City v. L.371, 17 OCB 1 (BCB 1976) [Decision No. B-1-76 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner

DECISION NO. B-1-76

DOCKET NO. BCB 240-75
A-509-75

-and-

LOCAL 371, A.F.S.C.M.E., AFL-CIO,

Respondent.

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DETERMINATION AND ORDER

The Social Service Employees Union Local 371 filed a request for arbitration on September 26, 1975, concerning the grievances of Alexander Epstein, a "Senior Citizen, Specialist" in The Office of the Aging. The Union contends that the City has refused to implement Article III, Section 7 of the contract[1] and is in violation of the applicable job description (Temporary Title Code #02735)[2] by refusing to pay the grievant a salary

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[1] Article III, Section 7

"In the event that the Employer in its exclusive judgment, experiences difficulty in hiring persons for any of the job titles covered by this Agreement, it may hire people at rates other than those provided as the minimum rates in this Agreement for those job titles. Such action by the Employer shall in no way be deemed to effect a change in the minimum rates provided for in this Agreement."

[2] Applicable Portion of Job Description

"A salary differential of $600 per annum will be made for each year of social science research or social welfare experience, up to a maximum of three (3) years; beyond the above requirements. Full time graduate work in the area of the social sciences on a year-for-year basis, may be substituted for the salary experience differential."

increment of $600.

On October 6, 1975, the City filed a petition challenging arbitrability alleging that Local 371 alone does not have standing under the contract to bring a Step III decision to arbitration[3] and further alleging that an arbitrable issue has not been raised.

The preamble to the collective bargaining agreement between the parties provides as follows:

> "Collective Bargaining Agreement entered into this day of by and between the City of New York and related public employers pursuant to and limited to their respective elections or statutory requirement to be covered by the New York City Collective Bargaining Law and their respective authorizations to the City to bargain on their behalf and the New York City Health and Hospitals Corporation (hereafter referred to jointly as the 'Employer'), and District Council 37, A.F.S.C.M.E., AFL-CIO, and its affiliated Locals 371, 957, 1070, 1113, 1457 and, 1509 (hereafter referred to jointly as the 'Union'), for the period from January 1, 1974 to

[3] Article VII - Grievance Procedure

"Step IV. (a) 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 fifteen (15) working days after receipt of the Step III decision. For Mayoral agencies, such arbitration shall be conducted by an arbitrator designated from a standing panel of three (3) arbitrators maintained by the Office of Collective Bargaining in accordance with applicable law, rules and regulations. The costs and fees of such arbitration shall be borne equally by the Union and the Employer. 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 any contract,

December 31, 1975." (emphasis added).

The City alleges that "Local 371's request for arbitration is not brought by the 'Union' as that term is defined in the contract (i.e., DC 37 and its affiliated locals, jointly) but by Local 371 alone," and therefore Local 371 alone cannot proceed to arbitration.

In its Reply and Brief filed on October 27, 1975, the City states that:.

> "DC-37 is the only union signatory to the contract in a position to decide whether a given grievance should be brought to arbitration. This is because District Council 37 sits in a unique position vis-a-vis the other union signatories. District Council 37 is in effect an overseer for its affiliated locals.

Footnote 3/ continued

rule, regulation, written policy or order mentioned in Section 1 of this Article. (emphasis added).

For the Health and Hospitals Corporation, 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 fifteen (15) working days of receipt of the conducted in accord with the Consolidated Rules of the Office of Collective Bargaining. The cost and fees of such arbitration shall be borne equally by the Union and the Employer. 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 any contract, rule, regulation, written policy or order mentioned in Section 1 of this Article. A copy of the notice requesting impartial arbitration shall be forwarded to the City Director of Labor Relations.

(b) There shall be no unreasonable delay by either party in the commencement of arbitration."

> It handles their dues and finances, assists in and in most cases conducts their negotiations, and provides extensive legal services, including the handling of grievances and arbitrations. Only District Council 37 is therefore in a position to weigh dispassionately whether bringing a particular grievance to arbitration would be in the interest of all the employees covered by the contract. Similarly, only District Council is in a position to prevent conflicting and/or frivolous grievances from reaching arbitration."

The City also contends that:

> "Article III, Section 7 is not subject to the grievance procedure since on its face it grants exclusive discretion to Petitioner in determining when- to hire at rates above the minimum. Such exclusive discretion is patently beyond the reach of review by an arbitrator or any other authority."

As its third ground f or relief the City argues that the Union, in violation of Section 1173-7.0 a.(3)[4] of the New York City Collective Bargaining Law (NYCCBL), is attempting to use the arbitration process to "reopen negotiations on educational differentials," a subject which was

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[4] NYCCBL Section 1173-7.0a.

"(3) Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreements arose and (b) there shall have arisen a significant change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement."

extensively discussed during bargaining for the present collective bargaining agreement.

The Union, in its answer filed on October 17, 1975, contends that the preamble to its contract spells out the "respective employer entities and labor organizations who are bound to the said agreement" but that "nothing in the agreement limits the right of any named labor organization from bringing a Step III decision to arbitration." It concludes, therefore, that as "a party to and a signatory to the instant agreement" it has the right to bring cases to arbitration.

The Union's position on this point is amplified on page 10 of its brief:

> " ... petitioner's (The City's) logic would require that no arbitration proceeding be commenced without the express approval of each of the 8 labor organizations which are signatories to the instant collective bargaining agreements. Likewise, Petitioner's construction of the collective bargaining agreement would require the City to secure approval from each of its related public employers prior to invoking arbitration. Such procedures were never intended by the parties. Rather, it would appear clear that Respondent has independent standing under Article VII of the contract to bring a Step III Decision to arbitration. As a matter of past practice, encompassing both the instant agreement and the prior 1971 to 1973 and 1974 agreements, Respondent has independently brought Step III Decisions to Arbitration. The instant petition constitutes the first such challenge to this well recognized method of submitting matters to arbitration."

With respect to the other City contentions, the Union states that the "grievant's right to annual salary increments is a substantive matter for the arbitrator to decide." In support of its position, the Union cites several court and Board decisions in its accompanying brief.

It should be noted that Local 371's position that it does not need the approval of any other group to bring Step III decisions to arbitration is supported by District Council 37, the organization which the City contends should be an overseer for all of its affiliated locals.

Discussion

The City's current position with respect to Local 371's standing to bring Step III decisions to arbitration without the approval of District Council 37 is inconsistent with the past practice of the parties.[5] A logical extension of the City's argument would mean that all eight union signatories would be required to approve every union request for arbitration submitted to this Office under this contract. This procedure would be both cumbersome and pointless since in most cases only the affected local, the one which holds the certificate for the title of the particular grievant would have knowledge concerning the alleged grievance. The City's position that District Council 37 and the affected local together would be the appropriate parties to bring a case

[5] See arbitration Case Nos. 238-72, 2.41-72, 242-72, 243-72, 528-73, 330-73, 333-73, 337-74, 338-74, 375-74, 380-74, 424-74, 431-741 510-75. All of the above cases with the exception of 510-75 were brought under the preceding contract which contained a preamble similar to the one in the present contract.

to arbitration - one which both Local 371 and District Council 37 strongly refute - is not a valid interpretation of the contract preamble.

Adoption of the City's view would result in extended administrative paperwork and, in all likelihood, rubber-stamping by the signatories not specifically involved with the particular grievance. The view, advanced by Local 371, is amply supported by past practice and by the unambiguous meaning of the references to "the Union" elsewhere in the contract. Article II, Section 1, of the contract, relating to dues check-off, states:

> Section 1
> "(a) The Union shall have the exclusive right to the checkoff and transmittal of dues in behalf of each employee in accordance with the Mayor's Executive Order No. 98, dated May 15, 1969, entitled "Regulations Regulating the Checkoff of Union Dues" and in accordance with the Mayor's Executive Order No. 99, dated may 15, 1969, entitled "Regulations Governing Procedures for Orderly Payroll Checkoff of Union Dues."
> (b) Any employee may consent in writing to the authorization of the deduction of the Union as the recipient thereof. Such consent, if given, shall be in a proper form, acceptable to the Employer, which bears the signature of the employee."

In the context of Article II, "the Union" clearly is synonmous with Local 371 because the latter, is the sole recipient of union dues deducted from the wages of employees in Local 371 titles. Traditionally, in the City of New York, the union receiving the check-off has been the appropriate party to bring grievances under a unit contract. Absent a strong evidentiary showing, there is no basis for a finding by this Board that any one reference to "the Union" in the contract means something other than the meaning accorded it by the parties in Article II.

District Council 37, as the City contends, does sit in a unique position vis-a-vis the other union signatories, but at most this would make it a proper, rather than a necessary, party to arbitration proceedings. The definition of "the Union" urged by the City in this case is selective and inconsistent with past practice; if adopted, it would change the nature of the certified representative. Neither the City nor any union through unilateral or joint action, direct or indirect, can exercise this power which is vested solely in the Board of Certification by §1173-5.0b(1) and (2) of the New York City Collective Bargaining Law. The parties herein have engaged in joint bargaining; to the extent that

this reduces the time, effort, and expense of collective bargaining, it is not only permissible, but desirable. However, no such arrangement can create new or different bargaining units; these are matters solely within the authority of the Board of Certification. The interpretation offered by the City as to the significance of such bargaining in the instant matter and of the contract language which that bargaining produced would change the representative status of Local 371. That this claimed change of status was allegedly accomplished with the agreement of Local 371 is immaterial. The fact is that even if Local 371 intended by the preamble language cited here to diminish its rights and duties as representative of the unit of which the grievant is a member - and Local 371 maintains that it did not - it was without authority to do so. Thus, we reject the City's first ground for relief since the argument upon which it is based would, if accepted, constitute Board of Collective Bargaining approval of a disregard of the exclusive unit certification function of the Board of Certification.

With reference to the City's other proffered grounds for relief, the Board when determining arbitrability has limited its review to deciding if the parties are obligated to arbitrate their controversies and, if so, whether the scope of that obligation is sufficiently broad to cover the particular controversy presented.[6]

In Decision No. B-4-72, the Board stated that the interpretation and applicability of contract terms are determinations for the arbitrator and not for the forum determining the arbitrability of the underlying dispute. This point was further elaborated in Decision No. B-25-72:

> "In cases seeking arbitration, the relevance or applicability of the cited statute or departmental regulation to the situation of the case and to the basic grievance propounded is a matter going to the merits of the case and, hence, one for the arbitrator to determine."

[6] See Board Decision No. B-2-69.

This is not to say that the Board will make no inquiry, under any circumstance, as to the prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration. The grievant, where challenged to do so, has a duty to show that the statute, departmental rule or contract provision he invoked is arguably related to the grievance to be arbitrated.

We find, however, that the City's arguments, here, that the contract provision allegedly violated is not subject to the grievance procedure and that the request for arbitration is "a 'back-door' attempt to reopen negotiations on education differentials," go to the merits of the claim and should be presented to the arbitrator, not to this Board.

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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

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

DATED: New York, N.Y.

February 4, 1976

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

EDWARD F. GRAY
MEMBER

JOSEPH J. SOLAR
MEMBER

N.B. Impartial Member Eisenberg did not participate in this decision.