City v. SSEU, L.371, DC37, 27 OCB 18 (BCB 1981) [Decision No. B-18-81 (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-18-81

Petitioner,

DOCKET NO. BCB-496-81
(A-1260-81)

-and-

SOCIAL SERVICES EMPLOYEES UNION,
LOCAL 371, DISTRICT COUNCIL 37,
AFSCME,

Respondent.

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DECISION AND ORDER

On May 22, 1981, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Social Services Employees Union, Local 371, District Council 37, AFSCME (hereinafter "Local 37111) on April 17, 1981. After the granting of an extension of time in which to answer, Local 371 filed a verified answer on July 20, 1981. On August 3, 1981 the City filed a reply to the answer, to which Local 371 responded on August 6, 1981.

Request for Arbitration

The request for arbitration alleges that the City violated Article IV, Section 7 of the City-Wide contract entered into by the City and District Council 37, AFSCME (hereinafter "D.C. 37").

Article IV, section 7 of the 1978-1980 City-wide agreement reads as follows:

> Section 7. Article IV Overtime
>
> a. These overtime provisions, including recall and standby provisions, shall apply to all covered per annum employees including those working more than half-time, and with permanent, provisional or temporary status, whose annual gross salary including overtime, all differentials and premium pay is not in excess of $22,500.
>
> b. When an employee's annual gross salary including overtime ,all differentials and premium pay is higher than $22,500 compensatory time at the rate of straight time shall be credited for authorized overtime. The gross salary shall be computed on an annual calendar year basis and for the purposes of this Section shall mean basic annual salary plus any monies earned.
>
> c. Employees whose annual gross salary including overtime, all differentials and premium pay is in excess of $22,500 shall be required to submit periodic time reports at intervals of not less than one week, but shall not be required to follow daily time clock or sign-in procedures. The periodic time report shall be in such form as is required by the Agency.

The request for arbitration states the grievance to be: "Grievants should no longer be required to use time cards to record their daily attendance." From papers attached to the request for arbitration it appears that the instant group grievance was filed on behalf of those individuals in the "Supervisors I, welfare" title employed by the Department of Social Services. Two employees, Tom Clougher and Tom Adams of the Long Term Health Home Care Department, were named as individual grievants in Steps II and III of the grievance procedure.

In the Step III determination of the grievance, the OMLR Review Officer quoted OMLR Interpretive Memorandum No. 51 (issued March 12, 1981) which states in relevant part:

> Interpretative Memorandum No. 50 is hereby superseded and Article IV, Section 7 of the 1978 - 1980 City-Wide Agreement amended as follows:...
>
> (c) Employees whose annual salary rate (including overtime, NPCP all differentials, and premium pay) is in excess of $25,920 shall be required to submit periodic time reports at intervals of not less than one week, but shall not be required to follow daily time clock or sign-in procedures. The periodic time report shall be in such form as is required by the Agency.
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> This memorandum shall be effective flarch 1, 1981, and shall terminate upon the finalization of the successor Citywide Agreement. All previous waivers of Article IV, Section 7 are hereby superseded.

The Hearing officer found that grievants Clougher and Adams both earned more than $22,500 and less than $25,920; a decision issued in which the grievance was held to be moot.

The City submits that by agreement of March 12, 1981 it and D.C. 37 agreed to amend Article IV, Section 7 of the City-Wide contract to reflect certain economic benefits that had been negotiated after the expiration of the 1978-80 contract but prior to the completion of a successor agreement. The City presented a letter dated March 12, 1981 signed and countersigned by authorized representatives from the City and D.C. 37 respectively, which states as follows:

> This is to confirm our agreement made pursuant to Article IV, Section 12 of the 1978-1980 City-Wide Agreement to amend Section 7 of said Article IV as follows:
>
> (a) These overtime provisions, including recall and standby provisions, shall apply to all covered per annum employees including those working more than half-time, and with permanent, provisional or temporary status, whose annual gross salary including overtime, all differentials and premium pay is not in excess of $25,920.
>
> (b) When an employee's annual gross salary including overtime, all differentials and premium pay is higher than $25,920 compensatory time at the rate of straight time shall be credited for authorized overtime. The

> gross salary shall be computed on an annual calendar year basis and for the purposes of this Section shall mean basic annual salary plus any monies earned.
>
> (c) Employees whose annual salary rate (including overtime, NPCP, all differentials, and premium pay), is in excess of $25,920 shall be required to submit periodic time reports at intervals of not less than one week, but shall not be required to follow daily time clock or sign-in procedures. The periodic time report shall be in such form as is required by the Agency.
>
> This agreement shall be effective March 1, 1981, and shall terminate upon the finalization of the successor Citywide Agreement. All previous waivers of Article IV, Section 7 are hereby superseded.

The Union seeks arbitration pursuant to Article XV, section 2 of the City-Wide contract which, in relevant part, provides that an unresolved grievance may be brought by the Union to the Office of Collective Bargaining for impartial arbitration.

Positions of the Parties

The City's Position

The City contends that Local 371 has not alleged a dispute subject to arbitral resolution and thus the request for arbitration should be dismissed. The City argues that D.C. 37 is the certified representative with whom it is

obligated to negotiate in good faith on all uniform matters under Section 1173-4.3(a)(2) of the New York City Collective Bargaining Law.[1] Furthermore, the preamble and Article I Section 1 of the City-Wide agreement defined D.C. 37 as the "sole and exclusive" collective bargaining representative on

[1] Section 1173-4.3(a)(2) of the New York City Collective Bargaining Law reads as follows:

> §1173-4.3 Scope of collective bargaining; management rights.
>
> a. Subject to the provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that:
>
> (2) 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 per cent 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;

City-Wide matters.[2] Therefore, the City contends, D.C. 37 did have the authority to amend the City-Wide contract.

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[2]The preamble to the 1978-80 City-Wide contract reads in pertinent part:

> Collective bargaining agreement entered into this 8th day of June, 1979 by and between The City of New York and related public employers pursuant to and limited to their respective elections or statutory requirement to be covered by the New York City Collective Bargaining Law and their respective authorizations to the City to bargain on their behalf and the New York City Health and Hospitals Corporation (hereafter referred to jointly as the "Employer"), and District Council 37, A.F.S.C.M.E., AFL-CIO (hereafter referred to as the "Union"), for the period from July 1, 1978 to June 30, 1980 ...

Article I, Section 1 of the same agreement reads as follows:

> ARTICLE I-UNION RECOGNITION ON CITY-WIDE MATTERS
>
> Section 1.
>
> The Employer recognizes the Union as the sole and exclusive collective bargaining representative on City-wide matters which must be uniform for the following employees:
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> a. Mayoral agency employees subject to Career and Salary Plan.
>
> b. Employees on the Health and Hospitals Corporation with the exception of Group 11 employees and interns and residents.
>
> c. Employees of the Off-Track Betting Corporation, and the New York City Housing Authority pursuant and limited to the extent of of their election to be covered by the New York City Collective Bargaining Law (N.Y.C.C.B.L.).
>
> d. Employees of Comptroller, District Attorneys, Board of Higher Educatibn (non-instructional personnel), Borough Presidents, and Public Administrators, who are subject to the Career and Salary Plan, pursuant to and limited to the terms of their respective elections to be covered by the N.Y.C.C.B.L., and any museum, library, zoological garden or similar cultural institution for Pamployees whose salary is paid in whole from the City Treasury, pursuant to and limited to the election of said cultural insti-tution to be covered by this Contract.

Local 371 does not allege a violation of the Article IV, section 7 amendment, but rather of the "original" provision. Thus, the City argues, Local 371 has failed to allege a grievance within the meaning of the amended Agreement.

Local 371's Position

Local 371 maintains that Article IV, Section 7 of the City-Wide contract was not lawfully amended in that D.C. 37 is powerless to change the relevant gross salary. Local 371 argues that the instant amendment must be deemed null and void because the AFSC11E international constitution does not confer upon D.C. 37 the authority to agree to any such amendment. While D.C. 37 is concededly the sole and exclusive collective bargaining representative on City-Wide matters, Local 371 maintains that its status goes only to the power to negotiate; it may not bind any of its constituent locals absent a vote by the membership. It follows, Local 371 further contends, that since the amendment herein was not voted upon by the membership and therefore not approved, it is not binding on Local 371 or its members. To allow D.C. 37 to bind the instant grievants would be in violation of the AFSCME international constitution's principles of democratic participation.

Local 371 maintains however, that the present issue is not one of internal union affairs but rather whether the

City can be permitted to invoke an entirely nugatory agreement with D.C. 37 as a basis for violating the City-Wide contract as it relates to Local 371.

Local 371 does concede that Article IV, section 12 of the 1978-80 City-Wide contract[3] does empower D.C. 37 to negotiate with the City concerning overtime regulations in emergency situations. Local 371 argues however, that there has been absolutely no showing of an emergency situation in the case at hand.

It should be noted that in its answer, Local 371 contended that the instant petition was time-barred by Section 6.4 of the Revised Consolidated Rules of the Office of Collective Bargaining.[4] However, ift its response of

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[3] Article IV, section 12 of the 1978-80 City-Wide contract states:

> Article IV Overtime
> Section 12.
> In emergency situations, the Employer shall have a right, after negotiation with the union to apply a variation of these overtime regulations.

[4] Section 6.4 of the Revised Consolidated Rules of the Office of Collective Bargaining reads as follows:

> Part 6 - Arbitration
> §6.4 Ten Day Notice-Preclusion of Objection. A request for arbitration may contain a notice that a petition for final determination by the Board, as to whether the grievance is a proper subject for arbitration, must be served and filed within ten (10) days or the party served with the notice'shall be precluded thereafter from contesting in any forum the arbitrability of the grievance. A petition pursuant to Rule 7.3 of these rules must be served and filed with the Board within ten (10) days after service of such notice or the party served therewith shall be so precluded.

August 6, 1981 Local 371 acknowledged that an extension of time had been agreed upon and withdrew its contentions concerning timely filing.

Discussion

The pivotal issue to be determined in this case is whether or not D.C. 37 had the power and authority to enter into an agreement with the City to amend Article IV, section 7 of the 1978-80 City-Wide agreement.

Briefly summarized, Local 371 claims that the purported amendment is without force and effect because D.C. 37 had no authority to agree to the amendment and bind the Local. It claims that the AFSCME international constitution does not confer upon D.C. 37 a unilateral right to bind its locals absent a vote by the membership. Local 371 thus claims that to the extent that D.C. 37 went beyond the mere negotiation of terms and purported to enter into an agreement binding upon its constituent locals, it violated the AFSCME constitution.

Whether or not D.C. 37 violated the AFSCME international constitution is irrelevant to the issue before us. It is well settled that this Board is without authority in internal union disagreements(Sharon and the N.Y.S. Nurses Association, B-1-81; Flowers, Jr. and Gotbaum, Maher, et al, B-18-79; and Velez and Local 237, IBT, B-1-79). Substantially similar rulings have been issued by the Public Employment

Relations Board, e.g. New York City Transit Authority, 13 PERB 4576 (1980); Deputy Sheriff's Benevolent Association of Onondaga County, 11 PERB 4589 (1978); and Civil Service Employees Association, Inc., 9 PERB 3064 (1976) among others. Likewise, in the private sector the Supreme Court has found that the National Labor Relations Board was not meant to have the power to "regulate the internal affairs of unions" (NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967)). Furthermore, it has been ruled that the Office of Collective Bargaining is not bound by internal union rules nor by determinations in internal union proceedings (New York City Local 246, S.E.I.U., AFL-CIO, Decision No. 45-69; Local Union No.3, I.B.E.W., AFL-CIO, Decision No. 36-69). Thus,a determination as to whether or not D.C. 37 violated the AFSCME constitution is one which Local 371 must obtain either through AFSCME's own internal mechanisms, or possibly, in the courts. Concomitantly, any such determination would have no bearing upon our determination of the issue presented herein.

Local 371 does not question that D.C. 37 is the City-Wide representative. Rather, Local 371's contentions in this regard seem to indicate some misunderstanding as to the source of D.C. 37's authority to act as City-Wide representative and as to the scope of that authority. It should be clearly noted therefore that its City-Wide representative status in no way relates to D.C. 37's status as

a constituent of AFSCME. D.C. 37 is the City-Wide representative solely by virtue of the fact that it qualifies as such under the terms of Section 1173-4.3(a)(2). As City-Wide representative D.C. 37 is designated and authorized to negotiate and to contract on behalf of all employees subject to the Career and Salary Plan as to all matters which must be uniform for all such employees. Among such matters are time and leave rules, including provisions as to overtime. D.C. 37's negotiation and agreement on the amendments of overtime provisions at issue here were thus entirely appropriate and within its mandate as City-Wide representative. The fact that the terms thus negotiated make reference to the gross annual salaries of certain affected employees does not mean that there was any negotiation as to the annual wages of such employees. On the contrary, it is clear that existing gross annual incomes were used only as reference points in determining entitlement to overtime. Local 371 does not contend that there are any special and unique considerations to be taken into account in the instant situation that call for unit bargaining for a variation in the City-Wide contract provision here in question. It logically follows that the terms negotiated and agreed upon between the City and D.C. 37, and which Local 371 here challenges, were properly and effectively contracted for.

Although the issue has not been raised by the parties, we note that Local 371 lacks the necessary standing to pursue the instant matter. Only the City-Wide representative and the City may initiate arbitrations under the City-Wide contract. While a unit representative could seek,and be granted,permission from the City-Wide representative to process a grievance through the arbitration procedures, the record before us contains no recitation of such authorization. In the absence of such designation by D.C. 37, Local 371 has no standing to bring the instant grievance to arbitration (City of New York and Communication Workers of America, AFL-CIO, Local 1182, et al, B-19-75).

Accordingly, for the foregoing reasons, we grant the petition challenging arbitrability and deny the request-for arbitration.[5]

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[5] It should be noted that the letter agreement of March 12, 1981 (supra) between the City and D.C. 37 in which the agreed upon Mainges are listed stabes that the amendment is to expire upon the finalization of a successor City-Wide agreement.

On July 15, 1981, following an impasse in negotiations, the City and D.C. 37 stipulated to five issues to be presented to an Impasse Panel, one of which relates to Article IV, Section 7. The positions submitted relating to this matter read as follows:

> Union Demand #16: Article IV, "Section 7(a & b): Delete monetary limit in paragraph a, and delete all of paragraph b."
>
> On June 25, 1981, the demand was modified as follows: Modify Article IV, Section 7(a & b) to increase the $22,500 to $25,920 and thereafter to the M-1 minimum or the average amount of managerial increases, whichever is greater.
>
> The City demanded a corresponding change in the language of subsection (c).

The impasse proceeding convened on August 18, 1981 before Peter Seitz, Esq. No report and recommendations has been issued as of the date of this Decision.

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 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
September 9, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD J. CLEARY
MEMBER

CAROLYN GENTILE
MEMBER