City v. Paver & Roadbuilders District Council, et. al, 21 OCB 3 (BCB 1978) [Decision No. B-3-78 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-3-78

DOCKET NO. BCB-264-76
(A-614-76)

Petitioner,

-and-

PAVERS AND ROADBUILDERS DISTRICT COUNCIL, LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Respondent

DECISION AND ORDER

On September 1, 1976, the Pavers and Roadbuilders District Council (Respondent) filed a Request for Arbitration of the grievances of nine Highways and Sewers Inspectors and two Senior Highways and Sewers Inspectors. on September 17, 1976, District Council 37, the City-wide representative, consented to the filing and processing of the Request for Arbitration by Respondent. The Request for Arbitration states as the grievance to be arbitrated, "[The] Transportation Administration has failed to provide overtime compensation to certain inspectors and senior inspectors," and Respondent seeks as remedy "payment of overtime compensation." Respondent claims that "... overtime provisions City-Wide Contract" have been violated by the employer.

Petitioner, appearing by the Office of Municipal Labor Relations* (OMLR), filed a Petition Challenging Arbitrability

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* At the time of the filing of the Petition Challenging Arbitrability, Petitioner was the Office of Labor Relations. On February 3, 1977, the Office of Labor Relations was officially designated the Office of Municipal Labor Relations.

on October 5, 1976, alleging, inter alia, that grievants' claims were not timely filed and that the grievance does not involve construction of the City-Wide Contract in effect at the time the Request for Arbitration was filed. Petitioner seeks that Respondent's Request for Arbitration be denied.[1]

SYLLABUS

This case concerns grievances over denial of overtime pay for hours worked between 35 and 40 hours per week during the period July 1, 1972 and April 15, 1973. The Union claims a unit agreement, signed March 19, 1974, retroactively established a 35-hour work week for grievants. Involved in determining the arbitrability of the grievances are: the July 1, 1970 to June 30, 1973 City-Wide Contract (hereinafter 1970 City-Wide Contract); the July 1, 1973 to June 30, 1976 City-Wide Contract (hereinafter 1973 City-Wide Contract); and the July 1, 1972 to June 30, 1975 unit agreement (hereinafter 1972 unit agreement) between the parties, signed on March 19, 1974.

A violation of the work-week clause of the 1972 unit agreement, retroactively applied, and a violation of the overtime provisions of the 1970 City-Wide Contract and/or the 1973 City-Wide Contract is alleged by the Union. The City disputes arbitrability on several grounds. Because our determination

[1] Deputy Chairman Laura, with the consent of the parties, conducted several conferences with them for the purpose of settling the dispute. On April 14, 1977, Mr. Laura advised that his mediation efforts to resolve the grievances had been unsuccessful.

of this matter involves conflicting allegations of fact and consideration of the relationship between and amongst the listed contracts, we detail the contentions of the parties and our analysis at length.

BACKGROUND

The 1972 unit agreement between the City of New York and Pavers and Roadbuilders District Council covering the titles Inspector and Senior Inspector for the period July 1, 1972 to June 30, 1975 was signed by the parties on March 19, 1974. Article III, Appendix A, Section 1(b) of the unit agreement states:

> All salary adjustments, including general increases, minimum and maximum salaries, advancement increases, lump sum payments, educational differentials and any other salary provisions of this agreement are based upon a normal work week of (35) hours.

Respondent alleges that for the period July 1, 1972 to April 15, 1973, grievants worked a number of hours in excess of the standard 35-hour work week and therefore are entitled to overtime compensation for such hours. It is undisputed that at the time grievants worked 40 hours per week; the claims for overtime are based on the assertion that the terms of the 1972 unit agreement are to be given retroactive effect.

According to Respondent, during the period May 1974 to October 1974 "requests for the payment of overtime were made

by various employees directly to the payroll division of the Department of Highways. In the fall of 1974, as the back-pay checks began to be received it became obvious that the overtime amounts were not included."

In its Answer to the Petition Challenging Arbitrability, Respondent alleges that a conference was held between William Hediger, Deputy Director OMLR, and representatives of Respondent in January 1975. Respondent states that Mr. Hediger then "advised the respondent that the failure to pay the said overtime pay after the contract between the parties was signed in March, 1974 was a result of a misunderstanding and would be corrected." Respondent further alleges that, on various occasions between January 1975 and September 1975, agents and representatives of OMLR agreed to "the payment of overtime for work performed in excess of said 35 hour work week, and such payment would be made as soon as mathematical computation was made."

Respondent also contends that in April 1975, when negotiations for a successor unit contract[2] were commenced, the claims for overtime pay were again discussed and that Respondent was assured that only an administrative delay was holding up such payment. Respondent further alleges that in June 1975, pursuant to the City's fiscal crisis, all such

[2] The successor unit contract covers the period July 1, 1975 to June 30, 1976 and hereinafter will be termed the 1975 unit agreement.

negotiations were suspended and that in August 1975, Respondent was given a proposed agreement and was advised by the then Director of OMLR that the question of overtime pay would have to be submitted to the Department of Transportation as a grievance. The Respondent filed a grievance for the payment of overtime pay with the Department of Transportation on September 11, 1975.

Petitioner, in its Reply to Respondent's Answer, denied knowledge or information sufficient to form a belief as to the truth of several of Respondent's assertions that prior to August 1975, representatives of OMLR on numerous occasions had advised Respondent that the overtime pay sought was in fact due in accord with the 1972 unit agreement between the parties and would be paid. Petitioner also denied on the basis of insufficient information to form a belief as to the truth of Respondent's claim that agents and representatives of Petitioner, on numerous occasions between January 1975 and September 1975, had admitted that the individual grievants were on a 35-hour work week, effective July 1, 1972. In its Reply, Petitioner stated, "[T]he claim for pay herein involved was the substance of one of Respondent's demands during the period of collective bargaining [for the 1975 unit agreement] between January and August, 1975, and that said demand was discussed, but not agreed to."

Because of the inconsistent allegations of fact which concern the arbitrability of the grievance, the Board, at its

meeting on June 22, 1977, directed that a hearing in this matter be held before a Trial Examiner. The hearing was held on August 18, 1977, at which time sworn testimony was heard, documents were received into evidence and a stenographic record of the proceeding was made. Petitioner filed a Post-Hearing Memorandum of Law on September 16, 1977; Respondent filed a Post-Hearing Memorandum of Law on October 3, 1977; and Petitioner, with Respondent's consent, filed a Reply Memorandum of Law on October 15, 1977.

POSITIONS OF THE PARTIES

Petitioner essentially argues that arbitration of the grievance is barred on two grounds: there is no applicable contract clause upon which the grievance may properly be based; Respondent has waived its right to arbitrate and/or is guilty of laches in processing the overtime claims.

Petitioner argues that this dispute concerns payment for alleged overtime and raises a question of the proper work week, subjects appropriately negotiated and agreed to at the City-Wide level.[3] As the grievance concerns work performed during the period covered by the 1970 City-Wide Contract, Petitioner contends that this dispute involves construction of the

[3] Petitioner cites, in support of this position, the Following: NYCCBL §1173-4.3a(2); City of New York and Local 3, IBEW, B-23-75; City of New York and Social Services Employees Union, B-11-68; City of New York and District Council 37, AFSCME, AFL-CIO, B-4-69.

terms of that contract. Petitioner alleges that the 1970 City-Wide Contract does not fix a standard work week, unlike the 1973 City-Wide Contract. Thus, Petitioner concludes, the parties are not obligated to arbitrate the instant grievances under the terms of the 1970 City-Wide Contract. Petitioner alleges that an arbitrator, with no authority to determine the standard work week, would be without jurisdiction to determine what overtime, if any, the grievants should receive.

In essence, and as stated at the hearing, Petitioners first point is that the grievance never arose -- that under the appropriate collective bargaining agreement for the determination of overtime pay during the period July 1, 1972 to April 15, 1973, the 1970 City-Wide Contract, there is no substantive provision on which these employees can base a claim that they are entitled to overtime pay for hours worked for the period between the thirty-fifth and fortieth hour.

Petitioner's second argument challenging the arbitrability of the grievances is that the Union has waived its right to arbitrate and is guilty of laches. Petitioner points out that testimony at the hearing indicates that the Union was not aware that the overtime allegedly due had not been paid until some time in late 1974[4] and that the grievance was

[4] Petitioner cites the testimony of: William Hediger, Deputy Director of Labor Relations, OMLR (Tr.36); Charles Romano, Business Manager of the Pavers and Roadbuilders District Council (Tr.39, 41); John LaRosa, Civil Service Representative, Pavers and Roadbuilders District Council (Tr.62). (References are to pages of the Transcript of the hearing held August 18, 1977.)

not filed until September 1975. Petitioner alleges that Respondent, rather than file a grievance, attempted to resolve the matter informally with OMLR and then, later, raised the claim at the bargaining table. Petitioner contends that the overtime claims were discussed during the course of negotiations for the 1975 unit agreement and that the City, under its duty to bargain in good faith, considered the demand but ultimately did not agree to it. Petitioner asserts that Respondent sought to resolve the claims through the grievance procedure only after the City refused to accede to the claims in collective bargaining and that such conduct constitutes a waiver of the claims.

Petitioner argues that the grievance is not arbitrable pursuant to the 1973 City-wide Contract as none of the operative facts giving rise to the grievance occurred after July 1, 1973, the effective date of the 1973 City-Wide Contract.[5] Assuming arguendo the union was not aware until some time in late 1974 that the overtime allegedly due had not been paid, OMLR notes that the grievance was not filed until at least nine months

[5] On this point, Petitioner also argues that a grievance concerning the terms of the 1970 City-Wide Contract is not arbitrable pursuant to the 1973 City-Wide Contract, as Article XIV, Section 1 of that contract states:

> The term grievance shall mean a dispute concerning the application or interpretation of this collective bargaining agreement Emphasis supplied).

later and that the 1973 City-Wide Contract imposes a 120 day limit on the filing of grievances. According to Petitioner, Respondent's course of conduct during the period of delay resulted in prejudice to Petitioner[6] and, thus, arbitration is barred by Respondent's laches. Petitioner further argues that Respondent, by arguing that the terms of the 1973 City-Wide Contract are applicable to this dispute, is seeking to avoid the necessary consequences "of the fact that the grievance arose under a contract which expired two years before." For the reasons stated above, Petitioner concludes that arbitration of the grievances pursuant to the 1970 CityWide Contract is also barred by laches.

Respondent argues that under the 1972 unit agreement between the parties, the non-payment of overtime compensation is arbitrable. Respondent cites Article VI, Section 1 of the 1972 unit agreement:

[6] Petitioner cites as prejudice suffered by the City due to Respondent's delay in filing the grievances the following: Assuming the grievances to be meritorious, they could have been adjusted and paid in Fiscal Year 1973-1974; the City is required, pursuant to the financial plan mandated by statute, to reduce expenditures in its Fiscal Year 1975-1976 budget if the City is found to owe any monies, the overtime claims were not raised by Respondent until Fiscal Year 1975-1976; the overtime pay claims were taken into account in negotiations for the 1975 unit agreement and, upon information and belief, the parties executed the 1975 unit agreement cognizant of same -- if the claims had not been a subject of negotiations, ultimately dropped by Respondent, the City might have been able to negotiate for terms more favorable to the City in the 1975 unit agreement.

> The term "grievance" shall mean (a) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;

Respondent claims that the grievance it seeks to arbitrate the nonpayment of overtime compensation -- falls squarely within the scope of the unit agreement definition of grievance.

Respondent cites the decisions of the United States Supreme Court in the Steelworkers Triology and decisions of New York State courts to the effect that arbitration is the preferred means of settling labor disputes and that the policy of the courts is to resolve doubtful issues of arbitrability in favor of arbitration.[7] Respondent argues that arbitration of the overtime claims is required by the grievance-arbitration clause of the 1972 unit agreement.

Respondent contends that the provisions of both the 1973 City-Wide Contract and the 1970 City-Wide Contract provide for arbitration of the instant grievance and that it, Respondent, may seek redress of its grievance under the provisions of either contract. Respondent contends that this dispute concerns a claim arising under the 1970 City-Wide Contract but which matured under the 1973 City-Wide Contract. Respondent explains that it is seeking overtime compensation for hours worked in excess of the 35-hour standard work week

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[7] It should be noted that Respondent's Memorandum of Law was submitted on October 3, 1977, prior to the decision of Liverpool Central School District v. United Liverpool Faculty Association, by the New York State Court of Appeals.

during the period July 1, 1972 to April 15, 1973, which work week was established by the 1972 unit agreement signed on March 19, 1974. Respondent argues that both the 1970 City-Wide Contract and the 1973 City-Wide Contract provide that straight time is to be paid for overtime worked between the thirty-fifth and fortieth hour if the employee was on a thirty-five hour work week.

Respondent points out that the grievance is arbitrable pursuant to Article XIV of the 1970 City-Wide Contract, which states:

> Any grievance concerning matters covered by this agreement shall be governed and controlled by (1) Local Law 53 of 1967, including any amendments thereto.

Respondent notes that Local Law 53 of 1967 established the NYCCBL, section 1173-3.0(0) of which states:

> [T]he term 'grievance' shall mean: (1) a dispute concerning the application or interpretation of the terms of a written collective bargaining agreement ....

As the 1972 unit agreement defines a grievance in the same terms as the 1970 City-Wide Contract, Respondent concludes that the grievance is arbitrable pursuant to either contract.

Respondent denies Petitioner's contention that arbitration is barred by laches and waiver. At the hearing, Respondent argued that the claim "arose when a representative of the City finally said we are in effect disagreeing with your interpretation of the contract .... That occurred in

1975, in August, and within the proper time a grievance was filed ... on September 11, 1975....”[8] Respondent explains this point as follows. When the grievants began to receive their backpay checks in the Fall of 1974 for monies owed pursuant to the then recently executed 1972 unit agreement, payment for overtime work was not included. In January 1975, counsel for Respondent and its agents conferred with the Deputy Director of OMLR who, according to Respondent, "agreed that the [1972 unit agreement] provisions did provide for overtime pay for hours worked in excess of 35 hours per week." Continuing, Respondent states that additional requests for payment of the overtime were made when negotiations for a successor unit agreement commenced in April 1975 and that the City's negotiator said he would look into the matter. It was not until August 1975, at a conference with the then Director of OMLR, Respondent contends, that the Union was advised "the question of overtime pay would have to be submitted to the Department of Transportation as a grievance."

Respondent argues that its request for overtime payments was not one of its collective bargaining demands during negotiations for the 1975 unit agreement, rather "it was a demand for payment that resulted in the delay that the City itself had foisted upon these employees." In its Post-Hearing Memorandum, Respondent asserts that the underlying issue on

[8] Tr. 10.

this point is one of timeliness, which has consistently been held to be a question properly resolved by an arbitrator.

Respondent further argues that while the grievance was not filed until two years after the expiration of the 1970 City-Wide Contract, that fact does not bar arbitration of the grievances as both the 1970 City-Wide Contract and the 1973 City-Wide Contract provide similar grievance machinery. Respondent maintains that case law in New York holds that the duty to arbitrate a dispute arising during the term of a collective bargaining agreement survives the expiration of the agreement.[9]

Respondent concludes by noting that Petitioner has not, at any time during the history of this case, denied that the employees worked the overtime and are, in fact, owed the overtime pay requested.

In its Post-Hearing Reply Memorandum of Law, Petitioner asserts that Respondent mistakenly states that the Deputy Director of OMLR, in January 1975, agreed that the 1972 unit agreement provided for overtime pay for hours worked in excess of 35 hours per week. Petitioner maintains that the transcript of the hearing indicates that Mr. Hediger stated that on the

[9] Respondent cites: Potoker v. Brooklyn Eagle, 2 N.Y. 2d 553 (1957), cert. denied, 355 U.S. 883; International Association of Machinists v. Buffalo Eclipse Cor., 12 A.D. 2d 875 (Fourth Dept. 1961), aff'd 9 N.Y. 2d 946(1); Application of Milner Hotels, 156 N.Y.S. 2d 566 (not officially reported) (Sup. Ct., N.Y. Cty. 1956).

basis of the information the Union presented at the January 1975 conference, there "might be some basis" for the claim of the Union.[10] Petitioner points out that OMLR Deputy Director Hediger did not express an opinion on whether the 1972 unit agreement provided for overtime pay for hours worked in excess of 35 hours per week nor was Mr. Hediger asked to express such an opinion. In fact, Petitioner continues, testimony elicited by counsel for Respondent at the hearing indicates that the standard work week and overtime compensation clauses are set forth in the City-Wide Contract.[11]

Petitioner also disputes Respondent's contention that the instant Request for Arbitration raises a question of interpretation of Article XIV of the 1970 City-Wide Contract which incorporates section 1173-3.0(0) of the NYCCBYL. Petitioner argues that an arbitrator is not empowered to construe statutes, rather an arbitrator only has the authority to interpret the agreement of the parties.[12] Furthermore, if arguendo the terms of the statute were incorporated into the 1970 City-Wide Contract, according to Petitioner, section 1173-3.0(0)(1) sets forth a definition of a grievance in terms

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[10] Petitioner cites Tr.37.

[11] Petitioner cites the testimony of Monroe S. Wasch, employed as an Assistant Director of Labor Relations in OMLR from August 1973 to March 1977, who was a negotiator for the City for the 1975 unit agreement and who was qualified as an expert witness by counsel for Respondent, Tr.25-27.

[12] Citing, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

of a dispute concerning "the terms of a written collective bargaining agreement." Petitioner contends that Respondent has not claimed that any applicable substantive provision of the contract has been violated. Therefore, Petitioner concludes, it would be inappropriate to submit the instant dispute to arbitration as that would, in effect, reserve the question of the arbitrator's jurisdiction to the arbitrator, which public policy in New York requires either courts or the Board of Collective Bargaining determine.

Petitioner questions the relevancy of Respondent's contention that Petitioner's duty to arbitrate the instant dispute survived the expiration of the 1970 City-Wide Contract. Petitioner characterizes this argument as a "straw man" and states that its position is "that Respondent, by choosing to raise the underlying issue in collective bargaining rather than filing a grievance, has waived any right it may have had to submit the grievance to arbitration and, further, that Respondent's delay in grieving has prejudiced Petitioner." Petitioner further asserts, "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."[13]

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[13] Petitioner relies, in particular, on City of White Plains v. Professional Firefighters Ass'n., ___ Misc. 2d ___, 95 LRRM 3150 (Sup. Ct., Westchester Cty. 1977), which held that the decision of the U.S. Supreme Court in Nolde Brothers v. Local No. 385, Bakery and Confectionery Workers Union, 97 S. Ct. 1067, 94 LRRM 2753(1977), holding that an agreement to arbitrate defined

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DISCUSSION

Careful examination of the pleadings, oral testimony, and documentary evidence presented by the parties to this dispute reveals that the central issue in this matter, raised by the City, is whether the Union has raised an arbitrable grievance under the collective bargaining agreements governing the parties' relationship during the time the Union alleges the overtime was worked, July 1, 1972 to April 15, 1973. The Union has, in effect, argued that it may grieve the denial of overtime payments pursuant to the 1972 unit agreement, the 1970 City-Wide Contract and/or the 1973 City-Wide Contract. We will deny the request for arbitration because the Union has not established, and cannot as a matter of law establish, that these employees are eligible to grieve an alleged violation of the overtime provisions of the 1970 or 1973 City-Wide Contracts based on the retroactive effect of the terms of the 1972 unit agreement.

We have held that the subjects of overtime and hours are "bargainable at the City-Wide level absent a showing of special and unique circumstances."[14] In so holding, we

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Footnote 13/ continued

grievances survives the expiration of the contract upon which arbitration is based if the grievance concerns an alleged violation of the contract, is not binding or controlling precedent for disputes arising in the public sector.

[14] For example, see Decision No. B-23-75 and cases cited therein.

stated that these are matters which "must be uniform," citing §1173-4.3a(2) of the NYCCBL.[15]

In Decision B-19-75[16] ,the Board was presented the question "whether a unit representative may grieve under the [1973] City-Wide Contract between D.C. 37 and the City of New York." At issue in that case, as in the instant matter, were the grievance-arbitration provisions of the 1970[17] and 1973[18] City-Wide Contracts. We also construed two provisions of the unit agreement between the CWA and the City, Article VII, "Citywide Issues", and Article VIII, "Grievance Procedure", which are virtually identical in language to two provisions of the 1972 unit agreement between the parties in this proceeding, Article IX, "Citywide Issues", and Article VI, "Grievance Procedure".

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[15] §1173-4.3a(2) states:

> Matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;

[16] City of New York and Communications Workers of America and City of New York and City Employees Union, Local 237, IBT .

[17] Article XIV of the 1970 City-Wide Contract.

[18] Article XIV of the 1973 City-Wide Contract.

In B-19-75,we held that the unit representative, the CWA, could not arbitrate the summer hours provisions of the City-Wide Contract pursuant to the grievance-arbitration clause of the unit contract. We explained:

> The language of the unit contract cited by CWA purportedly incorporating by reference the provisions of the City-wide contract manifestly does not constitute such an incorporation. Article VII of the CWA contract ..., merely sets forth the existence of the City-wide agreement and provides that its implementation shall not be barred by any language in the unit contract. The language of Article VII, far from incorporating the provisions of the City-wide agreement into the unit contract, instead recognizes that an agreement concerning issues not within the purview of the unit contract has been negotiated by another union. Such language does not confer any rights on the unit representative. Nor do we find that the summer hours provisions may be grieved as 'existing policy' under the unit contract. We find that the existence of a summer hours provision in the City-wide contract preempts its consideration as 'existing policy' in a grievance brought under any other contract. This is so because the policy served by designating certain subjects City-wide in scope would be defeated by any arbitration award which would be less than City-wide in its implications and enforceability.

As in B-19-75, the instant grievance is not arbitrable pursuant to the terms of the 1972 unit agreement because the overtime provisions of the 1970 or 1973 City-Wide Contracts were not incorporated by reference into the 1972 unit agreement. There is no contractual basis to support such a finding and, moreover, there is no basis in the record before us in the

instant proceeding to depart from our decision in B-19-75 as to any alleged implied incorporation by reference.

The issue then is whether arbitration can be had of a claimed violation of the overtime provisions of the 1970 or 1973 City-Wide Contracts based on the employees working hours in excess of the work week referred to in the 1972 unit contract.

Section 1, Article II of the 1973 City-Wide Contract, "Work Week", states, inter alia, "The normal work week for employees in each of the titles covered by this Contract shall be as listed in the attached Appendix A." Appendix A lists as a "required work week" for Highways and Sewers Inspectors and Senior Highways and Sewers Inspectors a thirty-five hour work week. Article IV, "Overtime", of the 1973 City-Wide Contract does provide that straight time is to be paid to employees who are on a 35-hour work week for involuntary overtime worked between the thirty-fifth and fortieth hour. However, the 1973 City-Wide Contract, signed on May 6, 1974, was not effective until July 1, 1973; the Union herein is seeking overtime compensation for hours worked during the period July 1, 1972 to April 15, 1973. Clearly, the grievance is not arbitrable pursuant to the terms of the 1973 City-Wide Contract as that contract was not in effect when it is alleged the overtime was worked.

The 1970 City-Wide Contract does not contain provisions which established a standard work week for City employees; nor

is there a basis in the contract to sustain a finding that the 35-hour work week was established by incorporation of the 1972 unit agreement into the 1970 City-Wide Contract. Thus, the remaining basis for ordering arbitration is a finding that grievants were on a 35-hour work week from July 1, 1972 to April 15, 1973 pursuant to the terms of the 1972 unit agreement, signed on March 19, 1974, and that the City's refusal to pay overtime for hours worked between the thirty-fifth and fortieth hours is arbitrable as an alleged violation of the overtime provisions of the 1970 City-Wide Contract. This would require our holding that the Union can arbitrate an alleged violation of the work-week clause set forth in the unit agreement. We have consistently held work week and hours to be subjects bargainable only at the City-wide level[19] pursuant to the public policy expressed in the NYCCBL.[20] We find no reason to sanction, in effect, a departure from our past decisions based on the record before us in this proceeding.

In summary, we will deny arbitration on the grounds that the Union cannot establish that the grievants are eligible to grieve an alleged violation of the overtime provisions of the 1970 City-wide Contract without reliance on the 1972 unit contract and its alleged retroactive effect. In Decision

[19] Decisions Nos. B-11-68; B-4-69; B-12-75; B-23-75.

[20] See note 15, supra.

No. B-1-76,[21] we held that it is our duty to inquire "under any circumstances, as to the prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration. The grievant, where challenged to do so, has a duty to show that the statute departmental rule or contract provision he invoked is arguably related to the grievance to be arbitrated." The Union claims, as the source of its alleged right, that Article III, Appendix A, Section 1(b)[22] of the 1972 unit agreement sets forth a 35-hour work week. As stated above, we have held work week to be bargainable only at the City-wide level and, thus, the Union has failed to establish the source of its alleged right to arbitrate the overtime claim.

We also note that the 1972 unit agreement, covering the period July 1, 1972 to June 30, 1975, was signed on March 19, 1974. The Union herein is seeking retroactive application of an alleged work-week clause to a period starting more than 20 months before the contract was signed. There is no provision in the 1972 unit agreement which would indicate that the parties intended to pay overtime for hours worked beyond 35 hours prior to the date the agreement was signed and for a period of time when, apparently, all parties believed the

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[21] City of New York and Local 371.

[22] Quoted on p.3, supra.

employees were on a 40-hour work week. While it may be argued that such a retroactive effect can be inferred from the language of Article III, Appendix A, Section 1(b) of the 1972 unit agreement, both parties were on notice or should have been on notice that agreement on the subject of work week is proper only at the City-wide level pursuant to BCB decisions dating from 1968. Moreover, Executive Order 52 (E.O. 52), promulgated on September 29, 1967, provided in section 9 as follows:

Effective Dates of Agreements and Retroactivity

> When a collective bargaining agreement covering a collective bargaining unit is concluded following the termination of a prior agreement covering that same unit, those provisions of the new agreement which by their nature can be made retroactive, and which the City has customarily made retroactive, shall be retroactive to the termination date of the prior agreement, provided that nothing herein contained shall prohibit the parties from agreeing or an impasse panel from recommending, that any benefit or other provision of a collective bargaining agreement be staggered or phased following the effective date thereof.
>
> When a collective bargaining agreement is concluded covering a unit as to which no collective bargaining agreement was in effect, the effective date or dates of the provisions thereof shall be the subject of negotiation.

However, E.O. 52 was superceded and amended by Executive Order 83 (E.O. 83), promulgated on July 26, 1973, almost 9 months before the signing of the 1972 unit agreement. Section 2 of E.O. 83 specifically repeals §9 of E.O. 52. Thus, in light of the specific repeal of the presumption of retroactivity attaching

to collective bargaining agreements and in the absence of affirmative evidence to the contrary, we cannot assume that the parties, in reaching agreement on the 1972 unit agreement, intended to cause the City to be liable for cost-occasioning overtime for such a substantial period of time based on a retroactive reduction in the work week.

We further recognize that the apparent confusion over which contract governed the parties' relationship and over what the grievants' work week was for the period July 1, 1972 to April 15, 1973 may exist because the 1973 City-Wide Contract, which sets forth in great detail required work week for employees by title, was signed May 6, 1974, six weeks after the 1972 unit agreement was signed. However, the Union herein is seeking arbitration of denial of overtime pay for hours worked during a period of time, July 1, 1972 to April 15, 1973, commencing before the July 1, 1973 effective date of the 1973 City-Wide Contract. For the reasons stated above, we are issuing an order granting the City's challenge to arbitrability.

Because we have found this matter not arbitrable, we have not considered the issue of timeliness in this proceeding.

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 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.
March 15, 1978

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

THOMAS J. HERLIHY
MEMBER

EDWARD SILVER
MEMBER

EDWARD J. CLEARY
MEMBER

MARK J. CHERNOFF
MEMBER