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-74-90

and

DOCKET NO. BCB-1310-90
(A-3450-90)

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO

Respondents.
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DETERMINATION AND ORDER

On August 1, 1990, the City of New York ("the City"), by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance brought by District Council 37, AFSCME, AFL-CIO ("the Union"). The grievance alleges that Robert Franzese ("grievant"), a former employee of the New York City Department of Transportation ("the Department"), was wrongfully terminated. The Union filed an answer on September 14, 1990. The City filed a reply on October 15, 1990.

Background

Grievant worked for the Department as a Supervisor of Highway Repairers. His wages and supplemental benefits were determined pursuant to a Comptroller's Consent Determination under § 220 of the Labor Law. The parties, therefore, were

subject to the grievance procedure provided in Executive Order No. 83 ("E.O. 83").[1]

On January 4, 1989, the Department recommended that grievant be terminated for excessive absence. After a Step II conference was held on March 9, 1989, the Department's Director of Labor Relations recommended that the penalty be reduced.[2] On October 25, 1989, the Department informed grievant that he had failed to meet, the terms and conditions set forth in the Step II decision

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[1] E.O. 83, dated July 26, 1973, provides a procedure for the resolution of grievances between the City and its employees. It provides, in relevant part:

> Section 5(b)(ii) ... the term "grievance" shall mean... (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 or conditions of his or her employment....

[2] The Department's recommendation included the following provisions:

> 1. Transfer from Flatbush Yard to Flatbush Ave. Yard (Arterials);
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> 2. Serve a one year probationary period commencing on the date of return to employment, to wit: March 13, 1988;
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> 3. Enroll and attend the outpatient program at Stuyvesant Square; and
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> 4. Failure to satisfactorily complete the one year probationary period for any reason or failure to satisfactorily complete the outpatient program shall return to the Step II Hearing Officer for completion of the termination procedure.

and, as a result, would be terminated as of November 5, 1989.[3] At a Step III hearing on February 14, 1990, the decision to terminate grievant was upheld by the hearing officer. No satisfactory resolution of the dispute having been reached, the Union filed a Request for Arbitration on May 18, 1990. The Union seeks, as a remedy, that grievant be reinstated with back pay and in all other ways be made whole.

Positions of the Parties

City's Position

The City argues that this grievance cannot be maintained because the Union has failed to state a provision of the collective bargaining agreement which is arguably related to the grievance. It maintains that although the Union characterizes the Department's termination letter as a contract provision, rule or regulation that has been violated, the letter neither contains contractual language nor cites rules or regulations. The City contends that the Union has not demonstrated the necessary nexus between the grievance to be arbitrated and a contract provision or agency rule.

The City asserts that grievant, as an employee subject to a 220 Determination, is entitled only to the rights granted under E.O. 83, and that the right to grieve a disciplinary action is

[3] Grievant claimed that injuries sustained in an assault and robbery on May 7, 1989 prevented him from attending all sessions of the rehabilitation program at Stuyvesant Square.

not granted therein. The City maintains that the Union may not expand the meaning of the term "rule or regulation" to obtain arbitration of the grievance.

The City further argues that a Step II penalty which could not be imposed without agreement by the employee would grant managerial power to parties other than management. It contends that the Step II penalty in this case applied only to grievant. To grant him the right to grieve a disciplinary action, the City maintains, would grant such a right to all employees who are disciplined, even where such a right has not been bargained for by the parties. This would create a duty to arbitrate where none exists.

Union's Position

The Union maintains that the City is required, by the terms of E.O. 83, to arbitrate violations of "written rules or regulations" of the Department. When the Department promulgated its Step II decision, the Union contends, it established a written rule affecting the terms and conditions of grievant's employment, a violation of which may be submitted to arbitration. The union argues that since grievant complied with the Step II decision to the best of his ability, the decision to terminate him was a violation of a written rule of the Department and is subject to arbitration.

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties have obligated themselves to arbitrate controversies and, if they have, whether that contractual obligation is broad enough to include the act complained of by the Union.[4] When challenged, the burden is on the Union to establish a nexus between the City's act and the contract provision it claims has been breached.[5]

The City and the Union are parties to a Comptroller's Consent Determination under § 220 of the Labor Law. The Determination does not contain a grievance and arbitration clause. E.O. 83 provides a grievance and arbitration procedure which applies when such a grievance and arbitration procedure has not been incorporated into a written collective bargaining agreement.[6] The parties, therefore, are governed by the grievance and arbitration procedure set forth in E.O. 83.[7]

A grievance under the provisions of E.O. 83 is defined as "a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting terms and conditions of

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[4] See, e.g., Decision Nos. B-19-89; B-65-88; B-28-82.

[5] Decision Nos. B-1-89; B-7-81.

[6] Decision No. B-17-84.

[7] Decision Nos. B-18-83; B-9-83; B-13-77.

employment....” The only issue which must be reached here is whether the Step II decision issued by the Department constitutes a written rule or regulation of the Department that may be submitted to arbitration according to the provisions of E.O. 83.

In Decision No. B-59-90, we held that:

> [A written statement by the Department] will not be accorded the status of a "written policy or rule" unless such a response is addressed generally to the Department and sets forth a general policy applicable to the affected employees... [O]nly if [written statements] meet these criteria can they be considered written rules of the Department.

It is clear that the Department's Step II decision recommending grievant's termination, contained in the letter of October 25, 1989, is not a written rule or regulation of the Department according to the criteria established by the Board. It does not set forth a general directive to the Department, nor is it addressed generally to the Department. It is simply a determination of grievant's employment status, addressed to grievant alone, and may not be accorded the status of a written rule. Thus, the claim here that grievant's discharge was not in conformity with the Step II decision does not constitute an arbitrable grievance as defined in E.O. 83.

For this reason, we find that the Union has failed to establish a nexus between the instant grievance and any source of a right to submit the dispute to arbitration. The Union's request for arbitration is, accordingly, denied.

ORDER

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

ORDERED that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied; and it is further

ORDERED that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted.

Dated: New York, New York
November 19, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

DEAN L. SILVERBERG
MEMBER

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MEMBER