OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.

DECISION NO. B-31-85

DOCKET NO.
BCB-761-85
(A-2018-85)

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In the Matter of the Improper Practice

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and NEW YORK
CITY DEPARTMENT OF PERSONNEL,

Respondent.
- - - - - - - - - - - - - - - - - - x

DOCKET NO.
BCB-764-85

DETERMINATION AND ORDER

On November 27, 1984, District Council 37, AFSCME, AFL-CIO ("D.C. 37" or "the Union") filed a request for arbitration on behalf of nine Technical Support Aides ("TSAs") employed in the medical Assistance Program of the New York City Human Resources Administration. It is alleged that the grievants were improperly denied

longevity increases in violation of the 1980-82 collective bargaining agreement ("Agreement") and other agreements between the parties. On January 18, 1985, the City of New York ("City"), appearing by its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging arbitrability. This matter was docketed as BCB-761-85. On February 14, 1985, the Union submitted an answer to the City's petition. OMLR filed a reply on March 8,1985.

On February 27, 1985, D.C. 37 filed an improper practice petition, in which it charged that the City unilaterally altered terms and conditions of its agreements with the Union [concerning longevity increases for TSA] and refused to bargain regarding those alterations", in violation of Section 1173-4.2a(4) of the New York City Collective Bargaining Law ("NYCCBL").[1]

[1]NYCCBL Section 1173-4.2a(4) provides:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargainIng with certified or designated representatives of its public employees.

This matter was docketed as BCB-764-85. The City filed an answer to the improper practice petition on May 1, 1985. The Union filed a reply on July 8, 1985.[2]

The above-described arbitrability and improper practice proceedings have been consolidated for decision herein as they involve the same parties, events and underlying factual circumstances.

Background

TSA is a broadbanded title consisting of three assignment levels. On March 13, 1978, the office of the Mayor promulgated Personnel Order No. 78/17 ("P.O. 78/17"), which established minimum and maximum salary rates for TSA Levels I, II and III. P.O. 78/17 also prescribed advancement increases for Levels II and III predicated upon length of service. of particular relevance to the instant proceedings are Paragraphs 3 and 4 of P.O. 78/17:

[2] The time lapses in excess of statutory limits for the filing of pleadings in the improper practice proceeding were attributable to requests for extensions by each party, were granted by the Office of Collective Bargaining.

> 3. After five years of continuous permanent service as Technical Support Aide, or in a predecessor class of positions, at Level I, employees shall receive whichever of the following is greater: either the minimum salary of Level II or the advancement increase for Level II as explained in 4 below.
>
> 4. A person assigned to a higher level position within the class of positions included herein shall receive as of the effective date of such assignment whichever of the following results in a greater rate: either the appointment rate then in effect for the higher level position to which assigned; or the rate received in the former assignment on the date immediately preceding the effective date of the new assignment, plus the advancement increase listed for the level to which assigned.

In connection with the broadbanding and consolidation of titles in the electronic data processing field, the Department of Personnel promulgated an "Information Guide for Employees Affected by the Broadbanding and Consolidation of Electronic Data Processing and Related .Titles" ("Broadbanding Guide"), in which it advised employees who were reclassified into the TSA title as follows:

> If you have been working as a permanent employee for five years or more when you became a Technical Support Aide, you will receive either $400 or the minimum salary of Level 11 ($8,350)

> whichever is greater. If you have been working for less than five years and you continue on at Level I you will receive this increase when you reach five years of service.

Thereafter, on July 30, 1981, a tripartite Salary Review Panel, established pursuant to the- 1980-82 Municipal Coalition Economic Agreement,[3] to "review and make recommendations on the wage and salary rates of any title ... for which there were both recruitment and retention problems", rendered a Decision and Award in which, inter alia, it upgraded the salary ranges for all levels of the TSA title.

