City v. CWA, 29 OCB 28 (BCB 1982) [Decision No. B-28-82 (Arb)]

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-28-82

DOCKET NO. BCB-577-82
(A-1449-82)

-and-

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Respondent.

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DECISION AND ORDER

On March 8, 1982, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Communication Workers of America (hereinafter "the Union" or "CWA") on February 25, 1982. CWA filed an answer on May 4, 1982, to which the City replied on May 14, 1982.

Request for Arbitration

The request for arbitration states the grievance be the: "Unilateral change in existing policy regarding check-cashing for members." The City is alleged to have violated Article VII, Section 2, Step 5 of the 1980-1982

collective bargaining agreement (hereinafter "the Agreements entered into between CWA and the Board of Elections which states:

> Step 5. An appeal from an unsatisfactory decision at Step IV may be brought by the Union or the Employer to the Office of Collective Bargaining for impartial arbitration within ten (10) working days of the receipt of the Step IV decision. Such arbitration shall be conducted by an arbitrator designated from a panel maintained by the Office of Collective Bargaining in accordance with applicable law, rules and regulations. A copy of the notice requesting impartial arbitration shall be forwarded to the Director of Municipal Labor Relations. The costs and fees of such arbitration including the cost of a stenographer, if any, shall be borne equally by the Union and the Board. The decision or award of the arbitrator shall be final and binding, to the extent permitted by and in accordance with applicable law specifically including S3-300 of the Election Law, and shall not abridge or diminish any of the rights or obligations of the Board of Elections pursuant to said S3-300, and shall be limited solely to the application and interpretation of this Agreement, rule, regulation, existing policy or order of the Board of Elections and shall not add to, subtract from or modify such Agreement, rule, regulations, written policy or order.

Article VII, Section 1 of the Agreement contains the following definition of the term "grievance":

> (A) A dispute concerning the application or interpretation of the terms of this collective bargaining Agreement.

(B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Board of Elections issued pursuant to its authority under Section 3-300 of the Election Law in reference to the terms and conditions of employment.

(C) A claimed wrongful disciplinary action taken against an employee.

As a remedy, the Union seeks "Restoration [of] previous policy."

Background

The parties agree that for a certain number of years,[1] the City maintained check depositories in several area banks. These non-interest bearing accounts served as the basis for compensation to the banks for cashing City employee payroll checks. As part of the 1976-1978 Agreement, however, the parties agreed to the elimination of check-cashing privileges. The following provision was incorporated into the parties' contract:

> ARTICLE XXI - CONFORMANCE WITH THE MEMORANDUM OF INTERIM UNDERSTANDING
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> Effective July 1, 1976 and continuing for the period ending June 30, 1978:
> (1) The City will unilaterally dis-

[1] Neither the City nor the Union state the date of commencement of the check-cashing practice in any of the pleadings submitted.

> continue the practice of maintaining depositories in commercial banks in order to provide check-cashing privileges for employees ....

Nonetheless, Chemical Bank continued to cash all City employee checks submitted to it until the beginning of 1982, at which time the parties became aware of Chemical's intention no longer to do so. A notice to City employees was issued by the City's Commissioner of Finance informing them that beginning February 15, 1982, employees could cash their payroll checks at Chemical Bank only if they maintained checking or savings accounts at Chemical with a balance equal to or greater than the amount of the check; one branch, however, would remain available to cash checks of City employees without Chemical Bank accounts.

Positions of the Parties

The City's Position

OMLR seeks dismissal of the instant petition on several grounds. The City contends that the Union has failed to allege any violations of the Agreement. In its Request for Arbitration, the only contract provision cited by CWA as having been violated relates to the binding arbitration portion of the grievance procedure. Furthermore change in practice described by the Union does

not constitute a "grievance" as that term is defined in the Agreement. The City urges that for a past practice to be grievable under Article VII, it must be written. CVA has not identified any written policy which incorporates the check-cashing practice. In addition, the City argues that the Union's reliance on Section 192 of the New York State Labor Law[2] is misplaced because: a) the provision is inapplicable to municipal employees; and b) a violation of the State Labor Law does not state the basis for a grievance under the Agreement. Moreover, CWA specifically agreed to the elimination of check-cashing privileges in the 1976-1978 Agreement.

OMLR also argues that no grievance has been stated against the City in that the practice of cashing City employee payroll checks was the policy of Chemical Bank rather than the practice of the City of New York. Thus, the Union has not identified any practice which can be attributed to the employer.

The City further contends that the Union's allegations of disparate treatment are totally inappropriate to the instant proceeding. The Health and Hospitals Corporation. (hereinafter "HHC") is a separate and distinct legal entity

[2] New York State Labor Relations Law, Section 192 pertains to the cash payment of wages.

and Chemical Bank deals with it as such. Arrangement between HHC and Chemical are unrelated and irrelevant to the relationship between Chemical and the City.

Union's Position

The Union admits that it erred by failing to allege any violation of the Agreement in the Request for Arbitration. CWA states, however, that the City was aware of the nature of its claim in that the Request for a Step III hearing specifically alleged a violation of the New York State Labor Law, Section 192. Furthermore, throughout the processing of the grievance which underlies the Request, it has 'been clear that the Union is alleging a unilateral change in past practice. CWA maintains that this unilateral action "is a violation of Law, which is a violation within the definition of a grievance stated in Article VII, Section l."

While the Union admits that check-cashing privileges were eliminated by the 1976-1978 Agreement, it states that Chemical Bank stopped cashing City payroll checks only after the City asked for interest on its money. CWA alleges that many City employees cannot afford the monthly bank charges they now must pay in order to have their checks cashed because their salaries are so low.

The Union additionally contends that HHC employees are still having their payroll checks cashed by Chemical Bank without having to open an account. CWA urges that "[t]his is a clear case of disparate treatment."

Discussion

It is well established that in determining disputes concerning arbitrability, the Board must first decide whether the parties are in any way obligated to arbitrate their controversies.[3] It is clear that the parties in the instant matter have agreed to arbitrate grievances, as defined in Article VII, Section 1 of the Agreement. The question before us thus is whether the instant claim is within the range of matters which the parties, by contract, have agreed to submit to arbitration.

In submitting a request for arbitration, it is incumbent upon the party seeking arbitration to allege facts which, if proven, would constitute a grievance within the contractual definition.[4] The parties have limited grievable matters herein to the alleged violation, misinterpretation or misapplication of a term of the Agreement, rule

[3] Decisions Nos. B-2-69, B-18-74, B-1-76, B-15-79, B-11-81, B-3-82.

[4] Decision No. B-22-80.

or regulation, written policy or order of the Board of Elections, or wrongful disciplinary action. The only contract provision, rule or regulation, written policy or order alleged by CWA to have been violated is Article VII, Section 2, Step 5 of the Agreement. This section merely describes the procedures to be followed when invoking the arbitration provisions of the grievance-arbitration procedure. Its function, in other words, is to prescribe procedural steps, not to define or create substantive rights. As such, it does not furnish an independent basis for a grievance, and CWA admits that it erred by citing this provision as having been violated. CWA has not specified any other clause in the parties' contract or any rule, regulation, written policy or order of the Board of Elections which it claims has been violated, misinterpretated or misapplied.

The Union's characterization of the City's actions as "unilateral" appears unwarranted in light of the fact that the Union and the City concur that check-cashing privileges were specifically eliminated in the bilaterally negotiated 1976-1978 Agreement. CWA has offered no evidence to indicate that check-cashing privileges were reinstituted by any subsequent agreement between the parties. In fact,

while it is clear that discontinuance of the privilege was made a matter of written agreement in the 1976-1978 Agreement, there is no evidence of any antecedent written agreement or written policy creating the privilege. It appears that the privilege may have existed by reason of an unwritten past practice; in this connection we note that a change in an unwritten past practice does not constitute a grievable matter under the definition of a grievance found in the Agreement. The issue as to whether the policy was a bank policy or an employer policy is thus irrelevant, since even assuming it was an employer policy, the City's obligation, if any, to continue the policy, was terminated by the 1976-1978 Agreement. By the same token, the Union's arguments as to disparate treatment of unit employees working for HHC and all other unit employees ignores the fact that the 1976-1978 Agreement frees the City of any obligation to maintain the check-cashing privilege and that even if it could be argued that action by HHC with regard to its employees is action by the City, the Union could not complain that failure to maintain the privilege for all employees was in violation of contract but only that extra-contractual privileges were being extended to some employees. It must be taken into account, however, that in the context of this matter the City of New York and HHC are entirely separate legal entities and the actions of the latter may not be attributed to the former.

Additionally, an alleged violation of the New York State Labor Law does not in and of itself state a grievance as defined by New York City Collective Bargaining Law, Section 1173-3.0[5] and has not been defined as such by the Agreement.

In summary, CWA has failed to satisfy the definition of a grievance under Article VII, Section 1 of the Agreement and has thus failed to state an arbitrable claim. This Board cannot create a duty, to arbitrate where none exists nor can it expand the obligation to arbitrate beyond the scope established by the parties in their contract.[6] We therefore shall

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[5] Section 1173-3.0(o) of the New York City Collective Bargaining Law states:

> o. The term "grievance" shall mean: (1) a dispute concerning the application or interpretation of the terms of a written collective bargaining agreement or a personnel order of the mayor, or a determination under section two hundred twenty of the labor law affecting terms and conditions of employment; (2) a claimed violation, misinterpretation, or misapplication of the rules or regulations of a municipal agency or other public employer affecting the terms and conditions of employment; (3) a claimed assignment of employees to duties substantially different from those stated in their job classifications; or (4) a claimed improper holding of an open-competitive rather than a promotional examination. Notwithstanding the provisions of this subsection, the term grievance shall include a dispute defined as a grievance by executive order of the mayor by a collective bargaining agreement, or as may be otherwise expressly agreed to in writing by a public employee organization and the applicable public employer.
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> See also Decision No. B-8-70.

[6] Decision Nos. B-12-77, B-20-79, B-15-80.

grant the petition challenging arbitrability and deny the request for arbitration.

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.
July 13, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER