

City v. CWA, 29 OCB 32 (BCB 1982) [Decision No. B-32-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter

THE CITY OF NEW YORK,
-and-

Petitioner

DECISION NO. B-32-82

DOCKET NO. BCB-588-82
(A-1482-82)

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO

Respondent.

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DECISION AND ORDER

On April 16, 1982, the City of New York, appearing by its Office of Municipal Labor Relations (herein after "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 Communications Workers of America (hereinafter "the Union" or "CWA") on behalf of grievant Lawrence Murphy on March 29, 1982 and amended on April 6, 1982. CWA filed an answer on May 14, 1982, to which the City replied on May 21, 1982.

Request for Arbitration

The request for arbitration alleges that the City violated Article VII (entitled "Grievance Procedure") of the 1980-1982 collective bargaining agreement (hereinafter "the Agreement") entered into between CWA and the Board

of Elections by failing to adhere to contractual grievance procedure requirements in that the City neglected to serve written charges of misconduct on the grievant. in a timely manner. As a remedy, the Union seeks full backpay from April 3, 1981 (the date of Murphy's discharge) to November 24, 1981 (the date of service).

Background

On February 2, 1981, Board of Elections employee Lawrence Murphy was informed that charges of misconduct had been brought against him and a hearing on those charges would be held on February 24, 1981. Said hearing was attended by the grievant and by representatives from both the Board of Elections and the Union. By letter dated March 4, 1981, Murphy was notified that his employment was being terminated effective April 3, 1982.

On March 17, 1981, Union President C. Richard Wagner appealed Murphy's dismissal to OMLR, claiming that the grievant was not allowed to present a defense at the hearing in accordance with contractual grievance procedures. Wagner also stated that the penalty of termination did not amount to progressive discipline.

Article VII, Section 1 of the Agreement d the term of "grievance" as:

- (A) A dispute concerning the application or interpretation of the terms of this 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.

Section 3-300 of the Election Law, referred to above, states in pertinent part:

Every board of elections shall appoint, and at its pleasure remove, clerks, voting machine technicians, custodians, and other employees....

With regard to "Disciplinary Procedure," Section 9 of Article VII reads as follows:

The Board of Elections may discuss complaints or disciplinary problems with an employee when such discussions are deemed necessary.

- a) After service upon an employee of written charges of incompetency or misconduct, a hearing with the employee shall be held with respect to such charges by two Commissioners, who shall represent the borough in which the employee works. The employee shall be served with written charges at least ten (10) days prior to the hearing. The employee may be represented, at his/her option, at such hearing by a representative of the Union. The employee and/or the Union shall have the right to

examine any witness(es) and to present a defense to the charges.

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- (b) Within five (5) work days of the hearing the two Commissioners shall report to the full Board, which will discuss and rule on the matter. A written decision shall be issued by ..the full Board by the end of the tenth workday following meeting of the Board. Disciplinary action, if any, shall be imposed consistent with the Board's ruling.
- (c) The Union may appeal the Board's decision if it is arbitrary or capricious. Such appeal shall be made within ten (10) working days of the receipt of the Board's decision to the Director of Municipal Labor Relations, or the Director's designee, with a copy to the Board. The Union shall submit a copy of the charges and the Board's decision to the Director of Municipal Labor Relations. The Director of Municipal Labor Relations, or the Director's designee, shall review such appeal and shall decide from the submitted papers whether a de novo hearing is necessary. If no such hearing is held a recommendation to the Board of Elections shall be made within fifteen (15) working days from the date of the appeal is received. If a de novo hearing is held a recommendation to the Board of Elections shall be made within fifteen (15) working days following the close of the hearing.
- (d) For employee's in the General Office, the President of the Board will appoint two Commissioners, one from each political party, to represent the Board in disciplinary proceedings.
- (e) The period of an employee's suspension without pay, pending hearing and deter-

mination of charges, shall not exceed
thirty (30) days.

Decision No. B-32-82
Docket No. BCB-588-82
(A-1482-82)

5.

- (f) Notwithstanding the above, nothing in this procedure is intended to restrict the Board of Election's rights under the Election Law.

Following a conference held on May 26, 1981, OMLR rendered a Step III decision in which the Review Officer found that the Board of Elections had acted pursuant to Election Law Section 3-300 in dismissing Murphy and that it could do so without regard to the contractual grievance provisions found in Article VII, Section 9. Furthermore, it was held that no written charges of misconduct or in competency were served on Murphy, so that no Section 9 hearing could have been held. Thus, the matter of an appeal from such action was not properly before OMLR.

On May 5, 1981, CWA filed a request for arbitration over the "arbitrary and capricious dismissal of Lawrence Murphy by failure of Board of Elections to follow terms and conditions of contract." Since the request contained several pleading deficiencies, OCB Deputy Chairman Laura returned the document the same day. Shortly thereafter, on May 20, 1981, representatives from CWA and OMLR met with Deputy Chairman Laura to discuss the matter. The parties agreed to remand the case to Step III at OMLR.

An Amended Step III decision was issued on October 27, 1981. In it, the Review Officer stated that Article VII

was not intended to restrict the Board of Elections' rights under the Election Law to remove employees. Rather, the Board of Elections could,

at its pleasure, remove employees for disciplinary reasons subsequent to according the employees the orderly due process of Section 9, of the Article VII. The only appeal the employee is afforded is to the O.M.L.R. which in turn makes a recommendation to the Board of Elections]. The Board, under this very limited procedure, always retained the right of final decision.

Since no charges had been served upon the grievant and therefore no charges were before OMLR, the Review officer remanded the case to the Board of Elections for compliance with the terms of the Agreement.

Charges were served upon Murphy and a hearing was held in accordance with Article VII, Section 9 on November 24, 1981, at which the grievant was represented by CWA. By letter dated, December 14, 1981, Murphy was, informed by Board of Elections officials that he was found guilty as charged and that his employment was terminated.

CWA appealed the dismissal on January 4, 1982 and a third Step III conference was held on January 29, 1982. According to the Review Officer's, Step III decision (dated March 19, 1982) the Union changed its position at the conference by no longer appealing grievant's dismissal. Instead, the Union sought backpay for the period of time (April 3, 1981 to November 24, 1981) in which the Board of

Decision No. B-32-82
Docket No. BCB-588-82
(A-1482-82)

7.

Elections delayed serving disciplinary charges. Since reinstatement was not sought, no defense to the discharge was presented.

The Review officer denied Murphy's grievance, finding that "full procedural compliance" had been accorded the grievant, "albeit belatedly." It was held that there was no right to back pay since Murphy had received a hearing and was deemed to have been appropriately discharged.

Positions of the Parties

The City's Position

OMLR seeks dismissal of the instant petition on several grounds. The City contends that the claim is not subject to arbitral review. Under Section 3-300 of the Election Law, the Board of Elections has the authority to "appoint and at its pleasure remove" employees. It is urged that in recognition of this authority, the parties specifically incorporated Article VIII Section 9 into the Agreement. OMLR interprets Section 9 to mean that final determinations in alleged wrongful disciplinary actions rest with the Board of Elections. The City maintains that sounding the present matter in terms of a violation of the grievance procedure is merely an attempt to circumvent the limitations found in Article VII, Section 9. The City argues that there exists no difference between substantive and procedural due process

claims in the present matter. OMLR urges that alleged procedural violations are relevant only to the extent that they impact on the substantive fairness of the Board of

The City further contends that the grievant has already exercised his rights and remedies under the Agreement and that any harm suffered was corrected by affording grievant a full due process hearing, albeit belatedly. Moreover, OMLR urges that there has been no showing of prejudice on account of the delay, so that grievant is not entitled to any back pay; independent damages do not flow from a procedural error.

The City additionally argues that not only has the Union failed to cite any provision of the Agreement allegedly violated, but CWA did not raise procedural issues during the earlier steps of the processing of the grievance except in the context of impact on the disciplinary action. OMLR therefore maintains that the Union has waived its right to claim lack of due process and cannot raise it for the first time in the present request for arbitration. OMLR states that in previous pleadings, CWA sought reinstatement and back pay for a claimed wrongful disciplinary action but is now attempting to institute an independent action for damages on account of contract violation.

The Union's Position

The Union contends that the Board of Elections took disciplinary action in violation of the grievance procedure in the Agreement. CWA urges that even though grievant did eventually have a hearing pursuant to Article VII, Section 9, it nevertheless has the right to appeal the seven month delay in service of charges.

CWA maintains that it protested the delay in its initial appeal to OMLR on March 17, 1981, and that it did so again at the Step III conference on January 29, 1982. The Union claims that the "egregious delay" caused "undue hardship" in that: a) CWA could not properly defend the grievant in the absence of charges; and b) Murphy was not employed by the Board of Elections for the entire seven month period that the Agreement was violated.

Discussion

The question before us is whether CWA's complaint in this matter is submissible to an arbitrator 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.¹

Contrary to OMLR's assertions, CWA does indeed cite a provision of the Agreement which it claims to have been violated, i.e., Article VII. While the Union could have been more specific by citing a particular section and clause, we find that the statement of the grievance set forth in the request for arbitration combined with the citation of an alleged breach of Article VII is sufficient to give clear notice to the City and to define the proposed area of inquiry.

Similarly, we find that OMLR is mistaken in its' contention that CWA is raising procedural issues for the first time in the instant request for arbitration. All three OMLR Review Officers discussed the Union's protests concerning service of charges in their Step III decisions. After the numerous appeals and remands which took place in this matter on account of procedural irregularities, OMLR cannot .be heard to argue either that the Union is now raising a procedural issue for the very first time or that CWA "waived" any rights to due process.

¹ Decisions Nos. B-22-80; B-15-77.

An examination of the definition of the term "grievance" found in Article VII, Section 1 of the Agreement indicates that both alleged wrongful disciplinary matters as well as disputes concerning the application and interpretation of terms of the Agreement are grievable matters. The parties differ, however, as to whether claimed wrongful disciplinary actions constitute arbitrable matters. The City would have us read Article VII, Section 9 as precluding all disciplinary grievances from the arbitral forum.

What must be emphasized is that the Union does not presently seek to change, modify or alter the substance of grievant's evaluation, or to change the penalty of discharge, nor does it seek reinstatement. Rather, the arbitration request pertains to the City's failure to adhere to procedural prerequisites in a timely manner, an error which the City admits. We are particularly mindful of that portion of Article VII, Section 9 which states: "(e) The period of an employee's suspension without pay, pending hearing and determination of charges, shall not exceed thirty (30) days." This clause appears to have been totally ignored in all three of OMLR's Step III determinations in that none of the Review officers address it directly.

The fact that the Union is now seeking a remedy not identical with the one originally sought (in that reinstatement is no longer requested) does not change the basic underlying dispute. Whether or not grievant is entitled to back pay as a result of the delay in service of charges is strictly a question of remedy. Issues of remedy have long been held to be within the province of the arbitrator.²

We thus decide the present matter without reaching the question as to whether a claimed wrongful disciplinary action constitutes an arbitrable matter under the Agreement. Rather, based on the foregoing, we find that the instant grievance, which relates to a claim of failure to adhere to contractually agreed upon grievance procedures, presents an issue suitable for resolution in the arbitral forum.

² Decision Nos. B-5-74; B-8-78; B-3-80; B-38-80;
B-4-82.

Decision No. B-32-82
Docket No. BCB-588-82
(A-1482-82)

13.

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

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER