City v. L.3, IBEW, 31 OCB 19 (BCB 1983) [Decision No. B-19-83 (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-19-83

-and- DOCKET NO. BCB-628-82 (A-1615-82)

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

Respondent.
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DECISION AND ORDER

On December 2, 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 which 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 to the City I s petition on December 13, 1982. OMLR did not file a reply.

BACKGROUND

The grievant, Joseph Abbate, Jr., is a Stationary Engineer (Electric) employed by the New York City Department of Transportation (hereinafter "the Department"). Mr. Abbate's grievance arises out of a delay of up to eight weeks in payment for overtime and night differentials earned by him between June 3, 1982

and June 9, 1982.

The Step II decision of the Department denying the grievance explains that a practice of withholding earned monies was adopted by payroll to facilitate their accounting procedures".[1] The grievance was denied at Step III on the ground that the allegation of "a violation of past practice" does not constitute a grievance as that term is defined in Executive Order 83 (hereinafter "E.O.83") pursuant to which the grievance was brought.[2]

Wage rates and other economic benefits for employees in the title Stationary Engineer (Electric) are determined by the Comptroller of the City of New York in accordance with Section 220 of the New York State Labor Law. The Comptroller's determination is based upon a survey of the rates of pay prevailing in the private sector for similar work. Accordingly, a ruling by the Comptroller is sometimes called a prevailing wage determination.

While Section 220 employees, if eligible for collective bargaining under the New York City Collective Bargaining Law, may enter into collective bargaining agreements through their certified representatives, which agreements cover non-economic

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[1] Letter dated July 28, 1982 from Elbert C. Hinkson, Associate Counsel, Department of Transportation, to the grievant.

[2] Abbate and Department of Transportation, OMLR File No. 6412, Step III Decision (Nove. 4, 1982).

conditions of employment including procedures for arbitration, there is no such contract in effect for the title Stationary Engineer (Electric). In such a case, E.O.83 provides a procedure for the pursuit of employee grievances.[3] E.O.83 defines the term "grievance" as follows:

> (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;
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> (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 terns and conditions of his or her employment; and
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> (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification (E.O.83, Section 5b).

On November 18, 1982, the Union filed a request for arbitration of a grievance described as "delayed wage payments" and claimed a violation of the prevailing wage determination of April 3, 1981.

POSITIONS OF THE PARTIES

Union Position

Local 3 contends that the Department's delay of up to eight weeks in making payments for work performed on Saturday,

[3] E.O.83 §5a (1) (B)

Sunday and holidays, as well as payment of night differentials owed to the grievant as provided for in the Comptroller's wage determination of April 3, 1981, constitutes a violation of that determination which, it is argued, "implies that the prevailing rate must be paid when due". In support of this contention, the Union asserts that the date on which wages are paid affects the terms and conditions of employment of its members.

Local 3 asserts further that the delay in payment violates "applicable laws," specifically, sections 191, 192 and 193 of the State Labor Law. According to the Union, section 191 enunciates the public policy of this State that wages must be paid in a timely manner. To deny arbitration of such alleged violations, the Union claims, would violate public policy in that the grievant would be relegated to the State Supreme Court for relief "at a time when the Corporation Counsel and the Supreme Court require additional staff for the work they now have." Local 3 also maintains that denying arbitration of such alleged violations would give greater effect to mayoral agency rules than to New York State law, a result which, the Union asserts, could not have been intended. The Union claims further that OMLR's objection to the arbitrability of alleged violations of law, raised after the City participated

in the lower steps of the grievance procedure, amounts to giving the Union "a runaround".

Finally, the Union asserts that the City's petition challenging arbitrability was not timely filed.

As a remedy, Local 3 seeks an order that wages be paid when they are due.

City's Position

The City opposes the request for arbitration, noting that the only grievance procedure available to the grievant herein is the one set forth in E.O.83 and the only definition of the term "grievance" in E.O.83 that applies to this case is the one that refers to a dispute concerning the application or interpretation of the terms of a Comptroller's determination under Section 220 of the Labor Law. Since Local 3 has failed to allege a dispute concerning any specific term or provision of the wage determination covering the Stationary Engineer title, 0MLR contends, no grievance has been stated within the meaning of E.O.83.

Further, the City asserts, the grievance is not arbitrable as an alleged violation of "applicable law," as the Union has failed to specify the applicable law it deems to have been violated. Moreover, even if the relevant laws had been identified, OMLR submits, violations of law are not arbitrable.

For the above-stated reasons, the City urges that the request for arbitration be denied.

DISCUSSION

First, we note that, subsequent to the joinder of issue in this case, Local 3 withdrew its contention that the City's petition was untimely filed.[4]

Second, we note that the Union herein charges the City with giving it "a runaround" by participating in the grievance process at the lower steps and then asserting that alleged violations of "applicable law" are not grievable. We shall reject this argument because, as we have previously held, participation in the first four steps of a grievance procedure does not estop a party from asserting before this Board that the claim is not within the definition of a grievance.[5] If the Union's reasoning on this subject were accepted, we noted, the City might refuse at the outset to participate in a case

[4] In any event, the City's petition, filed ten days after the execution by the grievant and Union of the waivers required by section 1173-8.0d of the New York City Collective Bar gaining Law ("NYCCBL") and by section 6.3 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), without which the filing of a request for arbitration is incomplete, was timely. See OCB Rules §6.4.

[5] Decision No. B-20-72.

where it believed that the matter complained of was not grievable and, therefore, not arbitrable. To preclude a challenge to arbitrability on this ground could discourage utilization of the full range of grievance resolution procedures which are designed to encourage discussion and possible settlement of a dispute at each of the steps of the grievance procedure.[6] Further the New York City Collective Bargaining Law (hereinafter "NYCCBL") provides that challenges to arbitrability are properly raised when the union files a request for arbitration.[7]

We turn now to the issue of substantive arbitrability presented for our determination: whether the grievance presented concerning a delay in making payments due under the terms of a Comptroller's determination is within the scope of the term "grievance" as defined in E.O. 83, Section 5b.

There is no dispute that the procedure set forth in E.O.83 is the appropriate vehicle for pursuit of this grievance or that the operative definition of "grievance" in this case is:

> a dispute concerning the application or interpretation of the terms of ... a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment.

Local 3 asserts that wages earned by the grievant for Saturday,

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[6] Decision Nos. B-20-74; B-3-76; B-12-77.

[7] OCB Rules §§ 6.4 and 7.3.

Sunday, and holiday work as well as night differentials due him were not paid for up to eight weeks. This delay, it is alleged, violates the Comptroller's determination which sets forth the wage rates applicable to each of the above-listed .categories of work. The City opposes the request for arbitration on the ground that the Union has not specified a term or provision of the relevant wage determination that allegedly has been violated and therefore has not stated a dispute concerning the application or interpretation of the determination.

Whether, as the Union contends, the 1981 Comptroller's determination for Stationary Engineers "implies that the prevailing rate must be paid when due," or at any particular time, involves the merits of the grievance, a matter into which this Board will not inquire.[8] our task in determining questions of arbitrability is to decide whether the violation alleged is within the scope of matters the parties are obligated, by contract or, as in the instant matter, by executive order, to submit to arbitration.

In dealing with this issue in recent cases, we have recognized the development in New York State of a body of law concerning the standard of arbitrability to be applied to

[8] See, e.g., Decision Nos. B-4-83; B-9-83.

public sector grievances arising under the Taylor Law. The principles currently applied by New York's highest court in arbitrability disputes have been considered by this Board in its effort to resolve such matters arising under our statute, the NYCCBL.[9]

That the New York courts have departed from the restrictive view of public sector labor arbitration espoused by the Court of Appeals in its 1977 decision in Acting Superintendent of Liverpool Central School District v. United Liverpool Faculty Association[10] can no longer be doubted. There court stated that arbitration under the Taylor Law should be denied unless the agreement to arbitrate is "express, direct and unequivocal as to the issues or disputes to be submitted to arbitration."[11]

An example of this departure is a 1979 decision in which the Court of Appeals permitted arbitration of a dispute as to whether "Per diem" teachers were "substitute" teachers within the terms of the collective bargaining agreement where the arbitration clause authorized the arbitrator to decide whether the provisions of the agreement had been complied with.[12] In 1980,

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[9] See, e.g., No. B-15-80 at pp. 8-10, Decision No. B-4-83 at pp. 9-10.

[10] 42 N. Y. 2d 509, 399 N.Y.S.2d 189, 369 N.E.2d 746 (1977).

[11] 42 N.Y.2d at 511, 399 N.Y.S.2d at 190.

[12] Board of Educ. of Roosevelt Union Free School Dist. v. Roosevelt Teachers Ass'n, 47 N.Y.2d 748, 417 N.Y.S.2d 741, 390 N.E.2d 1176 (1979).

the Court of Appeals stated:

> It begs the question to contend... that the grievance is not arbitrable because it involves a dispute that is not unambiguously encompassed by an express substantive provision of the contract. The question of the scope of the substantive provisions of the contract is itself a matter for resolution by the arbitrator (citations omitted).[13]

And in a 1981 decision, the court offered an explanatory footnote to its decision in the Liverpool case which should dispel any lingering doubts concerning the court's current willingness to submit a wide range of matters to arbitration under a broad arbitration clause. In Board of Education of the City of New York v. Glaubman,[14] the Courts of Appeals stated:

> Although we noted in Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. ... that the choice of the arbitration forum should be "express" and "unequivocal" we did not mean to suggest that hairsplitting analysis should be used to discourage or delay demands for arbitration in public sector contracts (citations omitted).[15]

Further guidance in the resolution of arbitrability questions may be found in a 1975 decision of the New York Court

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[13] Board of Educ. of Lakeland Cent. School Dist. v. Barni, 49 N.Y.2d 311, 425 N.Y.S.2d 554, 401 N.E.2d 912 (1960). See, Wyandanch Union Free School Dist. v. Wyandanch Teachers Ass'n, 48 N.Y.2d 669, 421 N.Y.S.2d 873, 397 N.E.2d 384 (1979).

[14] 53 N.Y.2d 781; 439 N.Y.S.2d 907; 422.N.E.2d 567 (1981).

[15] 439 N.Y.S.2d at 908.

of Appeals in a case which deals with a private sector dispute in a commercial setting. Nevertheless, the clear articulation by the court in that case of the distinct functions to be performed respectively by the court and by the arbitrator has been relied upon by the New York courts in subsequent cases. involving public sector labor disputes, and we think it clearly expresses the standard properly to be applied in determinations of arbitrability. In Nationwide General Insurance Company V. Investors Insurance Company,[16] the New York Court of Appeals, citing Steelworkers v. American Manufacturing Company for the authority to make the initial determination as to whether a dispute is arbitrable,[17] explained:

> Basically the courts perform the initial screening process designed to determine in general terms whether the parties have agreed that the subject matter under dispute should be submitted to arbitration. Once it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended. Penetrating definitive analysis of the scope of the agreement must be left to the arbitrators whenever the parties have broadly agreed that any dispute involving the interpretation and meaning of

[16] 37 N.Y. 2d 91, 371 N.Y.S.2d 463, 332 N.E.2d 333(1975).

[17] 363 U.S. 564, 570-71; 80 S. Ct. 1343, 1354; 4 L.Ed.2d 1403 (1960).

> the agreement should be submitted to arbitration (citation omitted) (emphasis added).[18]

We are also guided by the express statutory policy of the NYCCBL, which has been judicially recognized,[19]

> ... to favor and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organizations.[20]

Returning to the question presented in the instant matter, we note that E.O. 83's arbitration provision is a broad one defining the term "grievance" in relevant part as a dispute concerning the application or interpretation of a Comptroller's determination affecting terms and conditions of employment. The Comptroller's determination for Stationary Engineer (Electric) sets forth in detail basic rates of wages and supplemental benefits; it also prescribes overtime rates and incorporates by reference certain benefits provided in the 1980 Municipal Coalition Economic Agreement. While this provision does not, on its face, prescribe a time for payment, an issue has been raised concerning whether or not the wage determination contemplates that all benefits provided for therein should be paid when wage payments are regularly made. Where a Comptroller's

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[18] 371 N.Y.S.2d at 467, cited in County of Broome v. Deputy Sheriffs Benevolent Ass'n, 395 N.Y.S.2d 720, 57 A.D.2d 496 (3d Dep't 1977); City of Binghamton v. Binghamton Civil Service Forum, 434 N.Y.S.2d 748, 79 A.D.2d 729 (3d Dep't 1980); City of Poughkeepsie v. City of Pouqhkeepsie Unit, CSEA, Inc. 438 N.Y.S.2d 878, 81 A.D.2d 866 (2d Dep't 1981); Glasheen v. Town of Smithtown, 459 N.Y.S.2d 103 (2d Dept' 1983).

[19] City of New York v. Anderson, Index No. 40532/78 (Sup. Ct. , N.Y. Cty., 1978).

[20] NYCCBL §1173-2.0.

determination provides for the payment of overtime and other economic benefits, questions as to when, how or in what form such payments are to be effected are patently questions relating to the application of the underlying mandate to make such payments and are, we find, arbitrable under E.O. 83, Section 5b(A)(ii).[21]

It may be noted that the underlying grievance concerns the effect of a unilateral change by the Department of Transportation in its accounting practices, so that certain earned monies are being withheld by the payroll office for up to two months. The grievance was denied at Step III on the ground that alleged violations of past practice are not grievable or arbitrable. While we have previously denied arbitration of claimed violations of past practice absent an arbitration agreement defining the term "grievance" to include such claims,[22] here we have determined that the dispute is arbitrable as one involving the application or interpretation of a Comptroller's determination. Since the payroll practice at issue affects and is intimately related to the mandatorily bargainable subject of

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[21] See Decision Nos. B-25-72; B-1-76; B-20-82; B-4-83. It is interesting to note that, in 1976, a similar grievance, involving a delay in payment of wage supplements earned by Sewage Treatment Workers (also Section 220 employees), was resolved through arbitration. The City did not challenge arbitrability in that case. District Council 37 and City of New York, Case No. A-530-75 (Glushien, Arb.,1976).

[22] See, e.g., Decision No. B-20-72.

wages, issues relating to the practice are also arbitrable.[23]

Finally, we address the Union's claim that the stated grievance is arbitrable as an alleged violation of the State Labor Law. The only source of a right to submit grievances or to invoke arbitration in this case is the unilateral grant by the employer of such right in E.O. 83. That executive order limits the right to arbitrate by specifically enumerating the types of complaints that are submissible to arbitration. The specifications do not include alleged violations of State law. Accordingly, violations of a type other than those specified in E.O. 83, Section 5b, including the Union's claims asserted under the Labor Law, must be deemed not arbitrable.[24]

Therefore, having found that there is a dispute concerning the application or interpretation of the terms of a Comptroller's determination within the meaning of E.O. 83, we shall grant the request for arbitration with the limitation indicated above.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

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[23] See, Decision Nos. B-11-68; B-4-69; B-1-70; Matter of Board of Educ. of the City of Yonkers, 6 PERB §3064 (1973); Matter of the City of White Plains, 8 PERB §4544 (H.O. 1975); Matter of Niagara Falls City School Dist., 15 PERB §4508 (H.O. 1982).

[24] Decision Nos. B-12-77; B-13-79. See also, Decision No. B-4-78. We also reject the Union's arguments that public policy violations will result and that mayoral agency rules will be given greater effect than State law if arbitration of alleged violations of State law is denied

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, denied, to the extent that it concerns a dispute as to the application or interpretation of the terms of a Comptroller's determination; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted, to the extent that it alleges a dispute concerning the application or interpretation of a Comptroller's determination.

DATED: July 20, 1983
New York, N.Y.

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER