

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner

-and-

DECISION NO. B-14-77  
DOCKET NO. BCB-272-77  
A-648-77

LOCAL 1320, DISTRICT COUNCIL 37,  
AFSCME, AFL-CIO,

Respondent

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DETERMINATION AND ORDER

Local 1320, District Council 37, AFSCME (Local 1320), filed a request for arbitration on April 19, 1977, concerning the alleged failure of the Department of Public Works to abide by a Memorandum of Understanding signed by the parties in March 1967. Specifically, the issue to be arbitrated, as stated by Local 1320, is:

"Whether the appointment of a Senior Sewage Treatment Worker out of seniority order was a violation of the Memorandum of Understanding between Local 1320, DC 37 and the City of New York dated March, 1967, adversely affecting the rights of the grievants thereunder."

Local 1320's request for arbitration is made pursuant to the grievance procedure provided by the collective bargaining agreement which was entered into by the parties in November 1969, for the period October 33, 19E9 to-December 31, 1971.

The City of New York, appearing by the Office of Municipal Labor Relations (OMLR), filed a petition Challenging

Arbitrability on May 31, 1977. OMLR contends, inter alia, that the grievance is not arbitrable because the utilized arbitration procedure is no longer viable, in that the collective bargaining contract which provided for it expired in 1971 and in addition, the Memorandum of Understanding is unenforceable since municipal contracts of indefinite duration are against public policy. Thus, OMLR concludes, the City was free to unilaterally change wages, hours, or working conditions.

In its Answer, filed with this office on June 30, 1977, Local 1320 contends that the grievance is arbitrable as the conduct of the parties has kept both the collective bargaining agreement (Agreement) and the Memorandum of Understanding (Memorandum) valid and binding to the present time. Local 1320 alleges that the appointment of a Ward's Island Plant Sewage Treatment Worker (a Mr. Schlonsky) to a Provisional Senior Sewage Treatment Worker-position out of seniority, violated the Memorandum and adversely affected the rights of more senior employees. That portion of the Memorandum claimed to be violated is §3a which states:

"if a temporary or provisional job occurs within the plant, this vacancy shall be filled by employees at that plant according to seniority, provided the employee is fully competent to fill the position."

The grievance was first initiated on August 27, 1976, after Mr. Wagner, the Chief of Plant Operations confirmed the City's intentions to appoint Mr. Schlonsky to the position

indicated above. Thereafter, in October 1976, Mr. Schlonsky was so appointed.

POSITIONS OF THE PARTIES

OMLR argues that the instant grievance is not arbitrable because the Agreement containing the grievance procedure expired on December 31, 1971, and "the state of the law in New York is clear that when a grievance arises in the public sector after a collective bargaining agreement has expired, the provision for arbitration is no longer in effect" (citations omitted). Even if it did not so expire, OMLR claims "it would have terminated by operation of law since an agreement which has not been renewed cannot survive indefinitely because to permit this would violate public policy."

OMLR further claims that with the expiration of the Agreement on December 31, 1971, it was free to make unilateral changes in wages, hours or working conditions because there was no duty to preserve the status quo. The New York City Collective Bargaining Law (MCM) Section 1173-7.0d states that during the period of negotiations the parties shall preserve the status quo whereby the public employer "shall refrain from unilateral change in wages, hours or working conditions." The "period of negotiations" is defined as "the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed." OMLR alleges that

such "period of negotiations" did not commence as Local 1320 never manifested its desire to negotiate a new contract by filing a bargaining notice pursuant to KYCCBL Section 1173-7.0a(1). Therefore since no bargaining notice was filed the period of negotiations did not begin to run and there was no duty on the City to maintain the status quo, thereby permitting it to make unilateral changes in wages, hours or working conditions. Thus, even if a grievance procedure culminating in arbitration was available to Local 1320 under the Agreement, the instant grievance, OMLR claims, is not arbitrable because the City was permitted to make the aforementioned unilateral changes.

Regarding the Memorandum, OMLR alleges that it is not enforceable because it is not a collective bargaining agreement and its provisions were never incorporated into the Agreement. Even if it was a valid agreement, OMLR claims it must be unenforceable \*as municipal contracts of indefinite duration are against public policy," and "[a]lthough courts have construed municipal labor agreements of arguably indefinite duration as continued for a reasonable period of time those decisions do not support a similar finding herein.'

Local 1320 admits, in papers filed on June 30, 1977 and September 19, 1977, that the Agreement expired on December 31, 1971 and that, "the parties never entered into the period of negotiations as defined in Administrative Code S1173-7.0(d), nor, therefore, into the status quo period as provided for in

Administrative Code 51173-7.0(d)." Local 13210 alleges that, although the Agreement expired on December 31, 1971, the City has continued to honor it as evidenced by the fact that the grievances filed thereunder have resulted in arbitration. Local 1320 cites orie such grievance which went in arbitration <sup>1</sup> pursuant to the procedure provided by the expired contract and argues that:

"There was no challenge to arbitrability at that time by the City as there had never been prior thereto. It should also be noted that in that arbitration the specific violation cited was one involving the Comptroller's Deter-  
mination, dated August 5, 1974, which is indicative of the fact that at that time, the Petitioner acknowledged the continuing validity of the Agreement."

Local 1320 further contends that the Memorandum, which is alleged to have been violated in the instant grievance, has also been honored until the present tine by the City and that therefore by the actions of the City, both the Agreement and the Memorandum continue in effect as extended oral contracts. Thus, Local 1320 asserts the City is estopped from claiming that the Agreement hrs expired enbling it to make unilateral changes-  
in wages, hours or working conditions.

Local 1320 claims that it "has relied and continues to rely on the Agreement and Memorandum because of the City's

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<sup>1</sup> OCB Docket No. A-530-75.

continued and expressed adherence to them." Local 1320 concludes, "For Petitioner to succeed in its challenge to arbitrability would result in a gross inequity to Respondent, in that it would be left without a mechanism to redress its grievances and in that Petitioner would be given future license to accept or reject the Agreement and Memorandum whenever it so willed."

In a Reply Memorandum of Law in support of the Petition Challenging Arbitrability, filed on September 22, 1977, Petitioner argues that Respondent's "theory of estoppel" would require the Board "to infer a valid enforceable agreement through the silence of Petitioner." OMLR asserts that this theory is untenable, especially in light of recent cases in which the courts have stayed arbitration on the ground that the agreement had expired." <sup>2</sup> Petitioner points out that, in Dobbs Ferry Union Free School District v. Dobbs Perry United Teachers, <sup>3</sup> the Court held a survivorship provision of the collective bargaining agreement, which provided that the agreement would continue in effect after its expiration date unless

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Petitioner cites: Abate v. New York City Transit Authority, New York Law Journal, September 13, 1977, p.11 (Sup. Ct. Kings Cty.); Board of Education, Wyandanch Union Free School District v. Wyandanch Teachers Association, New York Law Journal, August 3, 1977, p.1 (App. Div., Second Department); Dobbs Perry Union Free School District v. Dobbs Perry United Teachers, 395 N.Y.S. 2d 988 (Sup. Ct., Westchester Cty. April-18, 1977).

<sup>3</sup> Misc. 2d , 395 N.Y.S. 2d 988 (Sup. Ct., Westchester Cty. April 18, 1977).

amended or superseded by the parties, contrary to public policy and, as the agreement had expired, so too had the contractual arbitration provision. Petitioner quotes the Court, "It is elementary that arbitration may not be compelled without a predicate contract therefor (citations omitted)." Petitioner concludes that where, as in the instant proceeding, the statutory status quo period is not applicable, "There is similarly no predicate contract pursuant to which arbitration may be compelled."

Addressing Respondent's claim that if Petitioner prevails in this proceeding, the parties then have no mechanism to redress grievances, Petitioner states, in a footnote:

"Respondent appears to have forgotten the grievance and arbitration procedure provided for in Executive Order 83. Whether or not such procedure would be available to Respondent in the instant matter is irrelevant."

#### DISCUSSION

The principal issues presented by the parties concern the validity of the Agreement and Memorandum. Concerning the Agreement, OMR claims that it has expired and since there was no status quo to be preserved, the City was free to make unilateral changes in wages, hours or working conditions. Local 1320, on the other hand, claims in effect, that by the City's past actions, OMLR is now estopped from asserting the Agreement's expiration.

01MLR cites several cases in support of its contention that in the absence of a rev- agreement, a contractual grievance procedure does not continue in effect upon the expiration of the contract term. In Bd. of Cooperative Educational Services of Rockland City v. PEEB and Boces Staff Council, 41 N.Y. 2d 753, 395 N.Y.S. 2d 439 (1977), the Court of Appeals held that the New York State Public Employment Relations Board's "Triborough Doctrine" does not obligate a public employer to pay salary increments due at a time when a contract has expired and the parties are in the midst, of negotiations for a successor agreement. However, the Court of Appeals indirectly upheld the underlying tenet of "Triborough" that the status quo, as it pertains to mandatory subjects of Bargaining, must be maintained during negotiations. Therefore, if the protection of the status quo was applicable to the expired contract herein, the grievance procedure, being a mandatory subject of bargaining, could still be utilized.

Bargaining for a new contract is an essential element in the status quo scheme established by §1173-7.0d of the NYCCBL. A request for the commencement of negotiations for a successor labor agreement is a condition precedent to the invocation of the status quo provision of our law. The policy of the City which brought about the enactment of the NYCCBL is to encourage collective bargaining with, a written labor agreement, resulting therefrom. In accordance with this policy

See NYCCBL §1173-2.0.



our status quo provision provides that a public employer refrain from unilateral changes in mandatory subjects of collective bargaining during "the period of negotiation," such period to begin with the filing of a bargaining notice. Since an examination of the record in this case reveals that no such notice was filed and that the union never attempted to negotiate a new contract, Local 1320 is not entitled to the protection that the preservation of the status quo, pursuant either to PERB's Triborough Doctrine or NYCCBL §1173-7.0d, affords

The fact that the City in the past might have arbitrated union grievances arising under the Agreement subsequent to its expiration date, does not constitute a waiver of its present right to challenge arbitrability. Perhaps the City should have challenged the arbitrability of prior grievances filed under the expired contract" rather than seeing them through to arbitration, however, it is important to note that the subject matter of the single grievance cited by Local 1320 as an example of the alleged past policy of the City in this regard, distinguishes that case from instant matter. The cited grievance (A-530-75) concerned an alleged violation of a Comptroller's Determination, the end-product of the procedure mandated by Section 220 of the New York State Labor Law for setting the wages of prevailing rate employees. Alleged violations of a determination under Section 220 are specifically

made subject to the grievance-procedure provided by Executive Order 83<sup>4</sup> and fall within, the scope of the term "grievance" as defined by the NYCCBL<sup>5</sup> and therefore are proper questions for submission to arbitration as provided by executive order or by collective bargaining agreement.<sup>6</sup> In conclusion, the cited grievance would have been found arbitrable even if the City had presented a challenge, and it necessarily follows that no precedent can be drawn from that case which would apply herein.

The City has not obligated itself to adhere to the Memorandum which was signed ten (10) years ago and never referred to again according to the record presented herein. Furthermore, there is nothing contained in the papers of the parties, except Local 1320's bold assertion, to suggest that there has been any oral contract which has served to extend the duration of either the Agreement or Memorandum.

A union cannot stand pat for six years on an expired collective bargaining contract and expect the terms thereof to be binding on the City in perpetuity. A labor contract is a "living" document only if it is attended to and revised

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Executive Order 83b - "... the term "grievance" shall mean (A) a dispute concerning the application or interpretation of the terms of... (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment."

<sup>5</sup> See NYCCBL §1173-3.0o(1).

<sup>6</sup> See NYCCBL §1173-E.Og(2)

on a regular basis. if a union wants the protection which a valid contract provides, it must see to it that the contract remains current and ongoing. moreover, the Memorandum which was entered into in 1967 and never incorporated in a contract or referred to again in any correspondence reflected in the record, can no longer be the subject of a proposed arbitration

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 Local 1320's request for arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.  
October 12, 1977

ARVID ANDERSON  
CHAIRMAN

WALTER L. EISENBERG  
MEMBER

ERIC J. SCHMERTZ  
MEMBER

EDWARD SILVER  
MEMBER

FRANCE MORRIS  
MEMBER

EDWARD J. CLEARY  
MEMBER

EDWARD F. GRAY  
MEMBER