

City v. L.371, SSEU, 31 OCB 3 (BCB 1983) [Decision No. B-3-83
(Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-3-83

Petitioner,

DOCKET NO. BCB-582-82

(A-1468-81)

-and-

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

Respondent.

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DECISION AND ORDER

On March 25, 1982, the City of New York, appearing by its Office of Municipal Labor Relations (the "City"), filed a petition challenging arbitrability of a grievance that is the subject of a ,request for arbitration filed by the Social Service Employees Union, Local 371, AFSCME (the "Union" or "SSEU") on March 11, 1982. On April 30, 1982, SSEU filed its answer, to which the City replied on May 28, 1982.

Request for Arbitration

Claiming that grievant was wrongfully denied a merit increase to which he was entitled and that the denial constituted a failure of the City to adhere to written policy and guidelines relating to merit increases, SSEU

cites Article VI, Section 1(B) of the Collective Bargaining Agreement as the basis for its request that this matter be submitted to arbitration.

Section 1.

D E F I N I T I O N: The term "Grievance" shall mean:

(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; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 73901.1 of the Unconsolidated Laws shall not be subject to the Grievance procedure or arbitration. [Emphasis added]

More particularly, SSEU alleges a violation of Bureau of Child Support ("BCS") Policy No. 10.109, and an April 7, 1982 Memorandum from Elizabeth Hassan, Assistant Director, Personnel Employee Relations and Training, BCS, addressed to all Borough Directors. BCS Policy No. 10.109 on the subject of "quality review" provides, in relevant part, as follows:

I. PURPOSE

This procedure is a tool to assist the Borough Director in obtaining more effective control and knowledge of the work flow and activity at the Borough Office. The sample and review of completed cases and the maintenance of an accurate count of each Group Worker's cases will identify areas of strength and weakness within the office, both in regard to individual work productivity and effectiveness of all Group Supervisors.

It is expected that this procedure will enable administrative staff at the Borough Office to determine where good supervision appears to be resulting in an efficiently operating group. It will also facilitate the preparation of valid and objective staff evaluations, particularly those of the Group Supervisors, as administrative staff will have developed a better knowledge of the capability and productivity of this staff.

The April 7, 1982 Memorandum, pertaining to salary adjust non-managerial employees whose work performance has been outstanding or superior," sets forth the guide lines to be utilized in the selection of candidates for merit increases, and indicates, at paragraph "2", that

[m]erit increases must be based on performances and appropriate documentation must be submitted with the request. A request must be accompanied by the most recent employee evaluation. only employees whose 1979 or 1980 performance rating demonstrated outstanding or superior performance are to be considered for requests for merit increases.

The grievant seeks, as a remedy:

Compliance, immediate granting of merit increases with appropriate retroactivity, and any other just and proper remedy, including interest.

Positions of the Parties

SSEU's Position

SSEU maintains that the grievant was improperly denied the merit increase to which he would clearly have been entitled had the criteria specified in Policy No. 10.109 and the April 7th Memorandum been applied. The contention here is that the productivity of employees is "uniformly measured on the Group Productivity Report, Form 508" and that these reports for the years 1979 and 1980 amply document SSEU's assertion that the grievant's performance figures far exceeded the figures of those employees who did, in fact, receive merit increases. It is further maintained that Group Productivity Reports on a City-wide basis indicate that grievant's performance figures surpassed those of merit increase recipients at other locations as well.

In light of the policy statement that "[o]nly employees whose 1979 or 1980 performance rating demonstrated outstanding or superior performance are to be considered for requests for merit increases," it is the

Union's contention that an impropriety has occurred in the selection of candidates for merit increases. Thus

[g]rievant's allegations that petitioner failed to adhere to the official written policy statements by awarding merit increases based upon favoritism rather than objective work performance states a violation of those policies and a grievance within the meaning of the Agreement.

The City's Position

The City maintains that no violation, misinterpretation or misapplication of any rules, regulations, written policy or orders affecting the grievant's terms and conditions of employment has occurred. Instead, the City argues, the charge by SSEU that a procedural violation has occurred has been made solely for the purpose of challenging the underlying denial of a merit increase. This, it maintains, is borne out by the fact that the Union has failed to in any way substantiate its charge. In this connection, the City cites Board Decision No. B-9-69 for the proposition that a management decision to grant or not to grant a merit increase is not subject to arbitral review. Thus, it argues, the request for arbitration should be denied.

Discussion

It is well established that in an arbitrability proceeding, consideration by the Board is limited to that of substantive arbitrability - i.e., is there an agreement between the parties to submit their disputes to arbitration and, if so, is the scope of the obligation broad enough to cover the particular grievance presented.¹ In determining arbitrability, this Board will, without going into the merits of the dispute, inquire as to the prima facie relationship between the act complained of and the source of the alleged right.² Thus, the grievant, when challenged to do so, has the burden of showing that the provision which it claims has been violated is arguably related to the grievance sought to be arbitrated. In the instant proceeding, SSEU claims that the grievant was denied a merit increase to which he was entitled, and maintains that the denial is attributable to the City's failure to follow the guidelines and criteria set forth in Policy No. 10.109 and the April 7th Memorandum. This violation, it is claimed, is the basis for the request for arbitration.

¹ Decisions Nos. B-22-80; B-15-79.

² Decisions Nos. B-3-78; B-1-76.

We find that where, as here, the union cites a rule, regulation, written policy or order which it claims has been violated, and demonstrates, as it has, an arguable relationship between the act complained of and the source of the alleged right, it thereby satisfies the elements of arbitrability to the extent they are considered by the Board.

In opposing the request, however, the City argues that:

1. The grievance herein is addressed to the denial of a merit increase, not as is alleged, the failure to follow procedures.
2. The granting or withholding of a merit increase is a managerial prerogative, not subject to arbitral review.

While the City cites B-9-69 in support of its position, we think that it fails to give proper emphasis to all that we said in that decision. We stated there that

... in line with the Supreme Court's decision in NLRB v. Katz, and the pertinent laws, regulations, and practices in City employment, that the procedures and criteria to be applied in determining eligibility for merit increases are within the scope of collective bargaining, but that the decisions whether or not to grant increases, and the aggregate amount thereof, are within the City's discretion, with the individual amounts to be determined by the City in accordance with the negotiated criteria and

procedures. Claims that such procedures and criteria have been disregarded or misapplied may be raised and determined under applicable grievance procedures. [emphasis added]

The fact that a public employer is under no obligation to bargain over a particular subject will in no way shield the subject from arbitral review once it is voluntarily incorporated into a provision of a collective bargaining agreement. Similarly, when a public employer unilaterally adopts a rule, regulation, written policy or order as to a subject, that subject, to the extent so covered, becomes arbitrable under most contracts of the City and municipal unions pursuant to standard language such as is set forth in Article VI, Section 1(B) of the instant contract rendering employer non-compliance with written policies and regulations grievable and arbitrable.

Performance evaluations and eligibility for merit increases are the undisputed subjects of Policy No. 10.109 and the April 7th memorandum. Since the collective bargaining agreement between the City and SSEU contains a grievance provision expressly covering violations of rules, regulations, written policies or orders, the grievance herein, as described in the request, is precisely the kind of dispute which the parties agreed would be arbitrable.

Further, the City's argument that SSEU is really grieving the denial of a merit increase, and not the failure to follow the guidelines relating to eligibility, must be rejected. To isolate the denial itself from the procedural violations alleged to have contributed to it is illogical since an employee would have no reason to grieve the failure to follow eligibility guidelines unless he was adversely affected by it.

It should be emphasized that while the Board has repeatedly and consistently held that the possibility that an arbitrator might render a proscribed remedy is not a basis for denying an otherwise valid request for arbitration, a clarification from this Board is warranted, under the circumstances of this case, as to precisely what it is that we have found to be arbitrable herein. The Board is satisfied that SSEU has stated facts in a manner and to an extent sufficient to fulfill the elements of arbitrability. Thus, having alleged that the denial of a merit increase was attributable to the City's failure to adhere to the guidelines and criteria set forth in Policy No.10.109 and the April 7th memorandum, we believe enough has been presented to us to allow arbitral consideration of that issue. We stress, however, that an arbitrator's examination

would be limited to a consideration of whether or not such a violation has occurred with the possible remedy of directing the employer to reconsider the eligibility of the grievant for a merit increase utilizing the aforementioned guidelines and criteria. An arbitrator could not, of course, in the circumstances of this case, direct the employer to grant the merit increase.³

Based upon these 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

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

³ Decision No. B-14-81 likewise contained a clarification as to the remedies available in arbitration.

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

DATED: New York, N.Y.
January 18, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER