to, subtract from or modify the City-wide Contract.

Section 3
As a condition to the right of a Union to invoke impartial arbitration set forth in this Article, the employee or employees and the Union shall be required to file with the Director of the Office of Collective Bargaining a written waiver of the right, if any, of the employee or employees and the Union to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

Section 4
Any grievance of a general nature affecting a large group of employees and which concerns the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement shall be filed at the option of the Union at Step III of the grievance procedure, without resort to previous steps.

Section 5

If a decision satisfactory to the Union at any level of the grievance procedure is not implemented within a reasonable time, the Union may reinstitute the original grievance at Step III of the grievance procedure, or if a satisfactory Step III decision

has not been so implemented, the Union may institute a grievance concerning such failure to implement at Step IV of the grievance procedure.

Section 6
If the City exceeds any time limit prescribed at any step in the grievance procedure, the grievant and/or the Union may invoke the next step of the procedure, except, however, that only the Union may invoke impartial arbitration under Step IV.

Section 7
The City shall notify the Union in writing of all grievances filed by employees, all grievance hearings, and all determinations. The union or a public employee organization which has been designated by the Union to represent the grievant or grievants shall have the right to have a representative present at any grievance hearing and shall be given 48 hours' notice of all grievance hearings.

Section 8
Each of the steps in the grievance procedure, as well as time limits prescribed at each step of this grievance procedure, may be waived by mutual agreement of the parties

Section 9
The grievance and arbitration procedure contained in this agreement shall be the exclusive remedy for the resolution of disputes defined as 'grievances' herein. This shall not be interpreted to preclude either party from enforcing the arbitrator's award in court. This Section shall not be construed in any manner to limit the statutory rights and obligations of the City under Article XIV of the Civil Service Law."

Articles VII and VIII of the unit contract between. CWA and the City provide, inter alia:

> "**Article VII - Citywide Issues**
>
> This agreement shall not constitute a bar to the implementation or binding effect of the collective agreement, which has been negotiated between the City and a Union representing a City-wide majority of career and salary employees concerning issues which are Citywide in scope, (such as overtime and time and leave regulations) affecting and binding upon all career and salary employees, including the employees covered by this agreement.
>
> **Article VIII - Grievance Procedure**
>
> **Section 1.**
>
> Definition: The term 'grievance' shall mean -
> (A) A dispute concerning the application or interpretation of a term of this collective bargaining agreement;
>
> (B) A claimed violation, misinterpretation, or misapplication of rules, or regulations, existing policy, or orders of the agency which employs, 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.
>
> * * *

> Step V - An appeal from unsatisfactory decision at Step IV may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within ten (10) working days exclusive of Saturdays, Sundays and holidays of receipt of the Step IV decision. In addition, the City may commence arbitration on grievances at this Step pursuant to the rules of the Office of Collective Bargaining. Such arbitration shall be conducted by an arbitrator designated from a panel maintained by the Office of Collective Bargaining in accordance with applicable law and its rules and regulations. A copy of the notice for impartial arbitration shall be forwarded to the Director of Labor Relations. The costs and fees of such arbitration shall be borne equally by the Union and the City. The decision or award of the arbitrator shall be final and binding to the extent permitted by and in accordance with applicable law and shall be limited solely to the application and interpretation of this contract, Personnel Order of the Mayor, rule, regulation or order applicable to an agency, and shall not add to, subtract from, or modify this agreement or, any of the aforesaid mentioned instruments."

Article VI of the contract between Local 237 and the City covering Special Officers provides, inter alia:

> "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 regulation of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration;
>
> (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;
>
> (D) A claimed improper holding of an open-competitive rather than a promotional examination; and
>
> (E) A claimed wrongful disciplinary action against an employee

In BCB-195 and BCB-196, Local 237 states that it is proceeding under Section 1 paragraph E, quoted above, and Section 4, Step D which provides a grievance procedure in cases of misconduct. Step D provides:

> "If the grievant is not satisfied with the decision of the Director of Labor Relations, the Union-with the consent of the grievant may proceed to arbitration pursuant to the procedures set forth in Step V of the Grievance Procedure set forth in this agreement.
> (b) Charges based on conduct which occurred before the execution date of this contract shall not be subject to this Section 4."

The contract was executed on April 23, 1974: the alleged instances of misconduct for which discipline was imposed took place in 1973.

Cases BCB-194-74 and BCB-196-74:

These two cases present identical issues. In both cases Local 237 seeks to arbitrate..disciplinary grievances under the unit contract covering Senior Special officers. The Union cites Article XIV of the City-wide contract as the applicable grievance procedure in its requests for arbitration.

It is clear that BCB-195 and BCB-196 are not arbitrable under the City-wide contract. The definition of a grievance in the City-wide contract is "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement." (emphasis added). Thus, a claimed violation of a unit contract is not within the definition of a grievance under the City-wide contract.

On June 26, Mr. Bert Rose of Local 237 informed the Board that:

> "In regard to the above captioned grievances, a review of this Union's files indicates that this Union made an error in filing under the City-wide contract. In all probability, it was a typographical error, and it has been overlooked all this time. Both grievances are raised under the grievance procedure in the unit contract.
>
> * * *

> "I am asking that in View of these circumstances, you allow these two grievances to go to arbitration since they are raised under the unit contract."

On July 1, 1975, the City of New York took the position that:

> "[Local 237] may withdraw the pending Request for Arbitration ... and submit a new Request in order to proceed to Arbitration.
>
> "The City of New York ... does not, however, waive its right to challenge the substantive and/or procedural arbitrability on any new Request for Arbitration."

We shall dismiss the requests for arbitration in BCB-195-74 and BCB-196-74, with leave to the Union to resubmit them in corrected form, within ten days of the date of this decision.

BCB-187-74 and BCB-189-74:

Both of these cases involve requests for arbitration claiming a violation of the City-wide contract. In BCB-189-74, the grievance relating to summer hours was initiated by Local 237 under the City-wide grievance procedure. However in BCB-187-74, the grievance relating to summer hours is brought pursuant to the CWA unit contract. In both of these cases the City raises the argument that a unit representative may not grieve under the City-wide contract. In

BCB-187-74, the City also raises the "argument that a claimed violation of the City-wide contract is not a grievance within the definition of the CWA unit contract grievance procedure.

To support its argument that the request for arbitration states a grievance within the meaning of its unit contract, CWA asserts that a violation of the City-wide summer hours provision is a grievance under the unit contract because "Article VII of the CWA contract effectively incorporates by reference those provisions of the City-wide agreement 'affecting and binding upon all career and salary employees, including the employees covered by this agreement.'" (See above, page 8). CWA urges that "the very question of whether the D.C. 37 contract provisions relating to summer hours is incorporated into the CWA collective bargaining agreement is a question of contract interpretation for the arbitrator, and not this Board." CWA's brief further contends that "the City's failure to grant summer hours .... is a violation and misapplication of the existing policy of the Department of Traffic, and therefore constitutes a 'grievance' within the meaning of paragraph B of Section 1 of Article VIII of the CWA-City collective bargaining agreement." (See above pp.8-9.)

We find that CWA may not grieve the summer hours provisions of the City-wide contract pursuant to the grievance provisions of the unit contract. The language of the unit contract cited by CWA purportedly incorporating by reference

the provisions of the City-wide contract manifestly does not constitute such an incorporation. Article VII of the CWA contract (see above page 8), merely sets forth the existence of the City-wide agreement and provides that its implementation shall not be barred by any language in the unit contract. The language of Article VII, far from incorporating the provisions of the City-wide agreement into the unit contract, instead recognizes that an agreement concerning issues not within the purview of the unit contract has been negotiated by another union. Such language does not confer any rights on the unit representative. Nor do we find that the summer hours provisions may be grieved as "existing policy" under the unit contract. We find that the existence of a summer hours provision in the City-wide contract preempts its consideration as "existing policy" in a grievance brought under any other contract. This is so because the policy served by designating certain subjects City-wide in scope would be defeated by any arbitration award which would be less than City-wide in its implications and enforceability.

Both BCB-187-74 and BCB-189-74 are brought on the theory that a unit representative may grieve under the City-wide contract where the grievance concerns employees in the certified unit. As quoted above on pp. 4-8, the grievance language of the current City-wide contract differs greatly from that of the previous contract.

The Brief submitted by CWA makes the following arguments:

1. CWA should have standing to assert a claim on behalf of unit employees it represents.
2. The language of the City-wide contract which states that "an appeal from an unsatisfactory decision at Step III may be brought solely by the Union to the OCB for impartial arbitration" is meant to exclude employees from requesting arbitration and to provide that only a union may process a grievance to arbitration: that language is not meant to exclude any union other than D.C. 37 from the grievance procedure.
3. D.C. 37 does not unlawfully delegate its exclusive representative status by authorizing another union to arbitrate City wide grievances.
4. D.C. 37 did not intend the language of the City-wide contract to prevent it from designating another union to arbitrate grievances under the contract.
5. Section 7 of Article XIV of the City-wide contract (quoted at page 7) clearly contemplates that D.C. 37 will designate another union to represent grievants.

The City's Brief presents the following arguments:

1. An alleged violation of a provision of another contract is not arbitrable under the CWA unit contract.
2. D. C. 37 is the sole and exclusive representative of employees for City-wide matters and it would be unlawful for D.C. 37 to delegate its duties to another union.

3. The parties "intentionally altered D.C. 37's right under the prior contract to appoint a 'designee' to invoke the arbitration procedure."
4. D.C. 37 may select a representative to conduct arbitration proceedings only after it has initiated arbitration in its own name.

D.C. 37 has not moved to intervene herein.

In a letter dated August 21, 1974 addressed to Mr. Ted Watkins of CWA, D.C. 37 took the position that it had the right to authorize CWA to act as the "agent" of D.C. 37 because the City-wide contract "provides that only District Council 37 may bring a matter arising under this contract to an impartial arbitration."

A letter dated February 3, 1975, from Mr. Alan R. Viani, Director of D.C. 37 Research and Negotiations, stated:

> "As you are aware, District Council 37, as City-Wide bargaining agent, negotiates on behalf of all employees covered by the City-Wide contract, including both employees represented in D.C. 37 occupational units and those in occupational units represented by other employee organizations. District Council 37 receives no dues payments or other reimbursement in connection with its representation of the latter group. Nevertheless, District Council 37 recognizes and has acted upon the fact that as the contracting union in the City-Wide contract, it has an on-going

> interest in and duty to the proper and consistent administration of the contract. it is in this connection that we entered into agreement on the subject provision which, in our understanding, would have provided for increased participation by District Council 37 in the grievance and arbitration process under the contract. It was not then nor is it new our understanding that any diminution of the role of occupational unit representatives in that process was intended. We are of the opinion that any such change would be detrimental not only to the effective administration of the City-Wide contract but to the entire concept of City-Wide bargaining."

The language of the grievance provisions of the City-wide contract is clear: "An appeal from an unsatisfactory decision at Step III may be brought solely by the Union." There is no doubt, on the face of the contract, that the wording precludes any other union not a party to the contract from seeking arbitration.. There is no need, where contract language is clear and unambiguous on its face, to look to the intent of the parties or to the other paragraphs of the contract to aid in the interpretation of the clause at issue. Therefore, we find that though individual employees and or D.C. 37 may initiate grievances and that a public employee organization designated by D.C. 37 has a right to be present at any grievance hearing, only D.C. 37 and the City may initiate arbitrations under Article XIV of the City-wide contract. It is required by this decision that D.C. 37 formally initiate the arbitration request under the City-wide contract. But after the formal request for arbitration is filed together with the appropriate waivers, D.C. 37, on its own initiative or on the request of the unit representative, may designate the unit representative thereafter to process the arbitration procedures as contemplated by Section 7 of the City-wide grievance procedure.

This procedure is essentially compatible with the position taken by D.C. 37 that the revised grievance language in the 1973-1976 contract did not intend "any diminution of the role of occupational unit representatives" in grievance and arbitration

handling, but rather that the new language provides "for increased participation by District Council 37." The result is also consistent with the City's position that only D.C. 37 may initiate arbitration and thereafter designate a unit representative to process the 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 requests for arbitration filed by City Employees Union Local 237, I.B.T. in Docket Nos. BCB-195-74 and BCB-196-74 be, and the same hereby are denied, with leave to the Union to resubmit them in corrected form within ten days of the date of this decision; and it is further

ORDERED, that the request for arbitration filed by Communications Workers of America, AFL-CIO: Local 1182, in Docket No. BCB-187-74 be, and the same hereby is denied with leave to District Council 37 to file within ten (10) days the same dispute for arbitration under the procedures set forth in this decision; and it is further

ORDERED, that the request for arbitration filed by City Employees Union Local 237, I.B.T. in Docket No. BCB-189-74 be, and the same hereby is denied with leave to District Council 37 to file within ten (10) days the same dispute for arbitration under the procedures set forth in this decision.

DATED: New York, N.Y.

July 10, 1975.

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

JOSEPH SOLAR
MEMBER

DANIEL J. PERSONS
MEMBER

THOMAS J. HERLIHY
MEMBER