City v. L. 1320, 15 OCB 9 9BCB 1975) [Decision No. B-9-75 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, DECISION NO B-9-75

Petitioner, DOCKET NO. BCB-198-74

-and

DISTRICT COUNCIL 37, LOCAL 1320
A.F.S.C.M.E., AFL-CIO

Respondent.

DECISION AND ORDER

On October 29, 1974, District Council 37, Local 1320, filed its request for arbitration which asserts that the Environmental Protection Administration (EPA) has violated Article V of the parties' collective bargaining 'agreement and the past practices of the EPA by allegedly "consistently changing the work schedule at the 26th Ward Water Pollution Control Plant to favor the relief watch Senior Sewage Treatment Worker to the detriment of other workers" The remedy sought is the institution of "a consistent schedule to include all Senior Sewage Treatment Workers working a rotating shift without favoritism."

The City commenced the instant proceedings by filing its "Petition Challenging Arbitrability" and its "Motion to Dismiss Improper Request for Arbitration" on November 6, 1974, and November 18, 1974, respectively.

THE CONTRACTUAL PROVISIONS

The Union alleges that its claimed grievance falls within the definition of the term grievance in Article VII, Section l(B) of its collective bargaining contract, which reads:

> "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."

Article V of the contract repeats Section 1173-4.3 b (Managements Rights) of the NYCCBL verbatim.

BACKGROUND

The Union filed a request for arbitration on February 13, 1974 which was docketed as A-355-74.[1] Waivers were not included with the request. The Office of Collective Bargaining (OCB), by a letter dated March 21, 1974, advised the Union that "inasmuch as the Request ... came in on February 13th, if the waivers are not submitted to OCB by March 29, 1974, we will close this [matter] out administratively."

The City's Office of Labor Relations (OLR), by a letter dated March 22, 1974, maintained that too much time had elapsed without the OCB processing the case because of the missing waivers, and if the case was not pursued by the Union it should be administratively closed. The OLR noted that since "there is no

[1] The only difference between A-355 and the instant request (A-414) is that in A-355 employees Passero, Chacon and Vaccarella are grievants, and in A-414 only Chacon and Vaccarella are grievants.

retroactive remedy requested, the case could be closed without prejudice to the Union to renew their claim at some future time when they plan to pursue it."

The OCB advised the Union by a letter dated April 2, 1974, that the case was administratively closed out as of March 29, 1974.

The Union submitted two waivers to the OCB on or about April 12, 1974.

The OCB, by a letter dated April 15, 1974, again advised the Union that the case was closed, returned the two waivers, advised the Union that three waivers were required, and stated that "If the Union wants to proceed it should send in a complete Request for Arbitration form to be processed without prejudice to the parties' rights."

The Union filed the instant request including the required waivers on October 29, 1974 with a note that the OCB should refer to its April 15th letter and to its file in A-355. The case was docketed as A-414-74.

The grievance alleges that the Employer unilaterally changed and continues to change a sixteen week rotational work schedule to the favor of one Senior Sewage Treatment Worker and to the detriment of all other Senior Sewage Treatment Workers. The Union maintains that the relief watch Senior Sewage Treatment Worker is used as a relief man only during the 8:00 A. M. to 4:00 P.M. tour. The Union asserts that the EPA arbitrarily changes the existing sixteen week work schedule of other Seniors to provide the needed coverage

when absences occur on the 4:00 P.m. to 12:00 Mid. and 12:00 Mid. to 8:00 A.M. tours.

POSITIONS OF THE PARTIES

The Union maintains that the OLR's letter of March 22, 1974 requesting that A-355-74 be administratively closed and the OCB's letter of April 15, 1974 to the Union both indicated that the administrative closing of the case was without prejudice to the Union filing a complete request at a later date. The Union contends that its request docketed as A-414-74 is the complete request contemplated by both the OLR and the OCB.

The Union further maintains that the EPA's arbitrary scheduling of work hours to the advantage of one Senior Sewage Treatment Worker creates an unreasonably excessive and unduly burdensome workload on other Senior Sewage Treatment Workers as a regular condition of employment. The Union argues that this violates the past practices of the EPA and constitutes a practical impact on employees resulting from the City's decisions on matters within its management rights.

The Union in its request for arbitration contends that both the alleged violation of past practice and the creation of a "practical impact" are grievances within the meaning of its contract.

The City's "Motion to Dismiss Improper Request for Arbitration" maintains that A-414 is an attempt to continue A-355 as an active request for arbitration after it was administratively

closed because no waivers were filed pursuant to NYCCBL Section 1173-8.0d and Rule 6.3(b).[2] The City asserts that "it never agreed that A-355 could or should be continued after it was administratively closed." Therefore, the City contends that A-414 should be dismissed as an improper request to continue A-355.

The City's "Petition Challenging Arbitrability" states that a question concerning the practical impact of the City's right to determine the methods, means and personnel by which the City's operation is to be conducted is not a grievance within the meaning of Article VII; that the Board of Collective Bargaining (BCB) is exclusively empowered to determine questions of practical impact; and that an allegation of a violation of past practice is not a grievance within the meaning of Article VII, Section 1(B).

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[2] Section 1173-8.0(d) reads:

"d. As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

Rule 6.3(b) reads:

"If the request for arbitration is served by a public employee organization, there shall be attached thereto a waiver, signed by the grievant or grievants and the public employee organization, waiving their rights, if any, to submit the underlying dispute to any other administrative or judicial, tribunal except for the purpose of enforcing the arbitrator's award."

However, the Union in its answer to the City's petition admits that a question concerning practical impact is not a grievance within the meaning of the contract, but asserts that an impasse panel should be created to make recommendations to relieve the practical impact because the City has not acted unilaterally to relieve it.

DISCUSSION

A. Motion to Dismiss Improper Request for Arbitration

It is important to distinguish between the two requests for arbitration (A-355-74 and A-414-74). While the former was administratively closed because no waivers were submitted, A-414-74 complies with Section 1173-8.0(d) and Rule 6.3(b).

The City's sole argument in its motion for the dismissal of A-414 is that it is somehow an improper continuation of A-355. However# there is nothing in the

record of the instant case to show that the Union is attempting to continue A-355; it merely has filed a new request to arbitrate basically the same grievance that was initially involved in A-355. And the record in A-355 clearly indicates that the OCB with the concurrence of the OLR administratively closed out that case without prejudice to the Union filing another request for arbitration at a later date. It must be noted, however, that the City's liability, if any, would be limited to a period subsequent to the filing of A-414.

B. Request for Arbitration[3]

The City maintains that the claimed violation of a past practice is not within the contract's definition of a grievance as "a claimed violation ... of the rules or regulations; existing policy, or orders applicable to the agency which employees the grievant..." However, a "past practice" is arguably an "existing policy" and the Board has held that the meaning of Cie term "existing policy" as used in a contract is arbitrable.

[3] The Union has acknowledged that a claimed violation of a practical impact is not within the contractual definition of a grievance and, accordingly, that issue is no longer before us.

In Decision No. B-6-69, Uniformed Firefighters Assoc. Local 94, the union sought to arbitrate the employer's elimination of ambulance No. 3 which according to the union constituted a benefit previously enjoyed by unit members. The Board found the contention to be within the contract definition of a grievance as:

> "a complaint arising out of claimed violations, misinterpretations or inequitable application of the provisions of this contract or of existing policy or regulations of the Department.
>
> The Board said:
>
> "The meaning of the term 'existing policy' as used in the contract; whether the City's provision of the ambulance in question and .any related services constituted a 'policy' within the meaning of that term; and whether the employer has the right to modify or cancel an 'existing policy' are questions involving the interpretation or application of the provisions of the contract."

Similarly, in Dec. No. B-5-69, Local 240, DC 37, the union grieved that the employer's unilateral removal of parking privileges for non-professional employees violated existing policy. The Board found the grievance arbitrable, and stated that the meaning of the contractual term "existing policy", and the question of whether the City's provision

of parking privileges constituted an existing policy, were matters to be determined by arbitration.[4]

In the instant case, we therefore construe the Union's claimed violation of a past practice to be within the contract's definition of a grievance as a claimed violation of existing policy. Therefore, the Board deems the grievance to be as follows:

> That the EPA has violated its "past practices" and thus has violated the "existing policy" provision of Article VII, Section 1 (B), of the collective bargaining contract by consistently changing the work schedule at the 26th Ward Water Pollution Control Plant to favor the relief watch Senior Sewage Treatment Worker to the detriment of other workers.

However, the meaning of the term "existing policy" as used in the contract, whether it encompasses past practices, whether the EPA scheduling constitute s a past practice, and whether the EPA has violated its past practices are questions relating to the merits of the parties' dispute and are, accordingly, for the arbitrator to determine.

Accordingly, we conclude and determine that the grievance herein is arbitrable.

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[4] Cf. Dec. No. B-20-72, City Employees Union, where the Board found that a claimed violation of past practice was not within EO 52's definition of a grievance. However, that case is inapposite because the definition of a grievance was limited to a claimed violation of certain rules or regulations and did not include a claimed violation of existing policy.

C. Request for the Creation of an impasse Panel

The Union's request for an Impasse panel to relieve the alleged practical impact resulting from the City's scheduling is inappropriate in the circumstances of this case. Impasse panels are appointed only when collective bargaining negotiations have been exhausted.[5] In the instant matter since the parties are not in negotiations, they clearly have not reached impasse.

Accordingly, we conclude and determine that the request herein should be denied.

0 R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the City's motion to dismiss the request for arbitration be, and the same hereby is denied; and it is further

ORDERED, that the City's petition be,, and the same hereby is denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same is granted; and it id further

[5] NYCCBL Section 1173-7.0c. (2)

ORDERED, that the Union's request for the creation of an impasse panel be, and the same hereby is y denied.

DATED: New York, New York
March 24, 1975

ARVID ANDERSON
C H A I R M A N

ERIC J. SCHMERTZ
M E M B E R

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