OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-5-81

-and- DOCKET NO. BCB-448-80 (A-1117-80)

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

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In the Matter of

THE CITY OF NEW YORK,

Petitioner, DOCKET NO. BCB-452-80 (A-1116-80)

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On or about, August 25,1980, District Council 37, AFSCME, AFL-CIO (the "Union") filed a Request for Arbitration alleging that the City of New York (the "City") had violated Article XV, Section 1 of the collective bargaining agreement between the Union and the City for the period February 1, 1972 - June 30, 1974, commonly referred to as the "PRCA Working Conditions Contract" (the "Agreement"), by allowing volunteers to perform duties that would otherwise be regularly performed by permanent civil service employees.[1]

[1]PRCA refers to the Parks, Recreation, Cultural Affairs Administration.

The Union filed a second Request for Arbitration on or about the same date, August 25, 1980, alleging that the City had violated Article IV, Section 2 of the Agreement by "arbitrarily and capriciously transferring the grievant, Thomas Albino."

On September 5, 1980, the City filed a Petition Challenging Arbitrability (the "Petition") of the first grievance on the ground that

> "the Agreement, pursuant to which this dispute has been brought expired on June 30, 1974, and the arbitration procedure contained therein is no longer valid and enforceable."

This Petition was docketed by the Office of Collective Bargaining as BCB-448-80.

On September 19, 1980, the City filed a Petition Challenging Arbitrability of the second grievance on the same ground. This Petition was docketed as BCB-452-80.

On October 2, 1980, the Union filed separate Answers to both Petitions denying the City's allegations.

On October 8, 1980, the City filed a joint Reply to both Answers.

At the request of the City these cases have been consolidated for decision as they present the identical issue for determination by the Board.

BACKGROUND

Petition BCB-448-80

On March 26, 1980, Thomas Albino, Park Supervisor at P.S. 220 Playground, District 6 Queens, filed a grievance directly at Step III of the grievance-arbitration procedure alleging violation of Article XV, Section 1 of the Agreement which reads in its entirety as follows:

> "Section 1. Volunteers will not be utilized to perform duties that would otherwise be regularly performed by a permanent Civil Service employee."

The grievance specified that,

> "The Department not only allows volunteers to do the work that is normally done by permanent employees, it encourages them by the Volunteer Program administered by The Office For Volunteers."

The action sought included a request that the Department of Parks and Recreation (the "Parks Department") honor the Agreement not to use volunteers by "stopping all volunteer programs and activities, and disbanding The Office For Volunteers."

On August 5, 1980, Review Officer Felix A. Cappadona issued the Step III decision denying the grievance. In his decision Review Officer Cappadona referred to a Step III conference during which the grievant described a case "whereby Park supervisors were asked to provide paint for a group

of cub scouts to use on park benches." The grievance also charged that the Park Department promoted the use of community organizations "to perform the duties of civil servants and claimed that this was being done in order to avoid hiring new employees."

The Parks Department's position regarding the work being performed was that the volunteer groups perform the work "on a one time, ad hoc basis in different locations and at different times."

> "The use of these groups in no way can be construed to be keeping civil servants from being hired."

The Review Officer in denying the grievance found that the volunteers were offering assistance "to both the Department and its employees" and did so "only where facilities were short staffed" and only "on a one time basis."

The Union filed its Request for Arbitration dated August 25, 1980 and the City responded in its Petition filed on September 15, 1980 asserting that the grievance is not arbitrable because the Agreement having expired is no longer in effect.

Petition BCB-452-80

On February 26, 1980 Thomas Albino, also the grievant in BCB-448-80, filed a grievance alleging that on February 21,

1980 he had been "arbitrarily and capriciously" transferred from his regular assignment at Lost Battalion Hall Recreation Center to the P.S. 220 Playground by his immediate supervisor in violation of Article IV, Section 2 and Article V of the Agreement. Article IV, Section 2 reads in relevant part:

> "Transfers will not be made for arbitrary or capricious reasons."

The remedy requested was transfer back to the regular assignment at the Lost Battalion Hall Recreation Center.

On March 6, 1980, the Department issued its final determination denying the grievance on the ground that "transfer within a district is a management prerogative. They are not subject to the grievance procedure."

On August 6, 1980 Review Officer Cappadona issued the Step III Decision. At the Step III Conference the grievant had claimed that Park supervisors are responsible for large areas rather than a small area such as a playground. Further, he asserted that if he does belong in District 6, "he also belongs to a location as is indicated on all of his leave sheets.

The Parks Department responded that there is nothing in the Agreement that "talks to an involuntary transfer within a District." Both Lost Battalion Hall and the P.S. 220 Playground are within District 6. The Review Officer in

affirming the Parks Department's denial of the grievance found that "assigning employees to different locations within a District is a management prerogative and does not constitute a transfer." The grievant thus failed to prove violation of the Agreement.

On August 27, 1980 the Union filed its Request for Arbitration and on September' 19, 1980 the City in its Petition Challenging Arbitrability responded that the grievance was not arbitrable for the same reason as asserted in BCB-448-80, namely, that the Agreement having expired the arbitration procedure contained therein "is no longer valid and enforceable." (Petition BCB-452-80 ¶9).

POSITIONS OF THE PARTIES

The City maintains in its Petitions that the grievances in these cases are not arbitrable because the Agreement under which both were brought expired on June 30, 1974 rendering the arbitration procedure contained therein unenforceable.

In addition, the City asserts that upon expiration of the Agreement, it was not subject to the requirements of Administrative Code Section 1173-7.0(d) which requires that public employers and public employer organizations preserve the status quo during "the period of negotiations," such period being defined as "the period commencing on the date on

which a collective bargaining agreement is concluded or an impasse panel is appointed." Citing Administrative Code section 1173-7.0 (a) (1) which specifies the time for filing a bargaining notice, the City asserts that no such notice was filed; therefore, the "period of negotiations" never commenced. Hence, there was no requirement to maintain the status quo and abide by the expired Agreement. (Petitions ¶¶9-13).[2]

In its Answers, the Union does not deny that the Agreement expired June 30, 1974. Rather, it maintains that the City is estopped to raise this objection because it has "honored and responded" to many grievances filed under the Agreement from the date of its expiration to the present. (Answers ¶3).

[2]Administrative Code Section 1173-7.0(a)(1) reads as follows:

> a. Bargaining notices. (1) At such time prior to the expiration of a collective bargaining agreement as may be specified therein (or, if no such time is specified, at least ninety but not more than one hundred and 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. The parties shall commence negotiations within ten days after receipt of such a bargaining notice, unless such time is extended by agreement of the parties, or by the director or the board of collective bargaining.

Furthermore, the Union argues that the Mayor's Executive Order No. 83, issued on July 26, 1973 (hereinafter "Executive Order 83") provides for an additional grievance arbitration procedure for all Mayoral agency employees "who are eligible for collective bargaining where there is no executed written collective bargaining procedure." (Answers 14). Hence these matters should go to arbitration if not under the Agreement then under Executive Order 83.

Citing Board Decision B-14-77, the City in its Reply asserts that past arbitrations under an expired contract do not constitute a waiver of its present right to challenge arbitrability.

As to the Union's assertions that Executive Order 83 provides for arbitration of these grievances, the City does not challenge Parks Department employees' rights to file grievances under Executive Order 83. Rather, the City alleges that they cannot file grievances "under an Agreement such as this one which has expired nor can they enforce its terms."

DISCUSSION

The Board will first address itself to the Union's argument that notwithstanding the contract's expiration, the City is estopped to deny arbitrability because "many of the grievances filed thereunder have been honored and responded

to" by the City. (Answers 113). The possible applicability of Executive Order 83 to these cases will be discussed later in this decision.

The"Estoppel" or "Waiver" Issue

With respect to the "estoppel" or "waiver" issue, the Board first notes that the Union does not dispute the City's contention that the status quo provisions of Section 1173-7.0(d) are not applicable here. The contract expired by its own terms and ,but for the estoppel question, the Union agrees that the City was under no obligation to maintain the status quo.

Turning first to Board precedent, the Board has addressed the issue of estoppel to deny arbitrability under an expired contract only once before, in B-14-77, wherein it stated the following:

> "The fact that the City in the past might have arbitrated union grievances arising under the Agreement subsequent to its expiration date, does not constitute a waiver of its present right to challenge arbitrability." B-14-77 at 9.

The Board went on to note that the single cited instance of past arbitration of a grievance under the expired contract in B-14-77 involved a grievance made arbitrable under a statute that mandated arbitration; therefore, the Board

noted that the grievance "would have been found arbitrable even if the City had presented a challenge, and it necessarily follows that no precedent can be drawn from that case which would apply herein."

The Board next considers PERB precedent. Although no case has been found in which PERB has addressed the estoppel or waiver issue directly as is required in the instant case, PERB, nevertheless, has dealt with this issue indirectly many times.

In Port Chester-Rye U.F.S.D., 10 PERB ¶3079 (1977), the Port Chester Teachers Association (the "Union") filed an improper practice charge alleging that while the parties were negotiating a successor contract to the one that had expired on June 30, 1975, the Port Chester-Rye school district (the "school district") had violated the Taylor Law by refusing to entertain a grievance or to submit it to arbitration pursuant to the grievance arbitration procedure in the expired contract. The school district asserted in its answer as an affirmative defense that as there was no contract in existence, there was no longer a grievance arbitration procedure.

In its decision PER-B stated the following:

> "The obligation of an employer to accept and hear grievances is not terminated upon the expiration of a contract....
>
> "We believe, however, that a distinction should be made as to the obligation of the employer itself in such circumstances to entertain and attempt to adjust grievances which arise subsequent to the termination of the contract and its obligation to permit such unresolved grievances to proceed to arbitration.
>
> "The obligation to arbitrate must be regarded as wholly contractual, deriving its existence from the terms of the actual bargain of the parties, rather than from the statutory mandate (see CPLR §7501 et seq.). Here, the contract had expired. As found by the Appellate Division, Second Department In the Matter of Board of Education (Poughkeepsie Teachers Association), 44 A.D. 2d 598 (1974), a contract having expired, the provision to arbitrate is no longer in effect." ¶10-3079 at 3134-35).)

PERB concluded its decision by stating:

> "We, therefore, find that the failure of the employer to entertain the grievance was a violation of the Act, but that the refusal of the employer to permit the grievance to proceed to arbitration was not a violation by reason of the fact that there was no agreement to arbitrate then in existence between the parties." (Emphasis in original; ¶10-3079 at 3135).

PERB, therefore, requires an employer to process grievances even though a contract has expired although the

employer does not have to arbitrate such grievances. This approach effectively undercuts any estoppel or waiver argument which necessarily implies that the employer in a given case has some choice as to the processing of grievances under an expired contract. Under Port Chester-Rye, the employer has no choice; it must process grievances even though the contract has expired. The union, therefore, can hardly complain that the employer waived its right to refuse to arbitrate simply because it heard prior grievances which it had no choice but to hear.

The Port Chester-Rye decision has been followed in subsequent PERB decisions. In East Ramapo Central School District, 12 PERB ¶3121 (1979), the school district refused to process the grievance of a teacher of six years who was terminated subsequent to the expiration of the contract and during the period of negotiations for a new contract. The union claimed that the school district improperly refused to process the grievance. Citing Port Chester-Rye, PERB stated the following as to the school district's argument that the refusal to process the grievance had been based on the fact that the contract had expired and they were still negotiating a successor contract:

> "This was not a valid reason for the District to refuse to process the grievance. It was required to do so

> even though it would not have been obligated to arbitrate the grievance." 12-¶3121 at 3218.

In reaching its decision PERB concluded:

> "We do, however, deem it necessary to direct the District to process grievances in the interim period between contracts up to the point of arbitration." Ibid.

PERB has cited Port Chester-Rye with-approval in other cases in which it denies arbitration after a contract has expired because the "obligation to arbitrate must be recognized as wholly contractual." Addison Central School District, 13 PERB ¶4515 at 4531 n.9 (1980); County of Rockland, 11 PERB ¶3023 (1978); Thousand Islands Central School District, 11 PERB ¶3025 (1978).

Consistent with the decision in B-14-77 and PERB precedent, the Board finds that no waiver of the right to refuse to arbitrate under an expired contract results from the processing of grievances under such a contract. To the contrary, the Board holds that under the NYCCBL the City in fact has a continuing duty to process grievances under an expired contract at least up to the point of arbitration.

Here, the Agreement having expired and no status quo being in effect, the City did not waive its right to refuse to arbitrate the grievances presented herein.

Executive Order 83

In its Answers, the Union asserts its right to arbitrate the "grievances" herein under Executive Order 83 which includes the following definition of "grievance" in section 5(b):

> "For purposes of subdivision a of this section, the term 'grievance' shall mean (A) a dispute concerning the application or interpretation of the terms of (i) a written, executed collective bargaining agreement; or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment; (B) 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; and (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification."

In its Request for Arbitration, the Union asserts violations of the Agreement. Subsection (A)(i) of Section 5(b) of Executive order 83 provides a means for obtaining arbitration of alleged violations of a collective bargaining agreement. Here, however, the contract has expired. Since the only substantive rights asserted by the Union arise under

an expired contract, the rights themselves no longer exist. Executive Order 83 Section 5(b) does not create new substantive rights; it merely creates a vehicle for the resolution of alleged violation of the substantive rights specified therein including collective bargaining agreements. Since the rights asserted here derive from a contract no longer in effect, we will deny arbitration under Executive Order 83.

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: February 3, 1981
New York, New York

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

MARK CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

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MEMBER

CAROLYN GENTILE
MEMBER