City v. L.371, SSEU, 31 OCB 28 (BCB 1983) [Decision No. B-28-83 (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-28-83

-and-

DOCKET NO. BCB-583-82

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371 (A-1399-82)

Respondent.
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DECISION AND ORDER

On March 26, 1982, the City of New York, appearing by its Office of Municipal Labor Relations ("the City" or "OMLR") , filed a petition challenging the arbitrability of a grievance submitted on behalf of five Senior Human Resources Specialists ("Sr. HRSs") by the Social Service Employees Union, Local 371 ("Local 371" or "the Union"). After receiving an extension of time, the Union filed an answer dated April 27, 1982. On May 5, 1982, the City filed a reply.

Background

The grievants herein were formerly employed by the Federation Employment and Guidance Service (FEGS), a non-profit social service agency which provided support and rehabilitative services to mentally disabled persons pursuant to a contract with the New York State Office of

Mental Health ("NYSOMH").[1] Effective July 1, 1980, these services were taken over by the New York City Human Resources administration ("HRA")[2] and the grievants became employees of the Community Support Services Project of Crisis Intervention Services ("CIS") within HRA.

While the service contract was held by FEGS, the grievants were members of Council 1707, AFSCME and were paid in accordance with a collective bargaining agreement between FEGS and Council 1707. The grievants were paid a salary designated in the contract between FEGS and NYSOMH[3] which, at the time of their transfer to HRA, was $17,700. When that contract was "taken over" by HRA on July 1, 1980, the grievants became subject to the collective bargaining agreement between Local 371 and the City ("Local 371 agreement"), which prescribes the following salaries for Sr. HRSs:

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[1] The Step III Decision of OMLR's Review Officer, dated December 11, 1981, indicates that the FEGS contract was not with NYSOMH, but with the New York City Department of Mental Health, Mental Retardation and Alcoholism Services ("DMHMR & AS"). From this fact, the Review Officer concluded that State funds were channeled to FEGS through the City agency.

[2] Agreement between, NYSOMH and DMHMR&AS authorizing the latter to contract with any qualified agency or department of the City of New York for the provision of Community Support Services; effective July 1, 1980, City Exhibit II attached to the petition challenging arbitrability.

[3] See note 1 supra.

	Minimum	Maximum
Effective 7/1/80	$16,575	$21,275
Effective 7 /1 /81	17,875	22,675[4]

The grievants continued to be paid at their former salary rate of $17,700, which was within the range set forth in the Local 371 agreement and consonant with amounts allocated for the grievants' salaries in a purchase of service contract between NYSOMH and the City ("NYSOMH-City contract"). This document also lists a January 1, 1981 salary rate for the grievants of $18,939.[5]

It is undisputed that the grievants did not receive an increase to $18,939 on January 1, 1981. It is also undisputed that the grievants have received scheduled increases pursuant to the Local 371 agreement. In the instant case, the grievants claim that, in addition to amounts prescribed in the Local 371 agreement, they are entitled to a salary rate of $18,939, retroactive to January 1, 1981; they seek appropriate monetary adjustments, including interest, based on that rate.

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[4] 1980-1982 Social Service Titles Contract, Article III (Salaries).

[5] City Exhibit III attached to the City's petition includes the following information with respect to each of the grievants:

Name	Date	Annual Salary	Bi-Weekly Rate	Pay Periods	Amount to Budget
[grievant]	7/1/80	17,700	680.77	12.9	18,320
	1/1/81	18,939	728.42	13.1	

Positions of the Parties

City's Position

The City maintains that we should deny Local 371's request for arbitration because the Union has failed to demonstrate a prima facie relationship between the act complained of and the source of the alleged right, as required by our Decisions B-1-76 and B-3-78. OMLR asserts that the "undated, unsigned memorandum" (the NYSOMH -City contract) on which the Union relies is totally unrelated to the matter of salary increases owed to the grievants. Rather, the City explains, the memorandum is part of a seven million dollar "umbrella contract" between the City and the State by which the City has undertaken to provide services to mentally disabled persons and the State has undertaken to reimburse the City for providing such services. Salaries for City employees, including the grievants, who are involved in the CIS program are but one item of the State's reimbursement obligation to the City.

OMLR argues further that the NYSOMH-City contract should not be deemed to alter the salary provisions of the Local 371 agreement, as the amounts set forth therein were not negotiated by the City's Director of Labor Relations. The Director of Labor Relations, OMLR notes,

has the exclusive authority to negotiate salary increases[6] on behalf of the Mayor, who has the sole authority to grant salary increases. [7] OMLR maintains that the salary rate of $18,939 effective January 1,1981 indicated in the NYSOMH-City contract is a "mistake," as it was not negotiated by the Director of Labor Relations and is inconsistent with the negotiated salary rates that are effective on July 1 under the Local 371 agreement.

Since the contract on which the Union relies was not negotiated and signed by a person having authority to alter employee salaries, the City maintains that this document cannot be taken as the written policy of HRA, as is alleged, any more than it can be, deemed a modification of the collective bargaining agreement. Accordingly, OMLR asserts, the request for arbitration must be denied.

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[6] The City cites Executive Order 83 of 1973, which provides:

> §4. AUTHORITY OF BARGAINING REPRESENTATIVE. The City Director of Labor Relations shall have the exclusive authority to negotiate on all matters within the scope of collective bargaining. No agreement, contract or understanding shall be made except by the City Director of Labor Relations nor shall any such agreement, contract or understanding be enforceable unless in writing and executed by the required parties. Where inconsistent with other Executive Orders the provisions of this section shall apply.

[7] The City cites the New York City Charter, §813 (a) (10).

Local 371's Position

The Union contends that the grievants were promised,[8] and should have received, a salary increase to $18,939 effective January 1, 1981 in accordance with the NYSOMH-City contract, and that the failure to grant this increase constitutes a grievance within the meaning of Article VI, Section 1 of the Local 371 agreement.[9]

The Union's position is twofold:

(1) The NYSOMH-City contract is a modification of Article III (Salaries) of the Local 371 agreement. Thus, there exists a dispute concerning the application or interpretation of the terms of the (modified) agreement

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[8] The decision of OMLR's Review Officer indicates that the Union offered undisputed testimony at the Step III conference to the effect that, shortly before the grievants became employees of HRA, the CIS Program Supervisor advised them that, effective January 1, 1981, their salaries would be $18,939. In response to this testimony, the Department asserted that the supervisor lacked authority to make salary representations to employees. The Review Officer did not address this issue in her decision. Although the issue was raised again by the Union's request for arbitration, it was not addressed by either party in any pleading before the Board.

[9] Article VI, Section 1 provides in relevant part:

> Definition: The term "Grievance" shall mean:
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> (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 of the Employer affecting terms and conditions of employment; ....

within the meaning of Article VI, Section 1 (A); and

(2) The NYSOMH-City contract is a written policy of HRA. Thus, there has been a violation of

written Policy of the Employer within
the meaning of Article VI, Section 1 (B)

Under either formulation, it is argued, the grievance is arbitrable.

Further, Local 371 contends, since the NYSOMH-City contract is legally binding on the City and, since the grievants are third-party beneficiaries of that contract, is a nexus between the alleged improper act of the (failure to pay proper salary rate) and the source of the right claimed by the grievants (NYSOMH-City contract).

Finally, the Union claims that the City's defenses, e.g., that the provision for a wage rate of $18,939 on January 1, 1981 was a mistake, relate to the merits of the grievance and are not a basis for barring arbitration in this case.

Discussion

Since 1969,[10] we have repeatedly held that, in determining questions of arbitrability, the Board must decide whether the parties to the dispute are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented. Examination

[10] Office of Labor Relations v. Social Service Employees Union, Decision B-2-69.

of Article VI, Section 2 of the Local 371 agreement reveals that the parties herein are obligated by contract to submit unresolved grievances to arbitration upon request to this Board by a party. The issue before us then is whether the particular grievance is within the scope of the agreement to arbitrate.

In order to be arbitrable under Article VI, Section l(A) of the Local 371 agreement, a grievance must involve "a dispute concerning the application or interpretation of the terms of this Agreement" (emphasis added). Here, the grievants' claim arises not under the terms of the Local 371 agreement but under a contract between the City and a third party. Nevertheless, the Union attempts to bring its claim within the above-quoted definition of a grievance by characterizing the contract between the City and NYSOMH as a modification of the collective bargaining agreement. For the following reasons, we must reject this argument.

It is evident that the Union is not a party to the NYSOMH-City contract, and that the mutual rights and obligations created by that contract run only between the State and the City. In addition, neither the NYSOMH-City contract nor the Local 371 agreement refers to the other. Thus, it cannot be argued successfully that one agreement incorporates the other.

We have previously found a separate agreement negotiated between the parties to a collective bargaining agreement to be a supplement to the collective agreement where the former specifically referred to the latter, or addressed matters also covered by the collective agreement between the same parties. In Decision B-6-76,[11] we noted that:

> "a supplement to the contract between the parties intended to and made to resolve a dispute as to the meaning and application of a term or terms of the contract arising during the effective period of the contract and in the course of its administration ... [is] ... a device commonly used in labor relations."

Such supplements, we noted,

> "... are regularly deemed to constitute additions or amendments to the contracts which underlie them and to be fully integrated and incorporated therein."[12]

On the other hand, we have found no incorporation by reference where there was no contractual basis for such a finding. For example, in Decision B-19-75,[13] we held that a unit representative could not arbitrate

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[11] New York City Health and Hospitals Corporation v. Committee of Interns and Residents.

[12] See also, Decisions B-17-71, B-4-72, B-5-75, B-5-76 and B-28-81 where the Board recognized the existence and validity of various types of supplemental agreements.

[13] City of New York v. Communications workers of America.

certain, provisions of the City-Wide- Contract pursuant to the grievance - arbitration clause of the unit contract. We found that, far from incorporating the provisions of the City-Wide agreement, the unit agreement merely set forth the existence of the City-Wide Contract and recognized that "an agreement concerning issues not within the purview of the unit contract [had] been negotiated by another union." We noted that this reference to the Cit-Wide Contract did not confer any rights on the unit representative.[14]

In the instant matter, we are presented with two distinct and unrelated agreements. While the NYSOMH-City contract appears, on its face, to address a matter that is also covered by the Local 371 agreement, this fact alone does not warrant a finding that one agreement incorporates or modifies the other.[15]

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[14] Id. at p.15. See also, Decisions B-3-78 and B-18-81.

[15] We have taken note of the City's argument that the Director of Labor Relations has exclusive authority to negotiate salary increases. However, we do not deem this fact to be dispositive of the issues before us.

We now turn to the Union's second contention, that the grievance is arbitrable under Article VI, Section 1 (B) because it states a violation of the written policy of HRA, which, it is argued, is embodied in the NYSOMH-City contract.

Written policy generally consists in a course of action, a method or plan, procedures or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency. The agreement of the union may be sought but is not required. Nevertheless, a policy must be communicated to the union and/or to the employees who are to be governed thereby.

In Decision B-31-82,[16] we found that HRA's Non-Managerial Employee Performance Evaluation Manual constituted a written policy of that agency. The Manual was developed in order to meet the requirement of the Revised City Charter for the establishment of an employee evaluation program based upon job performance. The Manual specified the tasks upon which employees were evaluated and the standards for measuring employee performance. It also included procedures for conducting

[16] City of New York v. Social Service Employees Union, Local 371.

employee performance evaluations. However, in Decision B-11-81,[17] we held that a letter from an Assistant Commissioner of HRA to the union, reflecting agency standards for supervisory responsibility (span of super vision) for a functional title was not written policy. In that case, we observed, inter alia, that the source of
the alleged policy was an in-house job evaluation of the functional title held by the grievant that was intended for position evaluation purposes only. The document simply listed tasks performed by incumbents of the title; it did not mandate that particular circumstances or working conditions be maintained. Further, it appeared that the contents of the document were communicated to the union only in response to its request for job specifications for various titles.

Evaluating the Union's allegations in the instant case in light of the criteria outlined above, we conclude that the NYSOMH-City contract does not constitute written policy. A contract is, by definition, a bilateral document, not a unilateral directive of the employer. Also, the clear purpose of the contract at issue herein is to define the respective obligations of the City to deliver services to mentally disabled persons living in the community and of the State to reimburse the City for providing such services. The document does not offer guidelines or procedures;

[17] City of New York v. Communications Workers of America.

it appears to be descriptive rather than prescriptive. Further, there was no intentional communication of the contents of the contract to the Union, nor was such communication necessary to the contract's implementation. While we do not purport to have identified every constituent element of a written policy, and will continue to determine such questions on a case-by-case basis, in the circumstances of this case, we are persuaded that the NYSOMH-City contract is not a policy of the employer.

We note the Union's argument that the NYSOMH-City contract is legally binding and that the grievants are third-party beneficiaries of that contract. However, the force and effect to be given this contract is a matter properly raised in another forum and not before the Board. Whatever rights the grievants may have thereunder are separate and distinct from rights existing under the Local 371 agreement. Since only the latter may be enforced through the grievance-arbitration procedure, and since we have found that the NYSOMH-City contract does not constitute either a modification of the collective bargaining agreement or a written Policy of HRA, we shall dismiss in their entirety the Union's claims that a violation of the NYSOMH-City contract is arbitrable. This is consistent with prior decisions wherein we noted that the Board can neither create a duty to arbitrate where none exists nor expand the obligation beyond the scope established by the parties in their contract.[18]

[18] See, e.g., Decisions B-12-77, B-20-79, B-15-80, B-28-82,

ORDER

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.
December 22, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
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JOHN D. FEERICK
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