City v. L.15, IBT, 19 OCB 12 (BCB 1977) [Decision No. B-12-77 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- X

In the Matter of

THE CITY OF NEW YORK,

Petitioner

DECISION NO. B-12-77

- and-

DOCKET NO. BCB-275-77
A-657-77

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15,

Respondent
- X

On June 3, 1977, the International Union of Operating Engineers (Respondent) filed a Request for Arbitraticn with the Office of Collective Bargaining. The Request for Arbitration claims that §70 and §80 of the Civil Service Law has been violated by the City (Petitioner), and states as the grievance to be arbitrated: "The improper transfer of nine Oilers and the assignment of Sewage Treatment Workers to perform the work of the transferred employees." Respondent seeks as a remedy the "[rletransfer of Oilers to former location and former duties."

Petitioner, appearing by the Office of Municipal Labor Relations, filed a Petition Challenging Arbitrability and an attached Memorandum of Law on June 24, 1977. Petitioner contends, inter alia, that the grievance is not arbitrable as it does not f all within the definition of a grievance as set forth in Executive order 83, and that Respondents allegation that Petitioner violated §70 and S80

of the Civil Service Law, was never raised in the grievance procedure that preceeded Respondent's Request for Arbitration.

An Answer to the Petition Challenging Arbitrability was filed with the OCB on July 28, 1977. Respondent claims it would fulfill the policies of industrial relations to bring this matter to arbitration, and that Executive Order 83 specifically authorizes it.

The parties in the instant action do not have a contract. This fact is not in dispute.

The grievance was presented orally through the first two steps of the grievance procedure. In her step 3 decision, the 014LR hearing officer denied the grievance as it did not constitute a "grievance" within the meaning of Executive Order 83.

POSITION OF THE PARTIES

Petitioner

Petitioner offers a number of arguments in support of its claim that the instant grievance is not arbitrable. Among them is that the alleged violation of §70 and §80 of the Civil Service Law does not fall within the definition of a grievance as set forth in Executive Order 83 which establishes a grievance and arbitration procedure for parties who are not covered by a collective bargaining contract containing a grievance mechanism.

Petitioner also argues that at the lower steps of the grievance procedure, Respondent was claiming as the Basis of the grievance, "ti-e assignment of employees to the work of Oilers represented by Local 15, the work being substantially different than those stated (sic) in the Job Classifications of the workers so assigned." Now, in its Request for Arbitration, Respondent also alleges violations of the Civil Service Law, such allegations not being raised previously. Assuming this "switch in midstream" riot to be fatal, Petitioner claims that the grievance still does not fall within the statutory definition of a grievance as set forth in Executive Order 83, and therefore is not arbitrable.

Respondent

In its Answer, Respondent speaks of the desirability of arbitration of disputes between public employers and their employees. It cites numerous cases which have espoused the policy of encouraging voluntary resolution of labor disputes through arbitration, and points to the NYCCBL and the Taylor Law, both of which encourage such resolution.

Respondent also claims Executive Order 83 allows it to bring this matter to arbitration, citing §5(d):

> "An employee organization certified for the unit which the grievant is a member shall have the right to bring grievances unresolved at Step 4 of the general procedure to impartial arbitration."

Unfortunately, Respondent does not address the issue regarding whether or not this grievance is a "grievance" within the meaning of Executive Order 83.

DISCUSSION

Executive Order 83, issued July 26, 1973, establishes a grievance procedure culminating in arbitration for those parties who are not covered by a grievance procedure of their own. There is no dispute that the instant parties do not have a collective bargaining contract containing such a procedure and therefore, if Respondent wishes to bring this dispute to arbitration, it must do so by way of Executive Order 83.

A grievance is defined by Executive Order 83 as follows:

> "For purposes of subdivision a [the grievance procedure', of this section, the term grievance' shall mean (A) a dispute concerning the application of [sic] interpretation of the terms of (i) a written, executed collective bargaining agreement; or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment; (B) a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment; and (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification. The term 'grievant' shall include all grievants in the case of a group grievance."

In its Request for Arbitration, Respondent claims a violation of 570 and S80 of the Civil Service Law. Petitioner alleges this claimed violation was never raised at the lower steps of the grievance procedure and Respondent admits the truth of this in its Answer.

In Board Decision No. B-27-75, a petition challenging arbitrability was granted because the union had raised an issue in its request for arbitration which had not been raised at the lower steps of the grievance procedure. The Board cited a past decision, B-22-74, which denied a request to amend a grievance just prior to its submission to an arbitrator. In that decision the Board stated:

> "The purpose of the multi-level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and-foreclosing the possibility of a voluntary settlement.*

Under that precedent, we find that the alleged violation of the Civil Service Law is not an arbitrable issue because it is "a novel claim based on a hitherto unpleaded grievance."

The grievance is also not arbitrable based on Petitioner's claim that *the assignment of Sewage Treatment Workers to perform the work of the transferred employees" does not constitute a grievance within the meaning of Executive order 83. It should be noted that Executive Order 83 amends and supersedes Executive Order 52 on which Respondent incorrectly based its demand for arbitration. while Executive Order 52 defined a grievance, _inter_ _alia_, as "a claimed assignment _of employees_ to duties substantially different from those stated in _their_ job classifications" (emphasis added), Executive Order 83 has altered this definition. It now reads, "a claimed assignment _of a grievant_ to duties substantially different from those stated in _his or her job classification_" (emphasis added). The distinction is an important one. Applying the former Executive Order, this Board ruled in Decision B-2-701 that a grievance which alleged others were performing work of the grievants was arbitrable. The Board held that the language of Executive Order 52 was "not limited to claims of assignment of the grievant to out-of-title work but also encompasses a claim that employees in a different title have been improperly assigned work within the grievants duties and functions." With the language now changed from "of employees" to "of a grievant," the person bringing the grievance nust show that he or she has been assigned

out-of-title work. Under Executive Order 83, a grievant cannot claim that a different employee has been assigned work out of his or her title, and this is what Respondent in the instant action has alleged.

The Board is troubled by this matter and by the ruling which, in the circumstances of this case, it is constrained to make; this is particularly true since it is the policy underlying the NYCCBL "to favor and encourage . . . written collective bargaining agreements . and final, impartial arbitration of grievances Regarding the particular point at issue in this matter, i.e., arbitration of grievances as to alleged wrongful assignment of unit work to non-unit employees, it is clear, under SS 1173-2.0, 1173-3.0.0 and 1173-8.Of
of the NYCCBL, among others, that a demand for the inclusion of provision for arbitration of such issues in any collective bargaining agreement between the City of New York and any unit of public employees would be a mandatory subject of bargaining; inclusion of such a provision in collective bargaining agreements would be favored by the law. There is no collective bargaining agreement between the parties nor do the records of the OCB indicate that any demand for collective bargaining has ever been made on behalf of the bargaining unit represented by Respondent. Thus, the only rights of unit employees or of the Respondent union to

submit grievances or to invoke arbitration of disputes with the employer derive from the voluntary, unilateral grant of such rights by the employer. Such a unilateral grant of the right to arbitrate has been extended by the employer in Executive Order 83. Since that Executive order is the sole source of whatever right the Respondent union has to submit disputes to arbitration, it is subject to such conditions and limitations as the Executive Order sets forth in defining the scope of the unilateral grant. Among such conditions and limitations are the Executive order's specifications as to the types of complaints covered and submissible to arbitration. Those specifications do not include complaints as to alleged assignments of unit work to non-unit employees. Thus, in finding the instant grievance not arbitrable we are not holding that such grievances are not proper and appropriate subjects for submission to arbitration generally,[1] but that in the absence of any agreement to arbitrate disputes and relying solely upon an Executive Order [2] which consents only to arbitration only within a limited group of grievances or complaints, the Union in this case is

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[1] On the contrary, we find that the inclusion of agreements to arbitrate such issues in collective bargaining agreements is strongly favored by the NYCCBL and its underlying policies.

[2] Respondent relies upon Executive Order 52 which was amended and superseded on July 26, 1973, by Executive Order 83.

bound by such limitations and has not established the right to arbitrate the instant grievance. The law and this Board assert the rights of public employees to organize and to bargain collectively. Both the law and this Board favor and support any effort by public employees to maintain and protect the integrity of bargaining units whether through union security clauses or grievance and arbitration provisions or both. No such contractual rights are presented in this matter.

While it is true that it is the policy of the courts, of this Board and of applicable laws to favor the impartial arbitration of grievances, as Respondent asserts, this does not mean that the courts or this Board can create duty to arbitrate where none exists or that they can enlarge duty to arbitrate beyond the scope established by the parties by contract or otherwise. it is well settled that a person may be required to submit to arbitration only to the extent that he has previously consented and agreed to do so. The City has not consented, by contract, Executive Order or otherwise to submit disputes with Respondent as to alleged assignments of unit work to non-unit employees to arbitration. It follows that Respondent cannot now require the City to submit such a dispute to arbitration and we will order accordingly.

O 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 Petition Challenging Arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Union's Request for Arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.
August24, 1977

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD J. CLEARY
MEMBER

FRANCES M. MORRIS
MEMBER