City v. L.371, SSEU, DC37, 45 OCB 75 (BCB 1990) [Decision No. B-75-90 (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-75-90

-and- DOCKET NO. BCB-1266-90 (A-3339-90)

LOCAL 371, SOCIAL SERVICE EMPLOYEES UNION, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On April 5, 1990, the City of New York (the "City") filed a petition challenging the arbitrability of a grievance brought by Local 371, Social Service Employees Union, AFSCME, AFL-CIO (the "Union"), on behalf of:

> Stephen Sprung and all other persons similarly situated who were employed at Linden Center, recom-mended for merit increases and did not receive same.

After receiving several extensions of time with the consent of the City, the Union filed its answer to the petition on September 9, 1990. The City filed a reply on September 19, 1990.

Background

The grievants in this matter, "Stephen Sprung and all other persons similarly situated," are employed by the Linden Income Maintenance Center ("Linden I.M. Center") of the City's Human Resources Administration ("HRA" or the "Agency"). Linden I.M. Center is one of approximately forty such centers located throughout the City.

On December 28, 1988, the Deputy Director of HRA's Income Maintenance Operations distributed to HRA Field Managers, two memoranda concerning "Non-Managerial Merit Increases." These memoranda provide as follows:

Memo No. 1:

> Attached please find the allocations for the Merit Increase. As you will note, the allocation for each Field Manager is one (1). However, if any Field Manager feels the need for any additional Non-Managerial Merits, it will be necessary for that Field Manager to discuss it with me.
>
> If the Center Directors do not utilize all the allocations, they are to immediately contact their respective Field Manager. The Field Manager should inform me of any allocation not fully used.

Memo No. 2:

> We have received authorization to pay merit increases to eligible Non-Managerial employees. The following are policy guidelines concerning these increases:
>
> ◦ An increase in duties within a title shall not be considered basis for a merit adjustment. If the increase in duties is significant, the position should be reclassified to a higher level.
>
> ◦ No more than one provisional promotion or one merit adjustment can be provided for any employee within a 12 month period from the date of the last provisional promotion or merit adjustment. Staff promoted off a C.S. list are eligible.
>
> ◦ Employees newly appointed on or after July 1, 1988 are not eligible for consideration since they did not work in FY '88 and are required to complete one year of service prior to merit consideration.
>
> ◦ Merit adjustments must be limited to employees with above average ratings (superior or outstand-ing) on their annual performance evaluations.
>
> ◦ In no case can the merit adjustments increase the employee's salary beyond the maximum established for the title and/or level. (Attached are the maximum salary levels for appropriate titles in I.M.)

- Non-Managerial adjustments must be based on merit with appropriate documentation. Such adjustment will be made at a flat rate of $1000.00.

- Submissions will be made by using the Planned Action Report ("PAR") and are subject to post-audit by the Department of Personnel, Office of Management and Budget and the Office of the Mayor. Current performance evaluations must accompany these submissions.

  A current evaluation is defined as an evaluation covering the 1 year period immediately preceding the submission of the merit. Since the evaluation cycle may not coincide with the submission date, it may be necessary to prepare a "special" evaluation to cover the period in question. Please note that it is not necessary to submit all your merits immediately as you will be able to use your allocations throughout FY '89, but no later than June 23, 1989. [Emphasis added.]

  Listed below are the PAR closing dates along with the period that will be required on the evaluation.

PAR	CLOSING DATE	PERIOD OF EVALUATION
Dec. 88	12/12/88	12/1/87 - 11/30/88
Jan. 89	1/23/89	1/1/88 - 12/31/88
Feb. 89	2/20/89	2/1/88 - 1/31/89
March 89	3/20/89	3/1/88 - 2/28/89
April 89	4/21/89	4/1/88 - 3/31/89
May 89	5/22/89	5/1/88 - 4/30/89
June 89	6/23/89	6/1/88 - 5/31/89

  Your allocation, attached, was based on your Program's number of eligible personnel on payroll as of June, 1988.[1] Eligible staff are defined as full-time, non-managerial personnel. While your allocation has been broken down by Division you may assign them at your discretion. Your original allocation was increased to allow for rounding off.

  All merit requests must be submitted using a PAR I Form and a justification memo, attached, along with the current evaluation.

There is no dispute that the PARs for the Linden I.M. Center were submitted in a timely manner and before the closing date for the month of

[1] Linden I.M. Center's allocation was listed as 14.

February, 1989. There is also no dispute that at some point during the period set forth for the consideration and granting of merit increases for FY '89, HRA decided to place a "freeze," for budgetary reasons, on all such requests.

"As a result," the Union alleges, "employees ... whose centers' recommendations were considered prior to the budgetary freeze were granted merit increases, while other employees, such as the grievants, whose centers' recommendations were not considered by the time of the budgetary freeze, were never considered for or granted merit increases."

On May 31, 1989, the Union filed a Step I grievance with the Director of the Linden I.M. Center, pursuant to Article VI of the 1987-90 Collective Bargaining Agreement between the parties (the "Agreement"). Therein, the Union maintained that the freeze constituted an arbitrary and inequitable application of HRA policy concerning merit increases. In a memorandum dated May 31, 1989, the Linden I.M. Center Director responded as follows:

> I am in receipt of your Step I Grievance dated 5/31/89 regarding non-payment of proposed merit increases.
>
> As I told you, the Linden merits were submitted prior to 2/20/89 as per the guidelines sent to Center Director. In good faith I thought these would be honored and I am very disheartened that they have been lost to us, especially since other sites received theirs.
>
> Obviously the situation is out of local jurisdiction; but, I think a more reasonable solution would have been to put the merits on hold rather than cancel them. Your grievance has been forwarded to Labor Relations and I.M. Personnel.

On that same day, the Linden I.M. Center Director forwarded the Union's grievance to HRA's Office of Labor Relations, with the following memorandum:

> Attached is a Step I Grievance resulting from non- payment of Meritorious Increases at the Linden Center.

See my reply attached.

As I told [the] Local 371 Union Rep., the list of those candidates for the meritorious increase was submitted to the Field Manager prior to the prescribed deadline. But, a subsequent deadline was imposed.

The fact that other sites were able to see their merits realized is unfair and demoralizing to non paid staff who may be just as or more deserving. Obviously the situation is out of local jurisdiction; but a more reasonable solution would have been to put the merits already submitted on hold rather than cancelled.

A Step II decision was rendered on July 13, 1989. HRA maintained that the granting of merit increases is discretionary with the Agency and, therefore, is not a grievable issue.

In a decision dated September 11, 1989, the Step III Review Officer upheld the Agency's decision below. Upon the Union's request for reconsideration, the City, in a letter dated November 30, 1989, again denied the grievance.

No satisfactory resolution of the matter having been reached, on January 31, 1990 the Union filed the instant request for arbitration. The Union claims an alleged "misapplication of policy/orders of the agency" and cites the "12/28/88 memos" of the Deputy Director of Income Maintenance Operations as the source of the alleged right that has been violated.[2]

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[2] Article VI, Section 1 of the Agreement defines the term "Grievance" as, inter alia:

> (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;....

Positions of the Parties

City's Position

The City submits that the Agency's discretion to grant merit increases is an exercise of managerial prerogative and, as such, is not grievable under the collective bargaining agreement. In support of its argument, the City cites Decision No. B-9-69, wherein the Board of Collective Bargaining (the "Board") concluded that:

> the procedures and criteria to be applied in deter-mining the eligibility for merit increases are within the scope of collective bargaining but that the decisions whether or not to grant merit increases, and the aggregate amount thereof, are within the City's discretion....

The City also argues that the 12/28/88 memos cited by the Union do not constitute "written policy or orders of the Employer," within the meaning of Article VI, Section 1(B) of the Agreement. Even assuming, arguendo, that the 12/28/88 memos do represent written policy or orders, the City asserts, the Union has failed to cite any provision of the memoranda which has been violated.

Therefore, the City maintains, because the Union cannot point to any limitation in the Agreement which is applicable to the Agency's exercise of its discretion in this matter, the Union's request for arbitration must be dismissed in its entirety.

Union's Position

The Union, while acknowledging the City's managerial prerogative to grant merit increases, maintains that this right does not preclude arbitral review if, in the exercise of its discretion, the City acts without regard for

established policy guidelines and procedures and in an arbitrary manner. The Union contends that the grievants were wrongfully denied consideration for merit increases in violation of the explicit and implicit policies and procedures set forth in HRA's memoranda on the subject.

The Union submits that at least one of the two memoranda (Memo No. 2)[3] clearly constitutes a "written policy or order of the Employer" within the contemplation of Article VI, Section 1(B) of the Agreement. Memo No. 2, the Union asserts, by its terms, expressly provides the "policy guidelines concerning [merit] increases" and the closing dates by which recommendations were required to be submitted. This memorandum, the Union asserts further, implicitly provides that merit increases be granted on a fair and equitable basis.

In support of its argument, the Union claims that once the recommendations of the Linden I.M. Center were timely submitted, the grievants became entitled to consideration for merit increases. This entitlement, the Union argues, was breached when the City subsequently decided, without notice, to introduce a new and arbitrary deadline in the process.

The imposition of the freeze, the Union argues, not only constitutes a "failure to adhere to [the Agency's] policy guidelines and procedures," but also results in a violation of the implicit requirement of Memo No. 2, "that a nondiscriminatory and rational determination be made to award merit increases to those persons found to be most worthy from the entire pool of candidates." Instead, the Union asserts, the determination rested entirely on whether a

[3] Supra, at 2-4.

particular I.M. Center's recom-mendations were received before the date of the freeze rather than after it. "Surely," the Union argues, "the memorandum did not envision that merit increases would be granted or denied on such an arbitrary and meritless basis."

Discussion

In considering challenges to the arbitrability of a grievance, this Board has a responsibility to ascertain whether a nexus exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[4] Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated; and that the parties have agreed to arbitrate disputes of that nature.[5]

In the instant matter, it is clear that the City and the Union have agreed to arbitrate grievances, as defined by Article VI of their Agreement, and that the obligation encompasses a claimed violation, misinterpretation or misapplication of "the rules or regulations, written policies or orders of the Employer applicable to the agency."[6] Here, however, the City argues that the memoranda cited by the Union do not fall within the contemplation of Article VI, Section 1(B) of the Agreement. The Union maintains that Memo No. 2, in

[4] Decision Nos. B-18-90; B-74-89; B-6-86; B-2-82; B-7-81; B-4-81.

[5] Decision Nos. B-35-90; B-65-88; B-52-88; B-35-88; B-13-87; B-28-82; B-15-79.

[6] Article VI, Section 1(B) of the Agreement, supra, note 2, at 6.

its prefatory statement, provides clear basis for the claim that it constitutes written policy. It states explicitly, "The following are policy guidelines concerning [merit] increases."

In cases analogous to this one, we have found on the basis of even less definitive language, that a document external to the collective bargaining agreement may provide an arguable source of an alleged right to proceed to arbitration where the contract provides a similarly broad definition of the term "grievance."[7] Moreover, in a case where: 1) the grievance concerned an alleged failure to follow guidelines relating to performance evaluations and eligibility for merit increases; 2) the guidelines were set forth in an internal memorandum from an agency official to all borough directors; and 3) the same definition of the term "grievance" was at issue, we held that:

> [W]hen 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 set forth in Article VI, Section 1(B) of the instant contract rendering employer non-compliance with written policies and regulations grievable and arbitrable.[8]

Therefore, to the extent that Memo No. 2 sets forth guidelines concerning recommendations for merit increases, by presenting therein criteria for eligibility and a course of action to be followed for their timely submission in order to ensure consideration, the memorandum has the force and effect of, and stands as, a written policy of the Agency.[9] Thus, an

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[7] See Decision No. B-41-90, and the cases cited therein.

[8] Decision No. B-3-83, at 8.

[9] See Decision Nos. B-28-83; B-31-82.

allegation that the City failed to adhere to the guidelines set forth in Memo No. 2 may constitute a grievable matter.

Accordingly, we next consider the City's alternative argument, that is: even assuming, arguendo, the memoranda represent written policy, the Union has failed to allege facts which establish that any provision of the memoranda has been violated. Furthermore, the City contends that because the complaint concerns a matter of management prerogative, the Union's mere conclusory statements that the Agency exercised its discretion in an arbitrary manner cannot form the basis of an arbitrable claim.

In any case in which the City's discretionary action is challenged, the burden will not only be on the Union ultimately to prove its allegations, but the Union will be required initially to establish that a substantial issue in this regard is presented.[10] Furthermore, as the City points out, we will require that a union allege more than the mere conclusion that discretion has been exercised in an arbitrary manner. In other words, we will require that the union "specify facts, which, if proven, would tend to substantiate allegations of arbitrariness."[11]

While it is clear that the City's decision whether to grant merit increases is a matter of management discretion,[12] it is equally clear, under the circumstances presented herein, that questions relating to the Agency's

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[10] See Decision No. B-46-86. See also, Decision Nos. B-74-89; B-16-87; B-14-87; B-5-84; B-8-81 (These cases set forth a comparable test for establishing the arbitrability of an action which is a statutory management right.)

[11] Decision No. B-46-86.

[12] Decision No. B-9-69.

adherence to procedures for the timely submission of recommendations for merit increases are arbitrable.[13] In this connection, we note that Memo No. 2 provides specific guidelines for the submission of recommenda-tions over a seven month period and, moreover, instructs HRA Field Managers as follows:

> Please note that it is not necessary to submit all your merits immediately as you will be able to use your allocations throughout FY '89, but no later than June 23, 1989.

Therefore, we find that the Union has alleged facts sufficient to establish that the City exercised its discretionary authority in a manner arguably violative of a specific provision of Memo No. 2, when it claims that the City imposed a new and unannounced deadline in the Agency's decision-making process. Moreover, the memorandum of the Linden I.M. Center Director to HRA's Office of Labor Relations, wherein he states that Linden Center's recommendations were "submitted to the Field Manager prior to the prescribed deadline ... [b]ut, a subsequent deadline was imposed,"[14] amply supports this conclusion.

Furthermore, the Union's allegation that merit increases were granted to employees of other centers simply because their submission happened to occur before the date of the freeze rather than after it, arguably establishes that the City failed to base its consideration of recommendations for all eligible non-managerial employees on the factors set forth in Memo No. 2. In this connection, the Union alleges, and the City does not deny, that "during the period set forth in [Memo No. 2] for the consideration and granting of merit

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[13] Decision No. B-3-83.

[14] Supra, at 5.

increases, HRA placed a freeze on the granting of any further merit increases, for budgetary reasons."[15] This unchallenged statement tends to establish the truth of the disputed allegation that, at least, some "merit increases were in fact granted to employees at income maintenance centers other than Linden."[16]

The response of the Linden I.M. Center Director to the Union's Step I grievance is particularly significant in this regard.[17] Therein, the Director stated that he was "very disheartened that [merit increases were] lost to [Linden I.M. Center employees], especially since other sites received theirs." Thus, we find the Union's assertion that the City withheld consideration of the recommendations submitted on behalf of the grievants at the Linden I.M. Center for reasons other than those set forth in Memo No. 2, states an arguable claim that the City exercised its discretion in an arbitrary or inequitable manner.[18]

Accordingly, we find that the Union's burden of demonstrat-ing that a substantial issue concerning the Agency's adherence to the guidelines set forth in Memo No. 2 with regard to the grievants at the Linden I.M. Center has been met and, therefore, we shall deny the City's petition challenging the

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[15] See Union's Answer, ¶14, at 5; City's Reply, ¶4, at 1.

[16] See Union's Answer, ¶13, at 5.

[17] Supra, at 5.

[18] See Decision No. B-46-86, where we concluded that there was a relationship between the City's denial of unearned sick leave and an arbitrary exercise of discretion where the union alleged facts which, if proved, would tend to establish that the City did not consider the factors set forth in the "Leave Regulations for Employees who are under the Career and Salary Plan." See also, Decision Nos. B-4-86; B-4-83; B-4-81.

arbitrability of this matter. Our finding herein is not to be considered as a finding on the merits of this case. Furthermore, the question whether the actions taken by the Agency were, in fact, arbitrary goes to the merits of the dispute and thus is a question to be determined by an arbitrator.

We reiterate that a matter concerning the City's decision whether to grant merit increases is within the exclusive province of management discretion. However, once the decision to grant merit increases has been made and, as in this case, management has established "policy guidelines" providing for the distribution of those increases among a defined group of employees, questions relating to the Agency's adherence to those guidelines are subject to arbitral review under a broad contractual definition of grievance such as is presented here.

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, denied; and it is further

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

DATED: New York, New York
December 3, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER

CAROLYN GENTILE
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