OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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CITY OF NEW YORK,

Petitioner,

-and- DECISION NO. B-10-77

DISTRICT COUNCIL 37, DOCKET NO. BCB-273-77
AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On June 9, 1977, the City of New York filed its petition contesting the arbitrability of a claim filed by District Council 37, AFSCME, AFL-CIO (DC 37), concerning minimum salaries under the contract for Computer Programmers.

The issue posed by the request for arbitration is "whether the employer violated Article 111, §3, of the contract by hiring employees in the title of Senior Computer Programmer above the minimum salary (a) without increasing the minimum salary for all employees in the title of Senior Computer Programmer and/or (b) when it was practicable to hire at the minimum." As a remedy, the Union seeks a "retro-active increase in the minimum salary for all employees in the title of Senior Computer Programmer to the highest rate received by any employee hired at a salary above the minimum rate from October 1, 1976 to the present or reduction to the minimum salary stated in the contract of all employees hired in the title of Senior Co-,i,puter Programmer since October 1, 1976."

The Union filed its Answer on June 30, 1977, the City filed an informal Reply on the same date, and a further letter on August 10, 1977. The City requests oral argument before the Board.

Applicable Contract Terms and Regulations

The Computer Operators' Contract, July 1, 1974 - June 30, 1976,[1] provides, inter alia:

"ARTICLE VII - GRIEVANCE PROCEDURE

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, written policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment . . . .

"ARTICLE III - SALARIES

Section 1.

(a) This Article III is subject to the provisions, terms and conditions of the Alternative Career and Salary Pay Plan Regulations, dated March 15, 1967 as amended to date, except that the specific terms and

[1] A contract f,or the term July 1, 1976 to June 30, 1978 was ratified on April 14, 1977. The demand for arbitration is made pursuant to the 1974-76 contract.

> " conditions of this Article shall supersede any provisions of such Regulations inconsistent with this agreement subject to the limitations of applicable provisions of law.
>
> "Section 3.
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> The Union agrees that if the City determines at any time during the period of this contract it is impracticable to recruit for any of the titles covered by this contract at the then minimum salary, the City may unilaterally increase the minimum entrance salary of such title by an amount deemed necessary to recruit for such title."

The City-Wide Contract, July 1, 1976 - June 30, 1978, provides, inter alia:

> "ARTICLE IX - PERSONNEL AND PAY PRACTICES
> Section 17.
>
> Effective October 1, 1976 through June 29, 1978, the minimum rate for new employees shall be ninety percent (90%) of the stated minimum rate in effect for the position to which they are appointed."

Section V of the Alternative Career and Salary Pay Plan Regulations (Mayor's Personnel order No. 21/67) provides in pertinent part as follows:

V. Appointments, Reinstatements, Promotions, Demotions, and Transters

> 1. Appointments and reinstatements shall be made at the minimum basic salary for the respective class of positions to which such appointments or reinstatements are made, as set forth in the Implementing Personnel Order or as otherwise authorized for a specific position or positions by a Certificate of the Mayor. In the event that a different appointment or reinstatement salary is authorized for a specific position or positions by a Certificate of the Mayor as herein provided, no other employee in a position in the same class of positions receiving a rate different from the rate authorized in such certificate shall be automatically entitled to have his salary adjusted to the rate or rates authorized in such certificate for the specific position or positions."

Positions of the Parties

The Union claims that the hiring of five senior Computer Programmers above the minimum salary specified in the unit contract violated Article III, S3, in that the hirings were made without increasing the minimum salary for all employees in the title and/or when it was practicable to hire at the minimum salary.

The City's Petition contests arbitrability on several grounds, all of which relate to contract language and the merits of the Union's claim. First, the City contends

that the appointment above the minimum rate was in accord with Section V of the Alternative Career and Salary Pay Plan Regulations (quoted above), and pursuant to appropriate certification of the Mayor. The City argues that pursuant to Section V, appointment of individual employees at a higher rate does not raise the minimum salary for an entire title. The City contends that the provisions of Section V are consistent with Article,III of the collective bargaining agreement (quoted above) and that the appointments do not amount to a unilateral increase in the minimum entrance salary for the title.

Further, the City contends that the grievance is frivolous, implausible, and does not state a colorable claim. The sum of the City's contentions on this point is that a matter may not be sent to arbitration unless there is more than an assertion of contract violation: according to the Petition# the grievance herein presents no "proof" or "support" of aviolation and thus may not be found arbitrable.

