Local Union No.3, I.B.E.W., 21 OCB 1 (BCB 1978) [Decision No. B-14-78 (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
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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-1-78

DOCKET NO. BCB-278-77
(A-664-77)

Petitioner,

-and-

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

Respondent.

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DECISION AND ORDER

On November 1, 1977, Petitioner, appearing by its Office of Municipal Labor Relations OMLR), moved to reopen Board Decision No. B-13-77 on the basis of the holding of the New York State Court of Appeals in Liverpool Central School District v. United Liverpool Faculty Association.[1] Respondent (the Union) submitted a letter, dated November 11, 1977, in opposition to the Motion to Reopen.

By letter dated November 28, 1977, the parties were advised that OMLR's Motion to Reopen 8-13-77 bad bean granted and that they could additional concerning the arbitrability of the grievance within a specified period of time. OMLR had submitted a brief concerning arbitrability of the dispute on November 10, 1977 pursuant to its request In the Motion to Reopen filed November 11, 1977. The Union set

[1] 42 N. Y. 2d 509, 399 N. Y. S. 2d 189 (decided October 18, 1977).

forth arguments concerning arbitrability in its letter of November 11, 1977. The Municipal Labor Committee (MLC) in a letter dated December 22, 1977, requested permission to express its support of the position of the union in this matter.

BACKGROUND

In B-13-77, we granted the Union's Request for Arbitration of a grievance alleging a "[b]ypassing for promotion to Foremen of Mechanics." The Request for Arbitration was made pursuant to §5(d)[2] of Mayor's Executive Order No. 83

[2] Section 5(d) states:

> An employee organization certified for the unit of which the grievant is a member shall have the right to bring grievances unresolved at Step 4 of the general procedure to impartial arbitration. As a condition to such right the grievant and such organization shall be required to file with the Director of the Office of Collective Bargaining a written waiver of the right, if any, of said grievant and of said organization to submit the underlying dispute of any other administrative or judicial tribunal except for the purposes of enforcing the arbitrator's award. In addition, the City shall have the right to bring directly to arbitration any dispute concerning any matter defined herein as a grievance. The City shall commence such arbitration by submitting a written request therefore to the Office of Collective Bargaining. A copy of the notice requesting impartial arbitration shall be forwarded to the opposing party. The arbitration shall be conducted in accordance with the Consolidated Rules of the Office of Collective Bargaining. The costs and fees of such arbitration shall be borne equally by the certified employee organization and the City. The City and the employee organization which is party to the particular grievance shall each pay 50 per cent of the fees and expenses of the arbitrator and of related expenses incidental to the handling of such arbitration.

(hereinafter E.O. 83) and alleged a violation of Mayor's Executive Order No.4[3] (hereinafter E.O. 4). The Board found that the Union had stated an arbitrable grievance within the definition of a grievance set forth in E.O. 83, §5 (b) (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...."

In B-13-77, we rejected the City's argument that the wording of §5(b)(B) of E.O. 83, "[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. The Board stated:

> [W]e 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

[3] Executive Order 4 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.

> agency unless a different effect is specifically prescribed. It would be inconsistent, 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 based the decision on our long held policy of resolving doubtful issues of arbitrability in favor of arbitration[4] and held that "the definition of a qrievance 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."

Alternate City Member Frances Morris dissented from the Board's decision, stating, inter alia, that E.O. 83, §5(b)(B) by its terms does not include an Executive order of the Mayor and that the Board was, in effect, rewriting the terms of E.O. 83.

POSITIONS OF THE PARTIES

The City argues that the recent Court of Appeals decision in Liverpool Central School District v. United Liverpool Faculty Association, supra, is applicable to this case and requires the Board to reverse its holding in B-13-77. Pointing out that in arbitrability cases arising under the NYCCBL, the Board sits in place of a court, OMLR states that the Board must apply the same standards as promulgated by the courts under the Taylor Law.

[4] Citing B-14-74; B-18-74; B-12-75; B-28-75.

OMLR notes that in Liverpool, the Court construed an inclusionary/exclusionary arbitration clause; that Is, an express agreement to arbitrate certain matters and an express exclusion of certain other matters from arbitration. The Court held that under the Taylor Law "[T]he agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration; anything less will lead to a denial of arbitration."[5] The City submits that under the Liverpool decision, arbitration must be denied in the instant case based on "the precise wording of Executive Order No. 83." The City contends that while the instant case concerns a unilateral commitment to arbitrate which contains only an inclusion of matters to be arbitrated but contains no specific exclusion from the commitment to arbitrate, this does not make Liverpool any less controlling.

The City argues that since the decision in Liverpool, there is no longer any presumption of arbitrability applicable to disputes arising in the public sector. Therefore, the City concludes, it should not be compelled to arbitrate a grievance unless the subject is specifically included within the grievance arbitration clause. The City contends that it should not be compelled to list exhaustively all exceptions to an Arbitration clause because, "Such a listing is virtually impossible

[5] 399 N.Y.S.2d 189, 190. The Taylor Law does not contain specific arbitration provisions such as are found in NYCCBL §1173-8.0.

where the employer is a municipal corporation subject to a plethora of rules and regulations which may be applicable to the agency but which the employer does not wish to arbitrate.

The Union submitted a letter in opposition to the Motion to Reopen. The Union argues:

> 1. The Court of Appeals does not have the power to change the effect of the United States Supreme Court decisions in the Steelworkers' trilogy, which are binding as to all types of arbitration, even though the Supreme Court's rationale was based upon private sector arbitration practices.
>
> 2. Liverpool is inapplicable here. The Court in Liverpool dealt with interpretations of agreements to arbitrate. This case involves an interpretation of an Executive Order, which OCB is empowered to construe in a reasonable fashion.
>
> 3. This case involves failure to promote without 'good and sufficient cause'. It would have no impact upon public policy but affects only an individual employee.
>
> 4. Liverpool postdated OCB's Decision n this case.

In its letter, the MLC argues that there is a presumption of arbitrability under the NYCCBL[6] and that the resumption is mot changed by the Court's decision in Liverpool, which "states that the usual presumption favoring arbitrability cannot be presumed under The Taylor Law." The MLC continues:

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[6] Citing §1173-2.0 of the NYCCBL

> Moreover, the court found that the particular controversy involved there could fall within both the included and excluded categories of arbitrable matters. Here we have no such ambiguity. it is clear that any Mayoral Executive order becomes a rule or regulation of each mayoral agency. It is as simple as that. Since there is no ambiquity, the matter is arbitrable even under Liverpool and even if New York City did not have a strong public policy favoring arbitration.

DISCUSSION

The New York City Collective Bargaining Law (NYCCBL) provides, in pertinent part, as follows:

> §1173-2.0 Statement of Policy
>
> It is hereby declared to be the policy of the city to favor and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

The public policy in favor of arbitration and in support of such presumptions of arbitrability as we have, from time to time, enunciated,[7] is clear.

[7] For example, see B-12-71; B-14-74; B-18-74; B-1-75; B-12-75; B-28-75.

The NYCCBL provides further, as follows:

Section 1173-5.0 Powers and duties of board of collective bargaining; board of certification; director.

a. Board of Collective Bargaining

> The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
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> * * *
>
> (3) on the request of a public employer or a certified or designated employee organization which is a party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure pursuant to section 1173-8.0 of this chapter;

It is thus apparent that the role of the quasi-judicial Board of Collective Bargaining (BCB) Inarbitrability disputes under the NYCCBL,, like the courts under the Taylor law, is to decide questions of substantive arbitrability.

As they are fashioned to meet the specific circumstances and conditions prevailing in New York City, the New York City law and procedures with regard to arbitrability issues have proven sound and effective. In the 10 years since the enactment of the NYCCBL, 707 grievance-arbitration, cases have been filed with the Office of Collective Bargaining,

and 646 of those cases have been closed. Without burdening the record with a-statistical analysis of the closing of the cases, either by award, settlement, dismissal or withdrawal we mote that judicial review of the closed arbitration cases has been sought in only a few cases. Since .1968, challenges to the arbitrability of cases filed with the BCB have numbered 202, of which 194 have been closed. Again without burdening the record with all the statistics, we note that 87 of the arbitrability cases have been closed by decision of the BCB; judicial review of the BCB decisions concerning arbitration has been sought in only 4 cases. None of these decisions have been appealed beyond the Supreme Court level. In sum, the volume of court litigation ever public sector arbitration cases in New York City is extremely low. Thus, it can be stated with positive assurance that the efficacy of the statutory public policy in achieving sound and harmonious labor relations between the City and municipal employee unions has been demonstrated by the record.

In B-13-77, we decided that §5(b)(B),of E.O. 83 was broad enough in scope to include an alleged violation of an Executive Order of the mayor, and specifically, whether the language 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" includes an alleged violation of E.0. which directs and regulates the actions of heads of City agencies in making promotions.

The NYCCBL sets forth standards for application by the BCB in making determinations of arbitrability of grievances pursuant to §1173-5.0a(3), supra. Among these are the provisions of §1173-8.0 which reads, in pertinent part, as follows:

> 1173-8.0 Grievance Procedure and impartial arbitration
>
> * * *
>
> b. Executive orders, and collective bargaining agreements between public employers and public employee organizations, may contain provisions for grievance procedures, in steps terminating with impartial arbitration of unresolved grievances. Such provisions may provide that the arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with the applicable law governing arbitration, except that awards as to grievances concerning assignment of employees to duties substantially different from those stated in their job classifications, or the use of open competitive rather than promotional examinations, shall be final and binding and enforceable only to the extent permitted by law.
>
> g. An employee may present his own grievance either personally or through an appropriate representative, provided that:
>
> (1) a grievance relating to a matter referred to in paragraph two, three or five, of subdivision a of section 1173-4.3 of this chapter may be presented and processed only by the employee or by the appropriate designated representative or its designee, but only the appropriate

> designated representative or its designee shall have the right to Invoke and utilize the arbitration procedure provided by executive order or in the collective agreement to which the designated representative is a party; and provided further that
>
> (2) any other grievance of an employee in a unit for which an employee organization is the certified collective bargaining representative may be presented and processed only by, the employee or by the certified employee organization, but only the certified employee organization shall have the right to invoke and utilize the arbitration procedure provided by executive order or in the collective agreement to which the certified representative is a party.

Clearly, therefore, the Board of Collective Bargaining is the body empowered by statute to determine whether an Executive Order of the Mayor provides for arbitration of a grievance.[8] In B-13-77, we exercised our statutory power to construe E.O.83 and found that under that Executive Order "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." The Board decided that because

We have exercised this statutory power In the past. See Board Decisions Nos. B-11-69; B-13-69; B-16-69; B-8-70; B-12-71; B-13-72; B-20-72; B-12-77. We further note that none of these decisions have been challenged in court.

[8] For example, see B-12-71; B-14-74; B-18-74; B-1-75; B-12-75; B-28-75.

E. 0. 4 is, in effect, a rule or regulation of the mayoral agency[9] affecting terms and conditions of employment as contemplated by E.O. 83, the grievance alleged is arbitrable pursuant to E.O. 83.

We believe that our finding that E.O. 4 is a rule or regulation of the mayoral agency within the meaning of E.O. 83 is not affected by the decision of the Court of Appeals in Liverpool, supra. The Court, in that case, determined whether the dispute concerned a health matter, which the parties specifically agreed to arbitrate, or a disciplinary matter, which the parties specifically agreed not to arbitrate. The Court stated, "A very reasonable assertion can be made that this particular controversy falls within both the included and excluded categories,"[10] and found that, under such an

[9] Although not raised by the parties in this proceeding nor in our original determination of this matter, we note that E.O. 4 has been superceded by §814(12) of the revised City Charter, effective January 1, 1977. That section authorizes agency beads to make appointments to competitive positions from eligible lists pursuant to §61(l) of the State Civil Service Law which provides for use of what is commonly termed "the rule of one of three." However, as stated in the Step IV Decision of this matter, grievant alleges he was bypassed for promotion an November 22, 1976, when E.O. 4 was still in effect.

[10] 399 N.Y.S. 2d at 293.

explicitly limited arbitration clause, unless there was an express, direct and unequivocal agreement to arbitrate the dispute, the matter was not arbitrable.

We note that in South Colonie Central School District v. South Colonie Teachers Association, decided by the Court of Appeals subsequent to Liverpool on November 21, 1977 (no.463), the Court found that a contract clause defining an arbitrable grievance as one based upon an event or condition which affects the terms and conditions of employment of a teacher or group of teachers and/or the interpretation or meaning of any of the provisions of this Agreement...” to be "sufficiently express, direct and unequivocal as to the dispute to be submitted [to arbitration]" (citing Liverpool, supra). The Court, in South Colonie, stated, "The District [by this clause] undertook to commit a very broad range of issues to ultimate arbitral determination.” (slip op. p.3).

The South Colonie decision's clarification of Liverpool does not directly set aside the finding in the matter decision that there is no presumption of arbitrability under the Taylor Law comparable to that which prevails in the private sector. We understand South Colonie to hold that a broad arbitration clause - a clause which in the words of that decision “committ[s] a very broad range of Issues to ultimate arbitral determination"- will have the effect of requiring arbitration of disputes which arguably fall within its ambit despite the fact that the clause makes no specific mention

of the particular type or class of dispute presented in a given case.

We are also aware of a decision of the Appellate Division, Second Department, which gave effect to a specific exclusionary clause exempting certain disputes from the general obligation to arbitrate alleged violations of a collective bargaining agreement. (Bd. of Ed. of Levittown v. Levittown United Teachers, N.Y.L.J., Dec. 21, 1977.) In that case, the contract as described by the court provided that if a provision thereof were found to be illegal, the parties should attempt to agree on a substitute provision," but if no agreement could be reached, arbitration was "specifically proscribed." In effect, the parties had removed from the grievance-arbitration process any dispute over the formulation of new contract terms to replace provisions found to be unenforceable as contrary to law. Levittown thus concerned a specific and express exclusion from arbitration of certain disputes over new contract terms.

We believe that Levittown is not helpful to our decision in the instant case. In the case at bar, there is no express exclusion from arbitration such as was present in Liverpool and in Levittown; rather E.O. 83 contains a general agreement to arbitrate disputes such as was present in South Colonie.

In B-13-77, the question was not whether the dispute was specifically included or specifically included from the agreement or consent to arbitrate; the issue was whether

E.O. 4 is a rule or regulation of a mayoral agency within the meaning of E.O. 83. We decided that it is. E.o. 83 specifically provides for arbitration of alleged violations of such rules or regulations. Therefore, we will uphold our decision in B-13-77 ordering arbitration of the grievance.

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 notion of Petitioner for reconsideration be, and the same hereby is, granted, and upon such reconsideration we adhere to our ruling in Decision No. B-13-77; and it is further

ORDERED, that the grievance presented by Respondent's request for arbitration be submitted to an arbitrator in accordance with our finding in Decision No. B-13-77.

DATED: New York, New York
February 2, 1978

Arvid Anderson
CHAIRMAN

Walter L. Eisenberg
MEMBER

Eric J. Schmertz
MEMBER

Edward F. Gray
MEMBER

I dissent Frances M. Morris
MEMBER

I dissent Thomas J. Herlihy
MEMBER

*Alternate City Member Morris's dissent, in which Alternate City Member Herlihy concurs, follow on page 17.

Dissenting Opinion of Member Morris

The decision and order of the Board upon reargument takes the position that the "test of arbitrability" is not whether the subject was specifically included or excluded but whether it may be interpreted as a subject which the parties intended to be arbitrable.

Such an approach is clearly contrary to the Court's holding on arbitrability in Liverpool.

Nor, in my opinion, is the decision in South Colonie applicable to the circumstances herein.

Moreover, the Board's decision here in effect reverses Liverpool on the basis of South Colonie, going far beyond the decision in the latter case.

Mr. Thomas Herlihy joins uke in this dissent.