OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-19-81

Petitioner,

DOCKET NO. BCB-497-81 (A-1263-81)

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondent.

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DECISION AND ORDER

On May 4, 1981, the Communications Workers of America (hereinafter CWA or the Union) filed a request for arbitration of the grievance of Edith Austin, a Principal Administrative Associate (PAA) employed by the Department of Social Services of the Human Resources Administration. The grievance arose out of the reassignment of Ms. Austin from PAA Level II to PAA Level I with a concomitant reduction in pay, which reassignment the Union asserts was arbitrary and capricious. The City of New York, through its Office of Municipal Labor Relations (hereinafter OMLR or the City), filed a petition challenging arbitrability on May 22, 1981. CWA obtained an extension of time in which to file an answer until June 30, 1981 and duly filed and served its answer on that day. The City did not file a reply.

BACKGROUND

The title Principal Administrative Associate (PAA) is a broadbanded title[1] consisting of three levels. The grievant was appointed to the title on or about December 12, 1977[2] and was assigned to Level II. She was also given the in-house title of Assistant office Manager at the Melrose Income Maintenance Center.

On or about October 30, 1980, the grievant was re-assigned from Level II to Level I of the PAA title, was re-moved from the position of Assistant Office Manager, and her salary was reduced to that of a PAA Level I. The reason given for this action was that "the telephone group of which she was in charge was not answering calls promptly, ... actions on closings and decreases in budgets were not taken expeditiously, and service priorities were not acted upon in time."[3]

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[1] The Principal Administrative Associate title was created by Resolution 77-43 of the City Personnel Director, adopted on November 9, 1977. The title includes permanent employees who, prior to the broadbanding, held the title Senior Administrative Assistant, as well as permanent incumbents in the titles Administrative Assistant (Secretarial) and Administrative Associate who took and passed a reclassification examination.

[2] The exact date of appointment is in dispute. CWA states that the grievant was appointed as a PAA Level II on December 22, 1977, while the City asserts "upon information and belief" that the appointment , was made on or about January 16, 1978. The three week discrepancy in no way affects our determination in this case, however.

[3] Determination of Grievance - Step II.

The grievance was processed through the prescribed steps and was denied by OMLR at Step III. The instant request for arbitration was filed by the Union pursuant to Article VI, Section 2, Step IV of the 1978-1980 collective bargaining agreement between the City and CWA covering employees in the PAA title.[4]

POSITIONS OF THE PARTIES

Union's Position

CWA contends that the reassignment of the grievant from PAA Level II,,after thirty-four months of service at that level, to PAA Level I and the concomitant reduction in salary constitutes an arbitrary and capricious demotion in violation of the Impasse Panel Award of Morris Glushien (hereinafter the Glushien award)[5] which, according to CWA, became part of the 1978-1980 PAA contract, or in violation of Labor Relations Order No. 81/1 dated August 12, 1980 (hereinafter LRO 81/1).

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[4] Article VI, Section 2, Step IV provides in pertinent part:

> An appeal from an unsatisfactory determination at Step-III may be brought solely by the Union. to the Office of Collective Bargaining for im partial arbitration within fifteen (15) working days of receipt of the Step III determination.

[5] Report and Recommendations of the Impasse Panel, City of New York v. Communications Workers of America, Local 1180 and District Council 37, Case No. I-144-79/I-151-79 (June 24, 1980).

CWA acknowledges that the Glushien award provides:

> ... that for a period of three years and three months after an employee has entered a particular level of a broadbanded title, he/she may be assigned at the discretion of the employer to a lower assignment level in the broadbanded title with a concomitant decrease in level of pay... . (Glushien award at 10)

and, further, that the Glushien award provides that:

> [t]he employer's decision to reassign the employee during this period to the lower assignment level and accompanying level of pay shall be final and shall not be subject to the grievance and arbitration procedure.... (Glushien award at 10)

However, the Union contends that the three-year and three-month period that an employee must serve in a level of a broadbanded title before the salary protection provided for in the Glushien award attaches[6] should be construed by this Board as a probationary period. CWA argues that, as is the case with a probationary period, "management ... must judge the merit and fitness of the employee in executing his/her job duties during the three years and three months." The purpose of a probationary period, according to the Union, is not only to enable the employer to ascertain the fitness of a probationer but also to give the employee a reasonable

[6] The Glushien award provides that employees who have served continuously for three years and three months in an assignment level of the broadbanded PAA. title may thereafter be reassigned to a lower level, but that such an employee will continue to receive the salary of the higher assignment level, unless the employee's last performance evaluation was unsatisfactory. Glushien award at 10-11.

opportunity to perform the duties of the office. CWA asserts that the grievant was not afforded a reasonable opportunity to perform.

In this connection, the Union alleges that the New York City Charter requires that sub-management evaluations be conducted annually.[7] CWA claims that the grievant's last performance evaluation (giving her outstanding ratings in six categories) covered the period from January 6, 1978. to June 30, 1978, that from June 30, 1978 to October 30, 1980, the date of the reassignment, her performance was not evaluated, and that at no time prior to the reassignment was the grievant informed that her performance was unsatisfactory. Whether the facts cited above constitute a violation of the City Charter or of any rule, regulation or contract provision is not an issue in this case. Rather, CWA argues, the employer demonstrated bad faith in failing to give the grievant annual performance evaluations and in reassigning her without prior counselling or notification

[7] The Union does not cite a specific provision of the City Charter to this effect. We note, however, that Rule 7.5.4(e) of the Rules and Regulations of the City Personnel Director provides as follows:

> Sub-managerial employees shall receive at least one performance evaluation a year and shall be informed in writing at the beginning of the evaluation period of the performance standards that are to be used as the basis for evaluation. All such employees shall be shown their evaluation reports.

that her performance was inadequate. The City also demonstrated bad faith, according to CWA, in allowing the grievant to work at Level II for thirty-four months of a thirty-nine month "probationary" period and then reassigning her to the lower level. The Union cites Application of Going[8] to the effect that:

> The appointing authority must act in good faith in determining the ability of a probationer to satisfactorily perform the duties of the office to the end of the probationary period.

CWA reiterates its position that the reassignment of the grievant was arbitrary and capricious and not in keeping with "the spirit of the Glushien Award." The Union urges that an arbitrator be allowed to interpret the effect of the Glushien award on employees who are reassigned within the levels of broadbanded titles before the expiration of the three-year and three-month period. CWA also cites Board Decision No. B-9-74 (A-364-74) where this Board held that the Civil Service Law, while not requiring that a probationary employee be served with charges or given a hearing, does not-prohibit the City and a union from contractually expanding the rights of probationers.

CWA pleads in the alternative that the reassignment of Ms. Austin violates Labor Relations Order 81/1. Having

[8] 170 N.Y.S. 2d 234, 5 A.D. 2d 173 (1st Dep't, 1958), aff'd, 183 N.Y.S. 2d 81 (1959).

been given no Information in support of this allegation, we assume that LRO 81/1 is cited insofar as it incorporates and makes applicable to all employees covered by the Alternative Career and Salary Pay Plan Regulations the terms of the Glushien award. Entitled "Alternative Career and Salary Pay Plan Regulations," LRO 31/1 at paragraph IX provides as follows

> Assignment Level Procedures.
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> 1. Employees who have served for three years and three months at an assignment level above the lowest assignment level of a title (Class of Positions) with two or more assignment levels, may only be reduced in salary based upon their last performance evaluation, whether annual or special, provided such overall performance evaluation rating is unsatisfactory. A special evaluation may not serve as the basis of a reduction to a lower pay level if made less than six months after an annual evaluation.
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> 2. Where an employee's salary has been reduced pursuant to paragraph 1. the Union may claim that the evaluation upon which it is based is improper or incorrect and appeal such claim under the grievance procedure of the Agreement. The Union shall have the burden of showing the arbitrator that the evaluation was improper or incorrect.
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> 3. The salary rate of an employee reassigned to a lower assignment level in a title (Class of Positions) with two or more assignment levels, whose salary is reduced shall receive the rate such employee would have been receiving had the employee served continuously in the lower assignment level. (Added 8/12/80 by LRO 81/1)

CWA seeks as a remedy the reinstatement of the grievant to Level II of the PAA title and retroactive pay.

City's Position

The City contends that CWA has failed to state a claim upon which relief can be granted. According to 0MLR, the Glushien award provides unambiguously that an employee who has not yet served for three years and three months at a particular level of a broadbanded title may be assigned to a lower level of that title with a concomitant decrease in pay at the employer's discretion and, further, that the employer's decision to reassign an employee under these circumstances is final and not subject to the grievance procedure. OMLR cites Board Decision B-10-79,[9] where a collective bargaining agreement between the City and the Uniformed Firefighters Association providing that "[i]n filling vacancies ... the Department's decision is final" was construed to mean that issues arising under that provision were not arbitrable.

Citing Board Decision B-12-77,[10] the City asserts that it is well-established that the City can only be required to submit to arbitration to the extent it has agreed

[9] City of New York v. Uniformed Firefighters Association, Local 94.

[10] City of New York v. International Union of Operating Engineers, Local 15.

to do so. Here, according to OMLR, the City has not consented to arbitrate the reassignment of the grievant because she had not served in Level II of the PAA title for three years and three months before she was reassigned.

OMLR contends that the Union has failed to show a prima facie relationship between the act complained of and the source of the alleged right as the Board has required in earlier decisions.[11]

Further, OMLR cites Article IV, Section 2 of the 1978-1980 contract between the parties which specifically limits the arbitrator's decision, order or award to the application and interpretation of the agreement and provides that "the arbitrator shall not add to, subtract from or modify the Agreement." It would thus be outside the scope of an arbitrator's authority to review the Department's decision to reassign the grievant in this case, according to the City.

In response to the allegation that the grievant's reassignment violated the terms of LRO 81/1, the City asserts that the LRO supports the City's own position in that paragraph IX merely implements the Glushien award. According to OMLR, the provisions of LRO 81/1 lend no support whatsoever to CWA's claims.

[11] OMLR cites Board Decisions B-1-76 and B-3-78.

For all of the aforementioned reasons, OMLR requests that its petition challenging arbitrability be granted.

DISCUSSION

The instant controversy is one of several which have recently been submitted to this Board arising out of the City's broadbanding policy. Broadbanding involves the consolidation of related job titles into a single title which may have two or more levels. The purpose of broadbanding is to improve the management of the City's workforce by affording the employer greater flexibility in assigning personnel. Broadbanding also increases employees' opportunities for promotion by decreasing the number of titles and, therefore, the number of exams required to reach the top levels.

In the instant case, the City's exercise of its prerogative to reassign an employee within levels of the broadbanded PAA title is alleged to be arbitrary and capricious and in violation of the terms of an impasse panel award, which the Union identifies as an "annex" to the 1978-1980 agreement between the parties and in violation of a labor relations order issued by the Office of the Mayor.

Although the Union has not indicated the section of the agreement under which it demands arbitration, we shall

construe the above allegations to be a statement of a grievance as that term is defined at Article VI, Section l(A) and (B), respectively, of the 1978-1980 PAA contract. These subsections provide:

> The term "grievance" shall mean:
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> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
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> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the City of New York Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration; ....

The Board has repeatedly held that its role in determining arbitrability is to determine whether the parties are contractually obligated to arbitrate their disputes and, if so, whether the scope of that obligation is broad enough to include the particular controversy presented.[12] It is undisputed that the City and CWA are parties to a collective bargaining agreement which obligates them to submit controversies to arbitration. Whether the instant dispute comes

[12] See, e.g., Board Decisions B-2-69; B-8-69; B-4-72; B-8-74; B- 28-75; B-l-76; B-10-77; B-15-79; B-22-80; B-6-81.

within that obligation is the issue before us here.

CWA does not claim that the grievant served in Level II of the PAA title for three years and three months and is therefore entitled to the salary protection prescribed in the Glushien award. Rather, the Union urges that the three-year and three-month period should be construed as a probationary period for the duration of which the grievant, impliedly, is entitled to serve in order to demonstrate her ability to perform the duties of the job. The reassignment five months short of the end of this period deprived her of a reasonable opportunity to perform, was arbitrary and capricious, and violates the "spirit of the Glushien award," according to CWA. The Union argues that an arbitrator should be allowed to interpret the effect on the grievant of the Glushien award, which is annexed to the collective bargaining agreement.

Morris P. Glushien was designated as a one-person impasse panel in 1979 to hear and make a report and recommendations in the contract dispute between CWA (Local 1180) and the City.[13] Early in the proceedings before the panel, all of the Union's demands except one were either resolved or withdrawn. The remaining demand, as modified by CWA, read

[13] The procedure for the resolution of impasses in bargaining is set forth as Section 1173-7.0c of the New York City Collective Bargaining Law.

in pertinent part as follows:

> Demand 44. An employee in the title Principal Administrative Associate ... who is assigned to a level II or III position ... shall after six months (or such other period as the Impasse Panel may determine to be appropriate), maintain the salary he or she was receiving at that level if thereafter he or she is reassigned to a lower level position in that same title. This shall not apply to disciplinary matters.

The report and recommendations of the Glushien award provides that:

> ... while employees who have continuously served for three years and three months in an assignment level of the broadbanded title may still be reassigned to a lower assignment level, he/she shall continue to receive the pre-existing salary and may not be reduced to the applicable salary rate for the reassigned lower assignment level unless the employee in his/her last performance evaluation ... is rated unsatisfactory. (Glushien award at 10-11)

It also provides that:

> ... for a period of three years and three months after an employee has entered a par ticular level of a broadbanded title, he/she may be assigned at the discretion or the employer to a lower assignment level in the broadbanded title with a concomitant decrease in level of pay. The employer's decision to re-assign the employee during this period to the lower assignment level and accompanying level of pay shall be final and shall not be subject to the grievance and arbitration procedure set forth in the applicable collective bargaining agreements. (Emphasis added)(Glushien award at 10)

The recommendations of the Glushien panel were accepted by both parties. The terms of the award are clear and unambiguous and lead to the uncontrovertible conclusion that, since Ms. Austin had not served for three years and three months at Level II of the PAA title at the time of her reassignment, the employer had the right, at his sole discretion, to reassign her to Level I and to reduce her level of pay accordingly.

No evidence has been supplied, nor do we find any, to support CWAIs contention that the three-year and three-month period should be construed as a probationary period or that the employer is obliged to allow the employee to complete such period before determining whether to allow the appointment to become permanent. While there nay be no legal barrier to the prescription by an impasse panel of a probationary period applicable to level assignments, and nothing to prevent the parties from agreeing to such a provision in collective negotiations, such is not the case here. On the contrary, the Glushien award, on its face, clearly contemplates that employees may be reassigned with a reduction in pay at any time during the three-year and three-month period at the discretion of the employer. The words, "[t]he employer's decision to reassign the employee during this period ... shall be final and ... not ... subject to the grievance and

arbitration procedure ..." leave no room for doubt on this point.

While it is the policy of the New York City Collective Bargaining Law (NYCCBL) and this Board to favor impartial arbitration of grievances,[14] the Board cannot create a duty to arbitrate where none exists. An impasse panel award that has been accepted by the parties to the dispute defines the relationship between them and is binding upon them by operation of law.

Disputes concerning the application or interpretation of other provisions of the Glushien award may well be subject to the grievance procedure in the contract between the parties.[15] However, were we to send this case to arbitration we would be setting an unacceptable precedent and one which we have, in prior decisions, refused to do. We would be sending to arbitration a dispute involving language specifically barring

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[14] Section 1173-2.0 of the NYCCBL states that:

> 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.

[15] In fact, the Glushien award specifically provides that:

> a union claim that the evaluation upon which an employee [who has been reassigned with a reduction in salary after three years and three months] is reduced is improper or incorrect [shall] be subject to the grievance/arbitration procedure of the parties' applicable collective bargaining agreement. (Glushien award at 11)

such dispute from the grievance procedure, in order to afford an arbitrator the opportunity to interpret the meaning of the exclusionary language. As we said in Decision No. B-10-79, "this would not only be an abuse of the process but would necessitate that the parties incur the expense of needless arbitration proceedings."

Arbitration of the Union's claim that the grievant's reassignment violated the terms of LRO 81/1 must also be denied. Based upon the Glushien award, paragraph IX of the LRO grants a degree of salary protection only to "employees who have served for three years and three months at an assignment level above the lowest assignment level of a title...." On its face, therfore, this provision does not apply to the grievant who admittedly served only two years and ten months at Level II.

We have limited our examination of this grievance to the clear and unambiguous language of the impasse panel award and labor relations order under which, it is alleged, the grievant's rights arose. The clear and unambiguous language of that award and order require a finding that the theory under which the Union seeks relief is untenable.

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, dismissed.

DATED: New York, N.Y.
September 9, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD J. CLEARY
MEMBER

CAROLYN GENTILE
MEMBER