Subsequent to '-the issuance of the Panel's decision, the City and D.C. 37 entered into further discussions concerning salary ranges for TSAs. The agreement resulting from these discussions was incorporated into a Supplemental Decision of the Salary Review Panel, dated February 5, 1982, and formalized in a letter agreement between the City and D.C. 37, dated February 16, 1982. The letter agreement states, in pertinent part:

[3] The 1980-82 Municipal Coalition Economic Agreement established economic terms and conditions of employment for employees represented by a Coalition of Municipal Unions. D.C. 37 was a member of the Coalition.

> Pursuant to discussions between the City and representatives of District Council 37 and Local 1549, it was agreed that the City would modify the job specification for Technical Support Aide by establishing new assignment levels I and I to replace the current level I ....

Thereafter, on September 22, 1982, the Director of OMLR issued Interpretive Memorandum No. 58 ("I.M. 58") on the subject of clerical longevity increases. i.M. 58 specifically provided that:

> Payment of similar increases for employees in the class of positions of Technical Support Aide provided by Personnel order 78/17, dated March 13, 1978, should not be made at this time pending issuance of further instructions by OMLR (emphasis in original).

In addition, on October 8, 1982, the New York City Department of Finance issued a bulletin (BCP 20-82) providing for payment of longevity increases to specific clerical titles, but making no mention of TSAs.

Positions of the Parties

I. The Arbitrability Issue (BCB-761-85)

D.C. 37 contends that its February 16, 1982 agreement with OMLR to divide Level I of the TSA title

into two assignment levels, denominated Ia and Ib, and to assign salary rates different from those recommended by the Salary Review Panel, in no way indicates that the Union consented to eliminate the longevity increase for TSAs who had served at Level I for five years. By its failure to pay longevity increases to the named grievants, D.C. 37 asserts, the City has violated prior agreements with the Union, the terms of which are reflected in P.O. 78/17 and in the Broadbanding Guide.

The City contends that D.C. 37 has failed to state a basis for its grievance because the position of TSA Level I ceased to exist on February 16, 1982, when the City and Union agreed to alter the structure of the TSA title by replacing Level I with Levels Ia and Ib. According to OMLR, the language of P.O. 78/17 providing a longevity increase for TSA Level I was "plainly modified" by the February 1982 letter agreement between the parties. Furthermore, since employees serving at TSA Levels Ia and Ib now receive annual salaries which are $3000 or $5000 higher than the salaries they would have received at Level I, the claim of right to a $400 advancement increase in addition to the higher

salary rate is, the City asserts, absurd. OMLR concludes that arbitration should be denied because the Union has failed to establish a prima facie relationship between the act complained of and the source of the alleged right, as has been required by this Board.

The City also contends that the request for arbitration should be denied because the claim is time-barred under Article VI, Section 2 of the Agreement, which requires that a grievance'be submitted "no later than.120 days after the date on which [it] arose." OMLR asserts that the issuance in 1982 of I.M. 58 and Department of Finance Bulletin BCP 20-82 put the Union on notice of the grievants' claims. Nevertheless, D.C. 37 waited until 1-984, far in excess of the 120-day contractual time limit, to file a grievance.

In its answer to the petition challenging arbitrability, D.C. 37 denies that the letter agreement of February 16, 1982 c-.--.iminated loncrevity increases for Level I of the TSt,. ..tle. in any event, the Union asserts, the City' ~.rgument on this point involves the merits of the dispute, not the issue of arbitrability.

The Union also argues that the question whether the greivance was timely commenced is an issue of

procedural arbitrability which is for an arbitrator to determine. On this point, D.C. 37 notes further that there are factual questions relating to notice and knowledge of the gr 4 evants' claims, when the claims arose, and whether they are continuing in nature, that are best determined in the arbitral forum.

For the aforementioned reasons, D.C. 37 maintains that its request for arbitration should be granted.

II. The Improper Practice Issue (BCB-764-85)

In the improper practice proceeding, D.C. 37 asserts that, at no time during the negotiations which resulted in dividing TSA Level I into two assignment levels with different salary rates, and nowhere in the signed agreements resulting from those negotiations, did the Union consent to eliminate the longevity increase prescribed by the Personnel order and Broad-banding Guide for TSAs who had served in Level I for five years. Thus, the City's assertion of a policy not to pay longevity increases to TSAs while continuing pay such increases for other clerical titles, in accordance with I.M. 58, constitutes a unilateral change in "terms and conditions of its agreements with the Union" and a refusal to bargain in violation

of the NYCCBL.

The City argues that the improper practice petition should be dismissed because it is time-barred. In support of this contention, OMLR cotes Article VI, Section 2 of the Agreement and notes that the Union failed to complain within 120 days of the issuance of I.M. 58 of September 22, 1982 or of Finance Department bulletin BCP-20-82 of October 8, 1982, which, it is alleged, put D.C. 37 on notice of the existence of its claim.

OMLR also asserts that the petition should be dismissed because it deals with the same underlying dispute as is sought to be submitted to arbitration, ion violation of the waiver requirement of Section 1173-8.od of the NYCCCL.[4]

[4]NYCCBL Section 1173-8.Od provides:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and such organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

D.C. 37 argues that the time limitation set forth in Article VI, Section 2 of the Agreement does not apply to the commencement of an improper practice proceeding. In any case, the Union contends, it did not receive notice of the City's change of policy until it received the petition challenging arbitrability in Docket No. BCB-761-85 on January 22, 1985. Thus, it is argued, the time in which to file an improper practice petition started to run-on January 22, 1985.

Finally, D.C. 37 denies that it has submitted the same underlying dispute to two different forums, thereby violating the waiver privision fo the NYCCBL. According to the Union, the factual issues in the two proceedings and the remedies requested and available in the two forums are not the same. Thus, it is alledged NYCCBL Section 1173-8.od is not a bsar to consideration of the improper practice petition herein.

As a remedy for the alleged statutory violation, D.C. 37 seeks (1) payment of longevity increases to all persons who have been employed as TSAs, Level I on a permanent and continuos basis for five years, (2) retroactive payment plus interest for persons who

ought to have received longevity increases in the past, and (3) an order directing the City to bargain in good faith before eliminating or altering longevity increases allegedly owed to TSAs.

Discussion

The grievances that underlie the request for arbitration in this case were initiated by D.C. 37 pursuant to the terms of a collective bargaining agreement which includes, as its Article VI, a comprehensive grievance procedure. Pursuant to Article VI, the City and Union have agreed to submit to final and binding arbitration any dispute defined as a grievance which has not been satisfactorily resolved at the preliminary steps of the procedure. The term "Grievance" is defined at Article VI, Section 1 to include, inter alia:

> (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 applicable to the agency which employs the grievant affecting terms and conditions of employment,. . .

Based upon the above, we find that the parties to the instant dispute have agreed by contract to arbitrate their controversies. We shall therefore consider whether the dispute presented in the instant case is within the scope of the parties' agreement to arbitrate.

D.C. 37 asserts that the City's failure to pay longevity increases to the named grievants violates prior agreements between the City a nd Union, the terms of which are reflected in P.O. 78/17 and in the Personnel Department's Broadbanding Guide. The Union does not dispute the City's assertion that negotiations between the parties during 1982 altered the structure of the TSA title by substituting Levels Ia and Ib for Level I. However, D.C. 37 argues that neither during those negotiations, nor in the signed agreements resulting therefrom, did it consent to eliminate the longevity increase for TSAs who had completed five years of permanent and continuous service at Level I.

The City does not dispute D.C. 37's assertion that, pursuant to the terms of prior agreements between the parties, a longevity increase was to be paid to

eligible Level I TSAs, nor does OMLR deny that a personnel order directed the heads of all affected City departments and agencies to pay such increases. The City would have us conclude, however, that since Level I of the TSA title has been superseded by the newly established Levels Ia and Ib,there is no basis for the grievances herein, and that arbitration should be denied because D.C~. 37 has failed to establish a prima facie relationship between the act complained of and the source of the alleged right.

In many cases, we have held that it is our duty, when determining questions of arbitrability, to inquire as to the prima facie relationship between the act complained of and the source of the alleged right redress of which is sought through arbitration.[5] We have stated that the party seeking arbitration, where challenged to do so, must show that the statute, departmental rule or contract provision invoked is arguably related to the grievance to be arbitrated.[6]

[5] E.g., Decision Nos. B-1-76; B-15-80;B-8-82

[6] Id.

In the instant matter, it is apparent that the parties devoted significant attention to the negotiation of salary rates and ranges for all levels of the TSA titles. While we cannot determine from the submissions of the parties whether they decided what effect the bifurcation of Level I of the TSA title would have on employees serving at Level I at the time the 1982 title and salary changes were implemented, we can conclude that the City and Union discussed and agreed upon terms of a contract that, in a general way, cover the subject of their dispute. Thus, we take notice of the fact that Article III, Section 2(c) of the Agreement, captioned "Level Ranges and Assignment Increases," sets forth salaries and increments for titles covered by the Agreement, including the TSA title. Moreover, Article III, Section 2(c) is amended by an Appendix B, which incorporates the conclusions of the tripartite Salary Review Panel as set forth in its Supplemental Decision, dated February 5, 1982, and reflects the outcome of the parties' negotiations on the subject of the TSA title structure that were also formalized in a letter agreement dated

February 16, 1982. Furthermore, the parties have cited a personnel order which, on its face, prescribes the benefit sought by the grievants herein.

Based upon the above, we conclude that D.C. 37 has met its burden of establishing a nexus between the act complained of and sources of the alleged rights. Whether the grievants were denied a benefit to which prior agreements and an order of the Mayor allegedly entitle them, and whether that alleged entitlement survived subsequent salary negotiations and the conclusion of new agreements, are questions relating to the merits of the grievance. We have repeatedly held that, in deciding questions of arbitrability, we shall not inquire into the merits of the dispute.[7] Moreover, it is now well-established that questions as to the scope of the substantive provisions of a collective bargaining agreement are matters for resolution by an arbitrator where, as here, the parties have included in their agreement a broad arbitration clause, extending to disputes concerning the application or interpretation of the Agreement or claimed violations, misinterpreta-

[7] E.g., Decision Nos- B-10-77; B-9-78; B-15-80.

tions or misapplications of the rules, regulations, written policy or orders of the employer.[8]

Insofar as the City's challenge to arbitration is based upon the alleged failure to initiate the grievance in a timely manner under the Agreement, it suffices to say that questions of adherence to contractually prescribed time limits, including such subsidiary issues as when the claim arose, and whether the claim is continuing in nature, are matters of procedural arbitrability, appropriately resolved by an arbitrator.

We turn now to consideration of the improper practice matter, which we consolidated for decision herein. In its petition, D.C. 37 asserts that the City's unilateral elimination of longevity increases for TSAs who had completed five years of service at Level I constitutes an improper refusal to bargain under the NYCCBL. The

[8] See, e. q., Matter of Nyack Bd. of Educ. (Nyack Teachers Ass'n), 55 N.Y. 2d 959, 449 N.Y.S. 2d 194, 434 N.E. 2d 264 (1982), aff'g, 84 A.D. 2d 580, 443 N.Y.S. 2d 425 (2d Dep't. 1981); Board of Educ. v. Barni, 49 N.Y. 2d 311, 425 N.Y.S. 2d 554, 401 N.E.2d 921 (1980); Matter of Wyandanch Union Free School Dist. v. Wyandanch Teachers Ass'n, 48 N.Y. 2d 669, 421 N.Y.S. 2d 813, 397 N.E. 2d 384 (1979); Matter of Board of Educ. v. Roosevelt Teachers Ass'n, 47 9.Y. 2d 748, 417 N.Y.S. 2d 252, 390 N.E. 2d 1176 (1979).

City denies that it unilaterally eliminated longevity increases for Level I TSAs. Rather, OMLR asserts, alterations in the TSA title structure, including elimination of Level I, were the result of bilateral negotiations and agreement with the Union. The City contends that the substantial salary increases negotiated for TSA Levels Ia and Ib were clearly intended to modify and replace the longevity increase previously prescribed for TSA Level I. Since the parties negotiated on the subject of salary rates and ranges for TSAs, OMLR maintains that there is no basis for a finding of improper practice.

We have carefully considered the claims asserted by the Union in the request for arbitration and improper practice petition and conclude that the two proceedings present alternative theories for recovery. Thus, if the grievance may be resolved by an arbitrator, whose task is to determine the intent and application of agreements between the parties, it must necessarily be concluded that there has been no refusal to bargain by the City. Conversely, if the arbitrator determines that the dispute presented is not covered by the parties' agreements, then there may be a basis for inquiring further into the Union's allegations that the City

unilaterally changed a term or condition of employment of TSAs in violation of the NYCCBL.[9] It is clear that the focus of the dispute in both proceedings is on a matter arising out of and requiring interpretation of the parties' agreements. Moreover, it is not only the Union that relies upon various agreements of the parties as the basis for its claims, but also the City, whose defense to the allegation of improper practice is based upon the assertion that agreements between the parties gave it the right to act as it did.

Where, as here, the contract clearly provides for grievance arbitration, the improper practice charge raises a claim of contract right, and it appears that arbitration will resolve both the improper charge and the contract interpretation issue, we have previously deferred our authority to decide and remedy improper practice claims to the arbitration process.[10] Permitting an improper practice charge that involves matters covered by a collective bargaining agreement.

[9] It is not disputed that the controversy herein concerns a mandatory subject of negotiations.

[10] Decision Nos. B-10-80; :1-10-85.

to proceed first to arbitration is also consistent with the declared policy of the NYCCBL "to favor and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organizations.[11] "Accordingly, for the aforementioned reasons, we shall defer resolution of the improper practice issue in the instant matter pending possible resolution of the parties' dispute in arbitration.

Consistent with our prior utilization of the deferral device, however, and in the event that, either the issueraised in the improper practice petition is not resolved in the arbitral forum, or the arbitration produces a result that is alleged to be inconsistent with policies and purposes underlying the NYCCBL, we shall, upon demand, reassert jurisdiction in this matter to hear and determine the allegations of improper 'practice. At such time as assertion of improper practice jurisdiction may become necessary, we shall consider the affirmative defenses raised by the City in opposition to the Union's petition.

Now, however, since we find that parties to these proceedings have agreed to arbitrate their

[11]NYCCBL §1173-2.0.

controversies and that the dispute presented is within the scope of that agreement, we shall grant the request for arbitration and defer consideration of the improper practice petition, in accordance with the principles outlined 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 petition challenging arbitrability filed by the City of New York, and docketed as BCB-761-85, be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO in Docket No. BCB-761-85 be, and the same hereby is, granted; and it is

ORDERED, that further proceedings on the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, and docketed as BCB-764-85, be, and the same hereby are,deferred, pending the conclusion of arbitration proceedings in Docket No. BCB-761-85; and it is further

ORDERED, that, unless a demand is made within 10 days after the conclusion of the arbitration proceedings directed above, and for reasons set forth in this decision, that the Board assert its jurisdiction to hear and determine the improper practice case (Docket No. BCB-764-85), the improper practice petition shall be deemed dismissed, without further proceedings thereon.

DATED: New York, N.Y.
October 31, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER