City v. L.371, SSEU, 29 OCB 20 (BCB 1982) [Decision No. B-20-82 (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-20-82

Petitioner, DOCKET NO. BCB-558-82 (A-1386-81)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent
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DECISION AND ORDER

On January 14, 1982, the City of New York, through its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR") commenced this proceeding by filing a petition challenging the arbitrability of a grievance filed by the Social Service Employees Union, Local 371 (hereinafter "SSEU" or "the Union") on June 25, 1981. SSEU answered the petition on March 29, 1982, to which the City replied on April 8. 1982.

Background

The Union seeks to arbitrate the grievance of Pauline Starks Hunt. Grievant Hunt entered City service in February, 1980 as a Social Worker in the Department of Social Services, Human resources

Administration (hereinafter "HRA"). SSEU claims that the grievant has not been paid at the correct salary since the time of hire. The Union alleges that the posted starting salary for grievant's position was $16,575 and that Hunt was verbally advised by HRA management that she would be hired at that salary rather than at the $15,325 minimum for the position and would receive two 8 percent increases within 15 months. The grievant, however, has been receiving the lower rate of pay and adjustments based thereon since the beginning of her employment.

The Union seeks arbitration pursuant to Article IV, Section 2 of the 1978-80 collective bargaining agreement between SSEU and the City (hereinafter "the Agreement"). That Article states in pertinent part:

> The employee and/or the Union shall present the grievance in the form of a memorandum, to the person designated for such purpose by the agency head no later than 120 days after ~he date on which the grievance arose.

The Agreement includes the following definition of the term "grievance":

> A claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy or orders applicable to tile agency which employs the grievant affecting the terms and conditions of employment....

As relief, the Union asks, "immediate payment of monies due with appropriate interest" and any other just and proper remedy.

The Union claims violations of: a) Article III of the Agreement, which sets forth salaries for employees covered therein; and b) HRA policy.

## Positions of the Parties

### City's Position

The City argues that the Union has failed to identify the "HRA policy" allegedly violated. It contends that the Board cannot assume the existence of": a written policy were none has been specified. Thus, the alleged promise to pay the grievant a specific salary must be characterized as an "oral agreement," the breach of which does not constitute & grievable matter under the definition of "grievance" contained in the Agreement. Furthermore, the City urges that the Board may not assume the existence of an oral contract in the absence of supporting factual allegations and in view of a written document to the contrary.

OMLR states that the allegation pertaining to a violation of HRA policy appeared for the first time in the Request For Arbitration, rather than at any prelim-

inary stage. The City therefore concludes that the allegation is without merit and is merely a subterfuge.

Petitioner further contends that Article III of the Agreement is subject to that portion of the Alternative Career and Salary Plan Regulations which reads:

> V. Appointments, Reinstatements, Promotions, Demotions and Transfers
>
> 1. Appointments and reinstatements shall be made at the minimum basic salary for the respective class of positions to which such appointments or reinstatements are made, as set forth in the Implementing Personnel order or as otherwise authorized for a specific position or positions by a Certificate of the Mayor. In the event that a different appointment or reinstatement salary is authorized for a specific position or positions by a Certificate of the Mayor as herein provided, no other employee in a position in the same class of positions receiving a rate different from the rate authorized in such certificate shall be automatically entitled to have his salary adjusted to the rate or rates authorized in such certificate for the specific position or positions.

The application of these terms to the present matter, it is argued, results in a finding that the claim is without merit. Furthermore, Petitioner claims that the Union's failure to state how Article III has been violated denies the City an opportunity properly to evaluate the claim and to present any procedural and/or substantive challenges to arbitrability.

The City also maintains that the grievance was filed more than 120 days after it allegedly arose. Thus, arbitration must be denied because the Union failed to Comply with the filing requirements specified in the grievance-arbitration provisions of the Agreement.

The Union's Position

SSEU submits that, in essence, Petitioner's argument is that the instant grievance is not arbitrable because it lacks merit. The Union urges that whether or not a grievance is meritorious is a substantive question to be resolved by the arbitrator and is not a matter within the Board's mandate. Moreover, the Union claims that the case is indeed meritorious.

The union contends that the salary actually paid to the grievant and the amount promised her are within the ranges established by Article III. Hunt is a covered employee; it follows that the Agreement governs in the instant matter. Furthermore, the Union argues that where the two conflict, Article III supersedes the Alternative Career and Salary Plan Regulations which call for minimum starting salaries. Additionally, the Plan itself makes provision for appointments above minimum title rates in certain circumstances.

SSEU argues that it is the policy, practice and procedure of HRA to hire employees at levels above the contractual minimum. The failure to pay a particular, agreed upon salary is a substantive and evidentiary matter which amounts to a violation of the Agreement. Questions relating to the existence of an oral agreement also constitute substantive issues, all of which are to be resolved at the arbitration stage. The Union argues that the Board is precluded from ruling on any substantive matter. Rather, under the provisions of the New York City Collective Bargaining Law, the Board is "simply to determine whether, as here, a contractual violation has been claimed".

The Union argues that although the original grievance stated that the City only violated Article III, SSEU retained the "right" to further particularize its claim by adding that "HRA policy" had also been violated. SSEU maintains that the HRA policy to pay salaries within the ranges established by Article III is derivative of the contract between the parties. Therefore, no further written formulation of policy is required. While written embodiments of this policy may exist, the Union claims that it is unable to locate them absent the discovery

rights and subpoena powers connected with the arbitral forum.

SSEU also contends that by alleging a failure to specify the grounds for the claim that Article III has been violated, the City is actually seeking evidence which goes to the merits of the case. The Union maintains that it has sufficiently met its obligation of identifying the claimed dispute; it need not supply the Board with evidence in support of its claim. SSEU notes that the City's Step III Review Officer "had no difficulty whatsoever in identifying and responding to" the Union's claim.

The Union urges that the City be estopped from alleging a time bar. The grievant relied to her detriment on false promises that an adjustment would be made; the violation continues to date. The grievant could not have learned of the incorrect salary rate until receipt of her first paycheck, the date of issuance of which is presently unknown. Furthermore, Hunt filed a complaint with the Office of Personnel Services (hereinafter "OPS") on or before February 23, 1981. The Union submits that grievant's obligation to file did not arise until after OPS issued its decision, the date of which is also presently unknown.

Discussion

Before examining the City's challenges to arbitrability, we must first resolve the Union's allegation that questions the Board's authority over substantive issues. Contrary to SSEU's assertions, it is well established that the Board of Collective Bargaining, rather than the arbitrator, is the forum charged with the duty of determining substantive arbitrability.[1] Questions such as whether an agreement to arbitrate covers a particular subject matter that is in dispute[2] and whether a supplemental agreement may be the basis for an arbitrable grievance[3] are substantive questions properly within the jurisdiction of this Board.

The City correctly asserts that the Union has failed to identify the HRA policy allegedly violated and that an oral contract may not be the subject of a "grievance" under the definition of that term in the Agreement. However, it is undisputed that since the initiation of the Step I grievance, SSEU has repeatedly alleged that

[1] Decision Nos. B-8-68, B-8-69, B-19-72, B-18-74, B-11-80

[2] Decision Nos. B-2-69, B-14-74, B-1-76, B-10-77.

[3] Decision No. B-4-72.

Article III of the Agreement has been violated.

Article III sets forth salary ranges for a multitude of titles, including Social Worker. The grievant ,is obviously covered thereunder. We need not determine at this juncture whether or not Article III is superseded by the Alternative Career and Salary Plan Regulations quoted above, for such a determination seeks to the merits of the claim, into which we do not inquire.[4] We note however, that the Plan does make provision, for variations in starting salary.

The City does not contest the existence of a contractual commitment to arbitrate disputes nor does it claim that salary disputes are not arbitrable generally. Looking to the claim as stated by SSEU, we find that the Union has met its burden of establishing a prima facie relationship between the act complained of (payment of an incorrect salary) and the source of the alleged right (Article III of the Agreement), redress of which is sought through arbitration. The alleged violation thus relates to the application of the parties' collective bargaining agreement and constitutes an arbitrable matter.[5]

[4] Decision Nos. B-12-69, B-8-74, B-10-77.

[5] Decision No. B-9-78.

We recognize that the existence of an "HRA policy", be it written or oral, may be of importance in deciding the merits and remedy in the instant matter. Having found the claim arbitrable under the Agreement, we do not reach any conclusion regarding the unidentified "HRA policy" except to reiterate our position that an oral agreement cannot provide the basis for filing an independent grievance.[6]

The City maintains that the Union's request is time-barred. We note that the contractual grievance procedure provides for the filing of a grievance within 120 days after the date on which it arose.

However, the instant grievance amounts to a "continuing violation" one which is repeated each time the grievant receives a paycheck. Therefore, in keeping with past precedent[7] and so as not to penalize the grievant for having exhausted internal administrative procedures in challenging her salary classification, we find that that part of the instant claim which relates to incorrect salary from February 25, 1981 (120 days

[6] Decision No. B-22-81.

[7] Decision Nos. B-3-80, B-12-81, B-15-81, B-4-82, B-7-82.

prior to the filing of the grievance) to the present is timely asserted and should not be barred from arbitral consideration.

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 Request for Arbitration filed herein by the Social Service Employees Union, Local 371 be, and the same hereby is, granted insofar as the Request seeks arbitration of the claim for the correct salary for work performed by the grievant from and including February 25, 1981 to the present time, and is denied insofar as the Request seeks arbitration of the claim for work performed by the grievant prior to February 25, 1981.

DATED: New York, N.Y.
June 17, 1982

ARVID ANDERSON
CHAIRMAN

HILTON FRIEDMAN
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER