City v. L.1320, DC37, 25 OCB 11 (BCB 1980) [Decision No. B-11-80 (Arb)]

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

THE CITY OF NEW YORK, DECISION NO. B-11-80

Petitioner DOCKET NO. BCB-371-79 (A-930-79)

-and-

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

Respondent
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DETERMINATION AND ORDER

On October 24, 1979, Local 1320 of District Council 37 (hereinafter D.C. 37 or the Union) filed a request for arbitration of its grievance concerning the issuance by the Department of Environmental Protection of Personnel Order 79-41-B (P.O. 79-41-B) which, the Union claims, violates the policy and practice set forth in the Department's rules and regulations. The City of New York, appearing by its Office of Municipal Labor Relations (hereinafter OMLR or the City), challenged the arbitrability of the grievance in a petition filed with this office on November 20, 1979.

BACKGROUND

By Intradepartmental Memorandum dated May 29, 1979, Edward Wagner, Chief of Plant Operations of the Department of Environmental Protection, issued P.O. 79-41-B regarding Work Time Procedure to all Plant Operations employees. The order reads, in pertinent part:

1. Employees shall sign in upon arrival, indicating the actual time arrived.

2. Employees shall report dressed and ready to work at the designated place for receiving work assignment at the beginning of the shift (8AM, 4PM, 12Mid., unless otherwise scheduled).

   Any employee not prepared and present at the beginning of his scheduled shift shall be considered late.

3. One 15 minute break is to be scheduled during the first half of the shift by the location supervisor. This break includes wash-up time, and may be changed if required by conditions at the location.

4. Sign out will take place at the end of the shift (4PM, 12Mid., 8AM unless otherwise scheduled).

The Union here contends that the personnel order violates a prior written agreement between the parties which was arrived at in resolving a grievance filed under the now expired October 31, 1969 to December 31, 1971 collective bargaining agreement. A letter, dated January 7, 1971, from the Department to the Union, sets forth the terms of the agreement between them and reads, in pertinent part:

1. Effective Monday, January 11, 1971 Sewage Treatment Workers working rotating watch shifts will be permitted a leeway of up to 15 minutes in relieving shifts. A man ready to start his watch at 8 a.m. will be permitted to relieve a man on the 12 p.m. to 8 a.m. watch between 7:45 a.m. and 8 a.m. A man ready to start his watch at 4 p.m. will be permitted to relieve a man on the 8 a.m. to 4 p.m. watch between 3:45 p.m. and 4 p.m. A man ready to start his watch at 12 p.m. will be permitted to relieve a man on the 4 p.m. to 12 a.m. watch between 11:45 p.m. and 12 p.m. This relief would take place at the sign in - sign out location in each of the plants.

On June 13, 1979, D.C. 37 submitted a grievance at Step III

of the grievance procedure under Executive Order No. 83 (hereinafter E.O. 83).[1] The Reviewing Officer, Felix Cappadona, issued his Step IV decision on September 14, 1979, denying the grievance because of the expired contract. On October 24, 1979, D.C. 37 filed a request for arbitration of the grievance pursuant to section 5 of E.O. 83, which gives the union "the right to bring grievances unresolved at Step 4 of the general procedure to impartial arbitration." Section 5(b)(B) 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....

POSITIONS OF THE PARTIES

City's Position

The City challenges the arbitrability of the grievance on two grounds: (1) that the collective bargaining agreement between the parties expired by its terms on December 31, 1971 and, since no bargaining notice was filed to preserve the status quo, the Union cannot rely on the grievance procedure contained in the expired contract; and (2) that a letter setting forth the terms upon which a grievance filed under the contract was resolved does not constitute a written rule or regulation of the agency so as to come within the definition of "grievance" in E.O. 83.

[1] Executive Order No. 83 provides a grievance procedure for all mayoral agency employees eligible for collective bargaining except members of the police force and employees covered by a written collective bargaining agreement containing a grievance procedure.

The City contends and the Union admits that, by filing its request for arbitration of the grievance under E.O. 83, D.C. 37 concedes the absence of an effective collective bargaining agreement. Further, it is undisputed that, with the expiration of the contract, the City was under no duty to preserve the status quo during a period of negotiations as required by Administrative Code Section 1173-7.0(d).[2] No bargaining notice was filed and, thus, no period of negotiation commenced.

OMLR asserts that the January 7, 1971 letter does not constitute a written rule or regulation as defined in Section 5(b)(B)of E.O. 83, but is merely "an interpretation resolving a grievance brought under the now-expired Agreement." Since the Union has recognized that the collective bargaining agreement is of no effect, the City rejects D.C. 37's position that "a letter written prior to and in accordance with the Agreement which subsequently expired somehow retains its validity." The City argues that acceptance of this position "would result in the anomalous finding that interpretations of fixed term agreements have an interminable existence."

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[2] Section 1173-7.0(d) of the NYCCBL provides in pertinent part:

> a. Bargaining notices. (1) At such time prior to the expiration of a collective bargaining agreement as may be specified herein (or, if no such time is specified therein ninety but not more than one hundred fifty days prior to expiration of the agreement) a public employer or a certified or designated employee organization, which desires to negotiate on matters within the scope of bargaining shall send the other party (with a copy to the director) a notice of the desire to negotiate a new collective bargaining agreement on such matters....

Union's Position

The Union concedes that it initiated its grievance under Mayor's Executive Order 83, claiming that "the P.O. No. 79-41-B of the Department of Environmental Protection is in violation of the rules and regulations and policy of the Agency as expressed by the Agreement between the Agency and the Union dated January 7, 1971." It also admits that its request for arbitration alleges a violation of "E.O. 83 Step 4(B)[sic] - Agreement of January 7, 1971."

The January 7, 1971 letter relied upon by the grievants dealt with the subject of "leeway" permitted Sewage Treatment Workers in relieving other shifts of such workers. Since the collective bargaining agreement in effect at that time did not mention the subject of "leeway" either explicitly or implicitly, the Union maintains that the January 7, 1971 letter cannot be deemed to be an interpretation of the expired agreement. Rather, the January 7 letter constitutes "a written interpretation of the agency's rules and/or regulations regarding the subject of employees reporting to work in relief of other shifts." D.C. 37 contends further that the letter, as a formal written interpretation of the agency's rules and/or regulations, became an integral part of those rules and/or regulations."

The Union asserts that the fact that the January 7, 1971 "interpretation" arose in the context of a grievance filed under the now-expired contract is of no significance. Article VII, ¶1(B) of the contract provided that a claimed violation, misinterpretation

or misapplication of the agency's rules or regulations could be grieved. According to the Union, once a grievance was filed under the contract provisions and resolved, the outcome was not an interpretation of the contract but an interpretation of the rule or regulation in question.

In sum, D.C. 37 argues that the January 7, 1971 letter "constitutes a written expression of a rule or regulation of the agency," and as such, properly serves as the basis for the present grievance brought pursuant to E.O. 83.

DISCUSSION

The power of the Board of Collective Bargaining (BCB) to decide questions of substantive arbitrability is derived from Section 11735-8.0 of the New York City Collective Bargaining Law (NYCCBL). This is the power, "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 the grievance and arbitration procedure established pursuant to Section 1173-8.0 of this chapter...." Section 1173-8.0 provides that:

> 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.

It is undisputed that the October 31, 1969 to December 31, 1971 collective bargaining agreement has expired, that no notice of bargaining was filed, and that the Union cannot avail itself of the grievance procedure under the contract. The only issue remaining for discussion

is whether the January 7, 1971 letter constitutes a written rule or regulation of the agency within the meaning of §5(b)(B) of E.O. 83.

In interpreting what may constitute the written rules and regulations of an agency for determining whether or not an arbitrable grievance exists under E.O. 83, the Board has held that an executive order of the Mayor is such a written rule or regulation.[3] Here, D.C. 37 requests the Board to construe the language of E.O. 83 to encompass a letter setting forth the terms of a settlement of a grievance brought under an admittedly expired contract. However, the January 7, 1971 letter can, at most, be termed a supplement to the expired collective bargaining agreement. It exists only in relation to the contract and must live or die with the contract. Further, the Board said in its Decision No. B-14-77:

> "[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 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."[4]

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[3] Matter of City of New York and Local Union No. 3, IBEW, AFL-CIO, Board Decision No. B-1-78. See also Matter of City of New-York and Local Union No. 3, IBEW, AFL-CIO, Board Decision No.B-13-77.

[4] Matter of City of New York and Local 1320, D.C. 37, AFSCME, AFL-CIO, Board Decision No. B-14-77.

We note that the employees represented by DC-37 in this case are "Section 220 employees," whose wages are determined by the Comptroller of the City of New York rather than by collective bargaining agreement. These employees are in no way precluded, however, from bargaining on other subjects, including grievance arbitration procedures.

Although this Board has followed the well-settled principles set forth initially 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) favoring arbitration of disputes,[6] on the facts before the Board in this case, acceptance of the union's argument would, as the City alleges, result in the "anomalous finding that interpretations of fixed-term agreements have an interminable existence."

We therefore find that the terms of the January 7, 1971 letter do not constitute written rules and regulations of a mayoral agency and that the grievance procedures of E.O. 83 are inapplicable.

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[6] The Supreme Court in that case said:

> "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." 46 LRRM at 2419; Board Decision No. B-13-77; See, also, NYCCBL §1173-2.0.

0 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 Union's request for arbitration be, and the same hereby is, denied; and it is further

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, granted.

DATED: New York, N.Y.
April 14, 1980

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

VIRGIL B. DAY
MEMBER

EDWARD SILVER
MEMBER

FRANKLIN J. HAVELICK
MEMBER

EDWARD J. CLEARY
MEMBER