

City v. L.3, IBEW, 31 OCB 18 (BCB 1983) [Decision No. B-18-83
(Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----- x

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-18-83

Petitioner,

DOCKET NO. BCB-648-83
(A-1689-83)

-and-

LOCAL UNION NO.3, I.B.E.W.,
AFL-CIO,

Respondent.

----- x

DECISION AND ORDER

On May 16, 1983, 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 Local Union No.3, I.B.E.W., AFL-CIO (hereinafter "the Union" or "Local 3"). The Union filed an answer on May 23, 1983, to which the City replied on May 24, 1983.

On July 15, 1983, the Union submitted a "rebuttal to OMLR's reply" which consists of an excerpt from a transcript of hearing before an Administrative Law Judge at the New York State Division of Human rights. The material was not accepted or considered by the Board because: 1) the submission was untimely; and 2) the document pertains to matters of proof more appropriate for presentation to an arbitrator.

Request for Arbitration

The request for arbitration alleges that the City violated "Executive Order 56 and the Federal Age Discrimination in Employment Act and New York State Executive Law §296" and that it did so by its "(f)ailure to assign equal overtime work to Joseph Callier."¹

The grievance on behalf of employee Callier, an electrician in the Department of Social Services, was filed pursuant to Executive Order 83 (hereinafter "E.O.83"), in which the term "grievance" is defined as:

(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.

As a remedy, Local 3 seeks "(p)ayment of overtime pay for overtime which should have been assigned, and order that future overtime be assigned equally."

¹ The request for arbitration was originally filed on behalf of two individuals. However, on May 12, 1983, counsel for Local 3 asked that the second grievant's name be deleted.

Position of the Parties

The City contends that the Union has not alleged an arbitrable grievance and thus the request for arbitration should be dismissed. OMLR argues that the Union seeks to grieve what it alleges to be a violation of the Federal Age Discrimination in Employment Act (hereinafter "ADEA") as well as State Executive Law §296 (hereinafter "Exec. Law §296"). Grievant's claim is filed pursuant to E.O.83. The City maintains that the above-cited definition of the term "grievance" under E.O.83 does not encompass the violation of laws such as the ADEA or Exec. Law §296.

The City further states that it has not violated Executive Order No.56 (hereinafter "E.O.56"), which relates to the control of overtime. OMLR urges that the assignment of overtime is within management's discretion and that E.O.56 neither limits its right to decide whether overtime will be worked nor does it mandate who, if anyone, will be chosen to work the overtime.

Additionally, OMLR contends that the Union has failed to offer factual support for its allegation that E.O.56 has been violated. The City submits that Local 3's allegation of a violation of E.O.56 is "a mere subterfuge" to compel the City to arbitration.

The Union challenges OMLR's statement that E.O.56 has not been violated; if assertions such as these are

credited, it argues, a union will never have access to the arbitral forum over any grievance relating to the breach of an executive order.

The Union urges that failure to hold that "violations of law" are grievable under E.O.83 "would give a more effective role to Mayoral Agencies' rules than to federal and New York State Law." It states that "BCB should presume that Mayor Lindsay ... assumed that violations of applicable state law are grievable ... City and State public policy would be violated by relegating a grievant to Supreme Court, at a time when the Corporation Counsel and the Supreme Court require additional staff for the work they now have." Furthermore, Local 3 maintains that an arbitrator is obligated to take into account applicable federal and state antidiscrimination laws when interpreting an executive order, and, if possible, interpret the executive order to "make it consonant with statute."

Discussion

The parties herein are not signatories to a written collective bargaining agreement. They are, therefore, governed solely by the grievance-arbitration procedures set forth in E.O.83,² which provides for the arbitration of alleged violations of mayoral orders.³

² Decision Nos. B-13-77, B-9-83.

³ Decision Nos. B-13-77, B-1-78.

The Union in the instant matter has claimed a breach of E.O.56, which includes the following provision:

Section 2. Authorization to work overtime compensable in cash shall be evenly distributed, where practicable, within each agency or agency subdivision, among all those employees who are eligible to perform the overtime work required.

The City contends that it has not violated E.O.56 and that Local 3 has failed to state facts in support of the alleged violation.

Whether or not the City has actually violated E.O.56 goes to the merits of the dispute. In deciding questions of arbitrability, it has long been and is the policy of this Board not to inquire into the merits of a claim,⁴ for issues relating to the merits are within the province of the arbitrator.⁵

The Board will, however, inquire whether the grievant has established a prima facie relationship between the act complained of and the source of the alleged right.⁶ Local 3 has met its burden of establishing an arguable relationship between the subject of its grievance, i.e., over-

⁴ Decision Nos. B-8-74, B-1-75, B-5-76, B-10-77, B-21-80, B-7-81, B-4-83, B-9-83.

⁵ Decision Nos. B-12-69, B-8-74, B-1-76, B-5-76, B-17-80, B-7-81, B-4-83, B-10-83.

⁶ Decision Nos. B-1-76, B-3-78, B-4-83, B-10-83.

time and E.O.56, which relates to overtime. A prima facie relationship having been shown, it is now for the arbitrator to interpret and decide whether a violation has actually taken place.

E.O.83 does not provide for the arbitration of disputes concerning the implementation or interpretation of a federal or state statute. E.O.83 explicitly enumerates the types of disputes and violations that are subject to arbitration; it includes alleged violations of executive orders but does not mention alleged violations of federal or state statutes. Applying the principle inclusio unius est exclusio alterius, we must reject respondent Union's arguments as to any presumption that Mayor Lindsay, in promulgating the E.O., intended it to apply to types of disputes other than those expressly mentioned.

Based upon the aforementioned considerations, we find that the grievance should be submitted to arbitration with the limitations indicated above.

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

Decision No. B-18-83
Docket No. BCB-648-83
(A-1689-83)

7

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.
July 20, 1983

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER