Local Union No.3, I.B.E.W., 19 OCB 13 (BCB 1977) [Decision No. B-13-77 (Arb)], Aff'd, City of New York v. Anderson, No. 40532/78 (Sup. Ct. N.Y. Co. July 17, 1978).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - - - - - - - - - - - - - - X
In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-13-77
DOCKET NO. BCB-664-77
A-664-77

Petitioner

-and-

LOCAL UNION No.3, I.B.E.W.,
AFL-CIO,

Respondent
- - - - - - - - - - - - - - - - - - - --X

DETERMINATION AND ORDER

On July 6, Local Union '_'41o.3, I.B.E.W., AFL-CIO, filed a Request for Arbitration 1with the Office of Collective Bargaining. The Reauest for Arbitration claims that the grievant, John J. Ayers, was bypassed for promotion in violation of the Mayor's Executive Order No.4 which states:

> "In order to carry out and protect the principles which underlie the provisions of Article V, section 6 of the Constitution, to Preserve the Civil Service merit system and to avoid favoritism and improper and unjust discrimination, all heads of City agencies are hereby directed to make appointments and promotions from eligible lists promulgated after competitive examinations only in the order in which the names of available candidates appear upon such eligible lists, except with the written approval of the Mayor upon good and sufficient cause being shown."

The grievance was initiated on January 17, 1977. Respondent alleged that the Human Resources Administration violated Executive Order No.4 in bypassing the grievant for

promotion to the position of Foreman of Mechanics without having the required permission to do so. In her step 4 decision, the OMLR hearing officer denied the grievance because it did not constitute a "grievance" within the meaning of Executive Order No.83.

On July 28, 1977, Petitioner, appearing by the Office of Municipal Labor Relations, filed a Petition Challenging Arbitrability, alleging that the dispute does not constitute a "grievance" as defined by Executive Order No.83, and is therefore not arbitrable. Petitioner cites §5b(B) of Executive Order No.83 which defines a grievance as 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." Petitioner claims that Executive Order No.4 "is not a rule or regulation of the agency by whom the grievant is employed," and therefore, a violation thereof does not fall within the Executive Order's definition of a grievance, and hence, is not arbitrable.

Respondent's Answer, filed with the OCB on August 2, 1977, analogizes to Board Decision No. B-7-71, in which the Board ruled that where a contract defined a grievance as a violation of rules and regulations applicable to the agency by whom the grievant is employed, a claimed violation of a Civil Service Rule is arbitrable. Respondent urges "that the

needs of common sense requires (sic) that [55b(B)l of Executive Order No.83 be construed that a grievance includes these same violations committed by the employer, whether the employer
violated its own rules or violated a rule applicable to it."

DISCUSSION

The parties to the instant action do not have a contract and are therefore relegated to the use of Executive Order No.83's grievance mechanism culminating in arbitration.[1] The underlying issue of this case concerns the interpretation of Executive order No.83's definition of a grievance - whether it is broad enought to encompass an alleged violation of an Executive order of the Mayor, applicable to all city agencies.

Petitioner would have us deny arbitration based on the precise wording of Executive Order No.83. It claims a "rule or regulation of the mayoral agency" is restricted so as not to include an alleged violation of an Executive Order of the Mayor applicable to all city agencies. We find

[1] Executive Order No.83 S5a(l) states:

The following grievance procedure shall be applicable to all mayoral agency employees who are eligible for collective bargaining under the New York City Collective Bargaining Law except (A) members of the police force of the Police Department and (B) All other employees in a bargaining unit for which the collective bargaining representative recognized or certified to bargain on wages, hours and working conditions has executed a written collective bargaining agreement containing a grievance procedure.

Petitioner's theory untenable.

Firstly, to say that an alleged violation of an internal rule of an agency is arbitrable, but that an alleged violation of an Executive order of the Mayor applicable to all city agencies is not, could have compromising results. For example, if an agency issues a regulation dictating policy "a", and later, an Executive Order by the Mayor directs that all city agencies must now follow policy "b", Petitioner's theory would have us hold that a dispute concerning an agency's failure to abide by policy "b" is not arbitrable. Thus, an agency could refuse to implement a policy as dictated by the Mayor, and a grievant would be denied the forum of arbitration to have the dispute settled. As it is the policy of the New York City Collective Bargaining Law to promote and encourage-arbitration as the selected remedy to redress grievances, [2] we cannot hold that an agency's failure to abide by an Executive Order of the Mayor applicable to it is not arbitrable because an Executive Order is not a rule or regulation of the mayoral agency. On the contrary, if the Mayor issues a rule in the form of an Executive Order applicable to all mayoral agencies, such rule becomes a rule of each mayoral agency unless a different effect is specifically prescribed. It would be inconsistent,

[2] NYCCBL §1173-2.0; Board Dec. No. B-12-71; B-1-75.

for arbitration purposes, to hold that an agency must abide by the rule as set forth in the Executive order, but that such rule is not a "rule or regulation of the mayoral agency" so as to preclude arbitration over an alleged violation of it.

We also take notice of Board Decision B-13-69, which Petitioner correctly points out in its Reply, filed August 8, 1977, states that an Executive Order should be interpreted by the Board "rather than by an ad hoc arbitration procedure with its potentials of conflict and inconsistencies." [3] However, in that decision we were addressing the issue of Executive Orders as defined by the NYCCBL §1173-3.0n. Such Executive Orders provide for the implementation and application of the provisions of the NYCCBL, and are properly for the Board to interpret. Executive Order No.4 is not such an Executive order. It does not concern any provision of the NYCCBL and is more in the nature of a personnel policy directive to agency heads requiring them to make promotions from eligible lists in the order in which available candidates names appear. Interpretation by an arbitrator to determine whether a violation of this Executive Order has occurred would not result in potential conflict or inconsistencies, and thus is a proper subject to go before an arbitrator.

Secondly, it is the policy of this Board that doubtful issues of arbitrability are to be resolved in favor of

[3] Board Dec. B-13-69, at p.3.

arbitration.[4] In this, the Board has followed the well settled principles initially set forth by the United States Supreme Court in United Steelworkers of America v. Warrior and Gulf Navigation Co. , 363 U.S. 574, 46 LRRM 2417(1960) which reads, in partAinent part, as follows:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration*clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id., 46 LRRM at 2419.

The Board finds that it cannot be said with positive assurance that 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," is not susceptible of an interpretation that would include a claimed violation of an Executive Order of the mayor applicable to all city agencies. Thus, the Board holds that the definition of a grievance as stated in Executive order No.83 is broad enough to cover an alleged violation of Executive Order No.4, and that'such alleged violation is therefore arbitrable.

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

[4] Board Decisions No. B-14-74; B-18-74; B-12-75; 19-28-75.

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.
August 24, 1977

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD F. GRAY
MEMBER

I dissent FRANCES M. MORRIS
MEMBER

*Board Member Morris's dissent follows on pages 8 and 9.

Dissenting Opinion

The opinion of the board departs from the express provisions of the grievance definition contained in Executive Order 83, set forth below in full:

> "b. For purposes of subdivision a of this section, the term "grievance" shall mean (A) a dispute concerningcg the application or 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 of misapplication of the written rules or regulations of the moyoral 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 tem., "grievant" shall include all gricvants in the case of a group grievance." (Emphasis supplied.)

The foregoing definition does not by its terms include an Executive Order of the Mayor. Nor can the characterization of the Order as"in the nature of a personnel policy directive to agency heads" bring the Order within the scope of the definition. Such policies are implemented by personnel orders, which are not within the grievance definition
of executive Order No. 83. Personnel orders of the Mayor, grievable under its predecessor, Executive Order No. 52 were deleted by the amendment to that order resulting in Executive Order No. 83. Assuming arguendo that Executive Order No. 4 can be characterized as a personnel policy directive, the result of the board's decision is to rewrite Executive Order No. 83 to insert the words "personnel order of the Mayor" [5] This is outside the scope of the board's authority.

[5] It is noted that, in fact the City Council enacted a local law similar to that of Executive Order No. 4, Local Law No. 14 of 1974, effective\ August 10, 1974. It was applicable at the time the actg for which the grievance was brought took place.

Of greater concern is the addition to the words "written rules or regulations of the in mayoral agency", the words "Executive Orders of the Mayor." Again, the grievance definition of Executive Order No. 83 has been rewritten. Mayoral executive orders were not grievable under the provisions of Executive Order No. 52 and are not contained in the grievance definition of Executive Order No. 83. The NYCCBL also contains no such definition, even though executive orders relating to that law are defined therein. 91173-3.0n.

The policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected remedy to redress grievances requires the selection of such remedy and intent that an item be grievable on the part of those authorzied by law to make such decisions, whether unilaterally or bilaterally. In the present instance, the board has assumed the power to select a remedy by rewriting the grievance definition.

Accordingly, I dissent from the Board decision in this case.

Francis M.Morris