Finally, the City alleges that:

> "If the instant grievance is found to be arbitrable, it will encourage municipal unions to file similar grievances as a harassment tactic and as an attempt to circumvent the collective bargaining process and the fiscal limitations which exist by virtue of the Financial Emergency Act for the City of New York."

Discussion

It is clear that the parties disagree whether the hiring of five employees above the minimum rate was in conformance with the collective bargaining contract and the Alternative Career and Salary Plan Regulations. Thus, the parties are at issue "concerning the application or interpretation of [the] collective bargaining agreement" and over a claimed violation, misinterpretation or misapplication of the rules or regulations . . . applicable to the agency." Consequently, the claim falls squarely within the contractual definition of a grievance contained in Article VII and quoted on page 2, supra.

Second, the weight of federal and state authority, as well as our own prior decisions, is against the legal position taken in the Petition.

There is no requirement, such as is claimed by the City, that a grievant must do any more than allege a contractual violation within the definition of a grievance agreed to by the parties and incorporated by them into their contract. No "Proof" need be presented to this Board regarding the merits of the grievance; such proof is to be put before the arbitrator who must decide the grievance. The Board's function in determining arbitrability is to "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." [2] I Indeed, adoption of the rule urged in the City's petition that the Board must make a finding that a grievance is not frivolous or in plausible could well work to the City's disadvantage in the arbitration; such a finding relating to the merits could be cited by the Union in support of its case before the arbitrator.

The Supreme Court of the Unifted States hold in United Steelworkers of America v. American Mfg. Co.: [3]

> "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, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. Vie agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have theraeutic values which those who are not a part of the plant environment may be quite unaware."

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[2] OLR v SSEU, Decision No. B.2-69. We have followed this ruie without alteration. See also Decisions Nos. B-8-69, B-8-74, B-14-74, B-19-74, B-28-75.

[3] 46 LMA 2414, 2415-6.

Section 7501 of the CPLR provides that in determining arbitrability, "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." The New York State Court of Appeals has applied this provision to enforcement of public sector collective bargaining agreements during a period of fiscal crisis.[4]

Finally, we shall comment on the City's assertion that the instant case may lead to an "attempt to circumvent. . . the fiscal limitations which exist by virtue of the Financial Emergency Act for the City of New York." The City has reference to a recent arbitral award, confirmed by the Supreme Court, Special Term, which dealt with a claim superficially similar to the one sought to be arbitrated herein, and where a salary increase was awarded by the arbitrator.[5]

In its letter of August 10, 1977, the City argues that "the contractual provisions which were the subject of the arbitrations in the CSBA case are clearly distinguishable from those herein." The City cites several provisions of the "side letter" in the CSBA case which allegedly differ from Article III,

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[4] Board of Education, Yonkers v.Yonkers Federation of Teachers, 386 NYS 2d 657, 661 (1976).

[5] CSBA, Local 237, IBT v. City of New York,Index No. 00800/77, Memorandum Opinion by Justice Helman, dated June 28, 1977.

§3 of the contract sought to be arbitrated in the instant case. The instant contract contains language relating to increases when "it is impractical to recruit ... at the then minimum salary", whereas the CSBA side letter did not specifically refer to such a situation. Further, the CSBA side letter contained a reference to a change in "each minimum rate ... at the same time", and purported to restrict the City's right to "unilaterally reduce" the minimum rate. The Computer Operator contract does not contain such language.

The letter of August 10, while stating differences between the two cases which may very well be significant, does not go to the arbitrability of the grievance. The arguments contained in the letter would be more properly made in the arbitral forum, where the arbitrator will have a full opportunity to hear the contentioqs of tf-o parties concerning the contract language and the intent expressed therein. It is the function of the arbitrator to weigh t-he considerations advanced by the City in its letter of August 10, 1977.

We find that the papers submitted by the parties are sufficient for purposes of our decision and that there is no need for the Board to hear oral argument. Therefore, we shall deny the City's request for oral argument.

Having determined that the claim alleged by the Union herein falls within the definition of a grievance contained in the collective bargaining agreement between the parties, we shall deny the petition contesting arbitrability and grant the request 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 petition of the City of New York contesting arbitration be, and the same hereby is denied; and it is further

ORDERED, that the request of District Council 37, AFSCME, AFL-CIO, for arbitration be, and the same hereby is, granted.

DATED: New York, New York
August 24, 1977.

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

VIRGIL B. DAY
M e m b e r

EDWARD F. CRAY
M e m b e r

EDWARD J. CLEARY
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FRANCES M. MORRIS
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