OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioners,

-and-

COMMITTEE OF INTERNS AND RESIDENTS,

Respondent.

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DECISION NO. B-31-81

DOCKET NO. BCB-503-81
(A-1276-81)

DECISION AND ORDER

This proceeding involves a petition filed by the City of New York which challenges the arbitrability of a grievance submitted by the Committee of Interns and Residents (hereinafer "CIR") on behalf of its President, Dr. Jonathan House. It is the City's contention that arbitration of CIR's grievance should be barred because (a) the waiver submitted by CIR, as required by 51173-8.0(d) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), is ineffective, inasmuch as there is pending an improper practice proceeding brought by CIR arising out of the same "underlying dispute"; and (b) CIR has failed to demonstrate a _prima facie_ relationship between the act complained of by the grievant, and the source of the alleged right, redress of which is sought through arbitration.

The CIR's request for arbitration in this matter was filed on June 15, 1981. The improper practice petition alleged to have arisen out of the same underlying dispute was filed previously by CIR on April 24, 1981. The City's petition challenging arbitrability was submitted on June 29, 1981. The CIR's answer and a memorandum of law were received on July 28, 1981. A letter of reply was filed by the City on August 10, 1981. Finally, a letter in response to the City's reply was received from CIR on August 17, 1981.[1]

Background

It is undisputed that on March 3, 1981, shortly after CIR's announcement of an impending strike, Dr. Jonathan House, President of CIR, was notified that his authorization for full-time release with pay for labor-management activities was suspended by the City, pursuant to the terms of the Mayor's Executive Order No.75, on the grounds of alleged involvement in organizing, planning, directing, or participating in a strike, work stoppage, or job action. It is also undisputed that Dr. House was further informed on March 3, 1981, that his employment with the New York City Health and Hospitals Corporation (hereinafter "HHC") was being terminated as of the following day.

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[1] The City, by letter dated August 20, 1981, requests that the Board decline consideration of CIR's response, on the ground that the OCB Rules do not permit a pleading in response to a reply.

Executive Order No.75 (hereinafter "E.O. 75"), entitled "Time Spent on the Conduct of Labor Relations between the City and its Employees and on Union Activity", sets forth the City's program for authorizing release from regularly assigned job duties, i.e., "release time", with or without pay, for employees who are engaged in labor-management activities and certain union activities. Section 4.3.4 of E.O. 75 provides:

> "4. organizing, planning, directing, or participating in any way in strikes, work stoppages, or job actions of any kind, are excluded from the protection or coverage of this Order. Any employees assigned on a full or part-time basis or granted leave of absence without pay pursuant to this Order who participate in such excluded activity may have such status suspended or terminated by the City Director of Labor Relations."

Paradoxically ,the provisions of E.O. 75 serve as both the justification offered by the City for its actions, and the basis offered by CIR for its request for arbitration.

In its improper practice petition, as amended, CIR alleges that the City and HHC committed improper practices in violation of NYCCBL §1173-4.2(a)(1) and (3) by unlawfully and discriminatorily suspending Dr. House from release time status and by terminating his employment. It is claimed by CIR that the suspension of Dr. House's release time status is discriminatory against Dr. House and CIR because,

> "... it is the only time that this provision of Executive order No.75 has been used against a union member or officer despite the occurrence of work stoppages by other public unions."

It is also asserted by CIR that the termination of Dr. House's employment discriminates against him for the purpose of discouraging participation in the activities of CIR by him and by other members of CIR. The remedy requested by CIR in the improper practice proceeding includes reinstatement of Dr. House to employment with HHC, with back pay, reinstatement of Dr. House to release time status, and an order directing the City and HHC to cease and desist from committing improper practices against Dr. House, and members of CIR.

In its request for arbitration, CIR alleges that the termination of Dr. House's employment by HHC constitutes a violation of E.O. 75, HHC's policy and practice with regard thereto, and of the collective bargaining agreement.[2] It

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[2] Article XIV, section l(B) of the collective bargaining agreement defines a grievant as:

> "A claimed violation, misinterpretation, or misapplication of the rules or regulations, authorized existing policy or orders of the Corporation affecting the terms and conditions of employment and training program."

It is not disputed that F.O. 75 is applicable to HHC and constitutes a rule, regulation, policy, or order of HHC within the meaning of Article XIV, section l(B). No other section of the collective bargaining agreement has been claimed by CIR to have been violated by HHC's actions herein.

is CIR's position that E.O. 75 and HHC's policies and practices related thereto, require that when an employee's release time status is suspended or terminated, the employee be reinstated to the employment from which he or she was formerly released. Since Dr. House was terminated from employment, rather than reassigned to job duties, CIR contends that the basis of an arbitrable grievance has been stated. The remedy requested by CIR on behalf of Dr. House is reinstatement to employment with back pay.

Positions of the Parties

City's Position

The gravamen of the City's argument is that the underlying dispute in both the improper practice petition and the request for arbitration is the same, and that, pursuant to the waiver requirement contained in NYCCBL §1173-8.0(d), a party may not submit a claim to arbitration where the same underlying dispute has been presented in another forum, in this case, an improper practice forum. The City defines the issue present in both the improper practice petition and the request for arbitration as follows:

> "...the right of [the City and HHC] to suspend Dr. House from release time under Executive order 75 for his activities and not restore him to the HHC payroll after his residency had been completed."

The City also contends that, even if the waiver requirement were satisfied, arbitration should be barred because CIR, "despite the City's proddings", has failed to show that the contract provision invoked (i.e., E.O. 75, incorporated into Article XIV, section 1(B) of the contract) is arguably related to the grievance to be arbitrated. The City further argues that the request for arbitration is vague and overbroad and should be dismissed on that basis.

CIR's Position

The CIR denies that the issues raised in the improper practice petition and in the request for arbitration are identical. The CIR contends that the parties, issues, and remedies requested in the two proceedings are different, and that resolution of the grievance will not resolve the improper practice, nor will the determination of the improper practice be dispositive of the grievance.

It is alleged by CIR that the parties to the request for arbitration are Dr. House and HHC, while the parties to the improper practice are CIR and Dr. House against the City as well as HHC. Further, CIR alleges that the remedy requested in arbitration is the reinstatement of Dr. House's employment, with back pay, while the remedy requested in the improper practice is restoration of Dr. House's release time

status and the issuance of a cease and desist order, in addition to reinstatement to employment with back pay.

Moreover, CIR argues that the issue in the request for arbitration is one of an alleged violation of contractual rights, while the issue in the improper practice matter is one of an alleged violation of statutory rights under the NYCCBL. It is submitted by CIR that determination of these issues will require the presentation of different facts and the application of different legal standards.

The CIR also contends that it has stated a claim within the contractual definition of a grievance, that its statement meets this Board's established tests of substantive arbitrability, and that the City's objections to the sufficiency of the request for arbitration are directed toward the merits of the grievance, a matter which is properly for the arbitrator, not this Board, to determine. For these reasons, CIR requests that the City's petition challenging arbitrability be dismissed.

Discussion

At the outset, we observe that both the improper practice petition filed by CIR in BCB-487-81 and the request for arbitration herein challenge the application of E.0 75 by the City and HHC. The pleadings in both proceed

ings fail to demonstrate any question requiring the <u>interpretation</u> of the clear terms of E.O. 75.

In the improper practice case, it is alleged that the provisions of E.O. 75, which permit the suspension or termination of release time because of prohibited strike activity, have been applied discriminatorily against Dr. House. It is asserted that it has been the City's practice not to exercise its right to suspend or terminate release time privileges in situations involving work stoppages by other municipal unions. The CIR alleges that, in a break with its past practice, the City has singled out Dr. House and CIR for the imposition of this penalty.

In the arbitrability proceeding, it is alleged by CIR that HHC's policy and practice under E.O. 75 require that an employee suspended or terminated from release time be reinstated to regular employment with HHC. The CIR contents that, in violation of this policy and practice, Dr. House was not restored to employment upon suspension of his release time status, but was terminated. We view this claim as also involving a question of the consistent application of E.O. 75.

It appears to this Board that both the improper practice case and the arbitrability case stem from and challenge the application of E.O. 75 to Dr. House and CIR in the wake of

CIR's announced intention to engage in a strike, a strike which subsequently occurred shortly after the suspension of Dr. House's release time status and the termination of his employment. In the improper practice case, CIR argues that the application of E.O. 75 is discriminatory, under the NYCCBL, while in the arbitrability matter, CIR submits that the application of E.O. 75 constitutes a breach of contract. The basis of the claims in both forums, however, is the application of E.O. 75 in a manner which is alleged to be a departure from prior practice and policy relating thereto.

We find, therefore, that CIR has raised the same underlying dispute in two forums, and that in so doing, it has violated the waiver provision of NYCCBL §1173-8.0(d)[3] and may not avail itself of arbitration while simultaneously prosecuting its improper practice petition. In reaching this conclusion, we reject CIR's contentions concerning identity of parties, issues and remedies in the two proceedings. The CIR and Dr. House clearly are parties in

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[3] §1173-8.0(d) provides:

"d. As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purposes of enforcing the arbitrator's award."

interest in both cases, as are HHC and the City's Office of Municipal Labor Relations. The fact that, in each case, certain parties are involved without being named as formal parties, is not dispositive. And, while the remedies requested differ in extent (the request in the improper practice being somewhat broader), there is material overlap, since the principal relief sought in both proceedings is the remedy of reinstatement to employment, with back pay. Most importantly, as stated above, we are convinced that the underlying dispute at issue in both cases is the same; this fact, combined with the actual, if not technical, identity of parties and remedies, is sufficient to warrant precluding the simultaneous prosecution of both cases.

We agree with the City's contention that the present matter parallels that considered by this Board in Matter of City of New York and Uniformed Firefighters Association, Decision No. B-10-74, and that the decision therein is equally dispositive of the waiver issue in the instant matter. Consistent with that decision, and in order to preserve the efficacy of the waiver requirement contained in NYCCBL §1173-8.0(d), we will dismiss the request for arbitration herein unless, within 10 days of receipt of this decision and order, CIR files a written request to withdraw the improper practice petition pending in BCB-487-81.

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, provided that, if, within ten days of receipt of this decision and order, the CIR files a written request to withdraw its improper practice petition in BCB-487-81, then the City's petition herein shall be denied; and it is further

ORDERED, that the CIR's request for arbitration be, and the same hereby is, denied, provided that, if, within ten days after receipt of this decision and order, the CIR files a written request to withdraw its improper practice petition in BCB-487-81 , then the CIR's request for arbitration shall be granted, and the matter may proceed to arbitration.

DATED: New York, N.Y.
December 2, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER