City v. L.371, SSEU, 29 OCB 31 (BCB 1982) [Decision No. B-31-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

- between -

THE CITY OF NEW YORK, DECISION NO. B-31-82

Petitioner, DOCKET NO. BCB-581-82 (A-1451-82)

- and -

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On March 23, 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 Social Service Employees Union, Local 371, AFSCME, (hereinafter "the Union" or "SSEU") on March 1, 1982. SSEU filed an answer on May 26, 1982, to which the City replied on May 28, 1982.

Request for Arbitration

The request for arbitration alleges that the City violated both Article VI, Section 1 of the 1980-82 collective bargaining agreement (hereinafter "the Agreement") entered into between the parties and the Human Resources Administration Non-Managerial Employee Performance Evaluation

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Manual, Sections I, III-X (hereinafter "the Manual") by disregarding agency policy when evaluating grievant George Silberman's performance.

Among the several definitions of the term "grievance" found in Article VI, Section 1 of the Agreement are the following:

> A. A dispute concerning the application or interpretation of the terms of this Agreement;
>
> B. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided disputes involving the Rules and Regulations of the New York City Personnel Director shall not be subject to the Grievance Procedure or arbitration.

As a remedy, the Union seeks removal from Grievant's personnel folder of the evaluation presented to him on September 16, 1981, as well as all its attendant documents, adherence by the Human Resources Administration (hereinafter "the HRA" or "the Agency") to its policy in future evaluations of Grievant, and any other just and proper remedy.

The instant grievance was filed pursuant to the grievance - arbitration procedures contained in Article VI, Section 2 of the Agreement.

Background

In May 1980, the HRA Office of Personnel Services promulgated the Manual. In a memorandum dated May 23, 1980, addressed to all supervisors, the ERA Assistant Commissioner for Personnel Administration stated that the revised City Charter requires the establishment of an employee evaluation program based on job performance. The Manual, which specified the tasks upon which employees are evaluated and the standards for measuring employees performance of those tasks, was developed to meet this mandate. The Grievant, George Silberman, was evaluated pursuant to Manual requirements for the period July 1, 1960 through June 30, 1961. He was shown the final draft of his evaluation on September 16, 1981. Thereafter, the Grievant filed an appeal from his unfavorable evaluation under the Performance Evaluation Appeals procedures of the Manual[1] as well as the

[1] Section XI of the Manual, entitled "Performance Evaluation Appeals" provides that:

> A. If the subordinate disagrees with either the supervisor's ratings or the recommendations' on the final performance evaluation, he/she has the right to discuss the evaluation in a meeting with the supervisor and the reviewer, prior to submitting an appeal.
>
> B. If the disagreement is not resolved at this meeting, the subordinate has 10 working days from the date he/she receives the rating to submit an appeal. The subordinate should set forth, in writing, the reasons why he/she disagrees with the supervisor's ratings or recommendations, and submit a copy of the relevant completed Form M-303a.

(more)

grievance which underlies the present matter.

Positions of the Parties

The City's Position

OMLR asserts that the Manual was promulgated pursuant to the Personnel Director's Rules and Regulations. Insofar as Article VI, Section l(B) of the Agreement excludes disputes involving the Rules and Regulations of the Personnel Director from the scope of arbitral review, the City claims that it follows that the instant grievance is not arbitrable.

The City argues that the Grievant is indirectly seeking to challenge the substantive content of his performance evaluation by claiming a failure to follow certain

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(Footnote 1/ continued)

> The appeal should be forwarded to the HRA/DSS Evaluation Board, which will review appeals and issue its final determination within thirty working days from the time the appeal is submitted.
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> The Board will review and consider all appeals to determine if the evaluation was conducted fairly and whether or not the rating was reasonable.
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> C. If the employee is dissatisfied with the Evaluation Review Board's determination, he/she may appeal to the Agency Head. Final review authority rests with the Agency Head.

procedural provisions of the Manual in preparing his evaluation. The City contends that performance evaluations were clearly intended to be a prerogative of management and that the appeal procedure of the Manual provides the only rights and remedies available to employees regarding disputes over the substantive content of their evaluations. The City cites the following to support their contention:

> The New York City Charter at Section 814, entitled "Agency heads; powers and duties" provides that:
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> "(a) Subject to the civil service law and applicable provisions of this charter, heads of city agencies shall have the following powers and duties essential for the management of their agencies in addition to powers and duties vested in them pursuant to this charter or other applicable law:
>
> (5) To assist the personnel department in the determination of minimum qualifications for classes of positions and to review and evaluate qualifications of candidates for positions in the civil service ...
>
> (13) To establish and administer performance evaluation programs to be used during the probationary period and for promotions, assignments incentives and training ... ;

The Rules and Regulations of the City Personnel Director at Rule VII, Section V, entitled "Performance Evaluation for Sub-Managerial Employees" provides that:

7.5.1 Agency Performance Evaluation Programs
Each agency shall establish and administer a performance evaluation program for sub-managerial employees in accordance with these rules or as prescribed by the city personnel director in the regulations or procedures. Such programs shall be subject to approval by the city personnel director.

7.5.2 Definition
The performance evaluations of all sub-managerial employees, other than members of the uniformed forces of the police, fire, transit police, housing police, correction services and operating staff of the independent authorities, shall be based upon evidence of the work actually performed by such employees as compared with pre-established performance standards.

7.5.3 Use
Performance evaluations of sub-managerial employees shall be used by agencies during the probationary period and for promotions, assignments, incentives and training.

7.5.4 General Administration
(a) Each agency shall establish and maintain an employee service board to oversee the operation and effectiveness of the agency's sub-managerial performance evaluation program.
(b) Rating criteria in the form of performance standards shall be developed through a process of job analysis that will include consultation with employees to be evaluated.
(c) Sub-managerial employees shall be rated by supervisors who directly observe

and/or review their work. All such evaluations shall be reviewed by a superior who is at least one level above that of the evaluator.

(d) Final evaluations shall be issued by the agency's employee service board subject to review by the agency head.
(e) 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.

7.5.5 Appeals

a Each agency shall establish and maintain an appeals board which shall determine appeals by permanent sub-managerial employees of their performance evaluation.
(b) The determination of the appeals board may be appealed by such permanent employee to the head of the agency.
(c) Procedures for such appeals shall be contained in the sub-managerial performance evaluation program submitted by the agency to the city personnel director.

OMLR further contends that Section 1173-4.3b of the New York City Collective Bargaining Law confers on management the right to "determine the standards of selection for employment. "

Moreover, the City claims that the remedy sought by the Grievant, removal of any evaluatory material in his personnel folder, is not available to him under either the Agreement or the City-Wide contract entered into between the City and the Union's designated representative. The City maintains that it "substantially complied with applicable procedures, rules and regulations or policy in

processing grievant's evaluation. " To the extent that some procedural steps were overlooked, it is argued that these steps were of minor significance and whether specifically adhered to or not, would have no bearing on the substantive content of the Grievant's evaluation.

The Union's Position

The Union contends that the failure to follow delineated procedures in conducting the Grievant's performance evaluation violated the Manual in several important respects. The Union claims that Sections I, III-X of the Manual were violated in that:

> a) Grievant was not asked to meet with his supervisors and the reviewer at the beginning of the evaluation period for the purpose of being made aware of the tasks upon which he would be evaluated. No discussion regarding the tasks which would be the basis for his evaluation was held by any of his 5 supervisors, except after the end of the rating period;
>
> b.) Grievant was requested by the director to sign the portions of Form M-303A (Evaluation Report), which specify the covered tasks, on October 28, 1980, almost 4 months after the beginning of the evaluation period. This was in direct violation of Particle VIII, Section 1 and 2 of the Manual, which Provide that Section 1 and Section 2 of the Form M-303A are to be completed at the beginning of the evalution period;

c.) Article VIII, Section 2 of the Manual requires that there be a personal conference between the supervisor and the employee at which the supervisor reviews the specific tasks and standards on which the employee will be evaluated. This Section also requires the supervisor to elicit and answer any questions the employee may have in order to ensure that the employee understands clearly what is expected of him/her. Grievant's supervisor failed to comply with this important requirement;

d.) During the evaluation period, none of the 5 supervisors to whom grievant was alternately assigned met with him on an ongoing basis to discuss his performance and to assist him in taking corrective action which might be indicated;

e.) Grievant's performance was not reviewed on a quarterly or semi-annual basis, in violation of Article IX of the annual

f.) Grievant's supervisor failed to meet with the Grievant approximately 10 days before the end of the evaluation period to discuss the contents of the evaluation portion of the Evaluation Form M-303A, as required under Article VIII, Section 2, of the Manual. On July 29, 1981 the director of the Office of Program Evaluation, who was not Grievant's immediate supervisor, informed Grievant of the content of his evaluation and advised hin, that nothing could be said by Grievant that would modify the evaluation. No discussion was had with the Grievant, no opportunity was provided to him to offer comments or clarifications and no opportunity was granted the Grievant to report his comments about the evaluation;

g.) The evaluation was not processed on a timely basis. Grievant was not shown the final draft of his evaluation until September 16, 1981;

h) The ratings received by the Grievant for the tasks covered by the performance evaluation were not justified by the objective evidence of his performance, i.e., records, charts, etc.;

i.) Although Grievant had 5 supervisors during the period relevant hereto, no performance reviews were prepared by any of the outgoing supervisors to reflect the successive changes in supervision.

The Union maintains that "the procedural defects were so substantial that it was impossible for [the Grievant] to receive a fair and proper evaluation."

The Union further contends that the Manual, which was adopted by the Agency and distributed to all supervisors pursuant to the memorandum from the HRA Assistant Commissioner of Personnel Administration, constitutes Agency policy. The Union asserts that a claimed violation of Agency policy comes within the definition of a grievance in Article VI, Section 1 of the Agreement and is clearly arbitrable.

The Union disputes the City's contention that the grievance involves the subjective determinations made by the Agency as to the Grievant's work performance. The Union acknowledges that the Grievant has fully exhausted all of his internal remedies under the Manual by filing an appeal from his unfavorable evaluation. However, it maintains that the focus of this grievance, the failure of

agency to follow the procedures set forth in the manual, is different from that in the appeal under the Manual. The Union argues that the internal appeal procedure provides a remedy only from the substantive content of performance evaluations.

The Union also argues in the alternative that it will take an extremely long time for a decision to be rendered on Grievant's appeal under the internal procedures.

Discussion

It is well established that the question before the Board on a petition challenging arbitrability is one of substantive arbitrability -- i.e., is there an agreement between the parties to subject their disputes to arbitration, and, if so, is the obligation broad enough in its scope to include the particular grievance presented.[2] OMLR argues that the Manual was promulgated as a directive of the New York City Personnel Director, which is excluded from the definition of a grievance in the Agreement, and is therefore excluded from the scope

[2] CHAIMIAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD F. GRAY
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

of arbitral review. However, as indicated in the memorandum from the HRA Assistant Commissioner of Personnel Administration, HRA developed

the Manual to meet the mandate in the Revised City Charter which "requires the establishment of an employee evaluation program based on job performance." While a job evaluation system may be required, the Manual promulgated by HRA is not the equivalent of a directive. Rather, the job evaluation system has the force and effect of, and stands as, a written policy of the Agency. As stated in Article. VI, Section l(B) of the Agreement, cited above, an alleged breach of written policy constitutes a grievable matter.

The City argues that employee performance evaluations are a prerogative of management and therefore not within the scope of arbitral review. While it is clear that the content of an employee evaluation is within the discretion of management, the Grievant herein is not seeking a reevaluation of the content of his performance evaluation. Rather, he is strictly grieving the Agency's failure to follow the evaluation procedures delineated in the Manual. Questions relating to procedure are grievable and subject to challenge by the Union. While the internal appeal procedure may be the only means to challenge the substantive content of an evaluation, the Grievant is not precluded from challenging a violation of procedure in the arbitral forum.

The City admits that "some procedural steps were overlooked," but disputes the Union's contention that the procedural defects were so substantial that it was impossible for the Grievant to receive a fair and proper evaluation. Such contentions obviously go to the merits of the dispute. It is well established that the Board in deciding questions of arbitrability will not inquire into the merits of a dispute.[3] Issues pertaining to the merits of a grievance and the appropriate remedy are for the arbitrator to resolve.[4] For the Board to determine which procedural steps the City overlooked and the affect of those procedural violations on title Grievant's evaluation would be to usurp the power of the arbitrator to independently resolve the merits of the grievance.

The Union's claim that it will take an extremely long period of time for a decision to be rendered on the Grievant's appeal from his unfavorable evaluation is irrelevant to the question of arbitrability herein. The Manual's appeal procedures relate to the content of the evaluation and have no bearing on the issue of procedural violations.

Based upon the above considerations, we find that this grievance should be submitted to arbitration.

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[3] Decision Nos. B-12-69, B-8-74, B-10-77, B-17-80, B-27-82

[4] Decision Nos. B-2-68, B-5-74, B-1-75, B-27-82.

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, denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted.

DATED: New York, N.Y.

August 24, 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD F. GRAY
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER