City v. L.300, SEIU, 55 OCB 6 (BCB 1995) [Decision No. B-6-95 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
City of New York,

Petitioner,

-and-

Local 300, Service Employees International Union,

Respondent.

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Decision No. B-6-95
Docket No. BCB-1552-93
(A-4401-93)

DETERMINATION AND ORDER

On February 11, 1993, the City of New York ("the City"), by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance brought by Local 300, Service Employees International Union ("the Union"). The Union alleges that Eleana Delgado ("the grievant"), a Purchasing Agent II employed by the Department of General Services ("the Department") was discriminated against for filing a grievance in 1989. Although the Union did not timely answer, the Office of Collective Bargaining ("OCB.") granted it a brief final opportunity to answer the petition, stipulating that the answer be filed by the close of business on Friday, August 13, 1993. Union filed its answer in the form of a letter dated August 16, 1993. The City filed a reply on September 10, 1993.

BACKGROUND

The grievant, a Purchasing Agent II has been employed by the Department since November 1986. At the time that the alleged

violative conduct occurred, the City and the Union were parties to a collective bargaining agreement effective July 1990 to September 1991 which contained a grievance and arbitration procedure culminating in binding arbitration.

On May 20, 1992, the grievant filed a grievance alleging that the Department discriminated against her because of a previously filed grievance for out-of-title work in May 1989. The 1989 grievance was resolved by a stipulation of settlement entered into by the parties in June 1990. As a result of the settlement, the grievant was promoted to Level II, with a salary increase that was made retroactive for six months. In her Statement of Grievance, the grievant alleges that she was the victim of harassment resulting in the restriction of her career advancement and job development. The grievant attributes the harassment to retaliation for filing the 1989 grievance.

The instant grievance was denied at Step I and was taken to Step II in July 1992. The Step II Review officer concluded that the grievant failed to show that she had been discriminated against, nor had she shown that she had been treated differently than any of the other employees within her unit. In addition, the Review officer determined that the grievant had not established a nexus between the grievance filed in 1989 and the harassment or retaliation which she alleged had begun in 1991. Thus, the Review Officer ruled, no contractual violation had occurred and the grievance was denied. The same result obtained when the grievance was advanced to Step III.

Pursuant to Step IV of the parties' grievance and arbitration procedure, the Union appealed the Step III decision on behalf of the grievant by filing a Request for Arbitration alleging a violation of Article VI, Section l(b) of the collective bargaining agreement.[1] At the lower steps of the grievance procedure, the grievant claimed a violation of Executive Order 83 ("E.O. 83"), Section 6.[2] The Union contends that a violation of E.O. 83, Section 6 constitutes an arbitrable grievance under Article VI, Section 1(b) of the collective bargaining agreement. As a remedy, it seeks that the City "cease and desist retaliatory discrimination."

POSITIONS OF THE PARTIES

City's Position

The City asserts that the Union's request for arbitration must be denied because its claim does not fall within the definition of a grievance under Article VI, Section 1(b) of the collective bargaining agreement. The City maintains that a

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[1]Article VI, Section l(b) states in relevant part that a grievance shall mean:
"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..."

[2]Executive order 83, Section 6 states:
" There shall be no discrimination against any employee because (he) such employee exercises the right of self-organization, presents a grievance, or gives testimony or information in any hearing or conference relating to any matter presented or arising under this Executive Order."

grievance, as defined in the collective bargaining agreement, is a "violation, misinterpretation or misapplication of a rule or regulation or written policy or order of the employer applicable to the agency..." In its petition challenging arbitrability, the City states that the Union, in its request for arbitration, did not refer to a specific rule, regulation or written policy or order that it alleged was violated. The City notes, however, that at the Step II hearing, the grievant cited E.O. 83, Section 6 as the written policy she alleged was violated.

The City contends that E.O. 83 is not a rule, regulation, written policy or order of the employer within the meaning of the collective bargaining agreement and for this reason, the grievance is riot arbitrable. In support of its argument that E.O. 83 is not a rule, regulation, written policy or order of the employer applicable to the agency, the City cites Decision No. B-13-69, in which we held that Executive Order 52 ("E.O. 52") was not a personnel order within the meaning of the NYCCBL, but was rather an executive order because it provided for the implementation of the NYCCBL.[3] According to the City, executive orders which implement provisions of the NYCCBL are not rules or regulations within the definition established by the

[3]Executive Order 52 was amended and reissued as E.O. 83 on July 26, 1973.

collective bargaining agreement and may not be the basis of an arbitrable dispute.[4]

The City cites Decision No. B-13-69 for the proposition that executive orders implement provisions of the NYCCBL and must therefore be interpreted by this Board. It notes that the NYCCBL prohibits public employers from interfering with employees' collective bargaining rights, and that Section 6 of E.O. 83 is an implementation order of the provisions of the NYCCBL. Placing the grievant's claim before an arbitrator, the City asserts, could lead to potential conflicts and inconsistencies with the Board's prior interpretation of the statute. It contends that the grievance is inappropriate for the arbitration process.

In its reply, the City further asserts that the party seeking arbitration must cite the specific rule, regulation, written policy, or order that it claims was violated. The City contends that, aside from E.O. 83, the Union has failed to cite a specific rule, regulation, written policy or order which it alleges was violated.

In the alternative, the City argues, even assuming that E.O. 83 is a rule or regulation of the employer, arbitration should be denied because the grievance falls within the purview of

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[4]The City cites section 12-303 of the NYCCBL to define "executive order." Section 12-303 provides in relevant part that: "The term 'executive order' shall mean, in the case of a mayoral agency, an executive order, memorandum or directive of the mayor ... which provides for the application of the provisions of this chapter or otherwise implements the provisions of this chapter."

management rights. According to the City, Section 12-307(b)[5] of the NYCCBL grants management the right to direct employees and determine personnel issues by which its operations are to be conducted.[6]

The City maintains further that the grievant has failed to establish an arguable relationship between the acts complained of and the alleged discrimination. The City maintains that, where a management right is in dispute, a union must show that a substantial issue under the collective bargaining agreement has been presented.[7] Relying on Decision Nos. B-28-92 and B-19-92, the City maintains that in order to show that a substantial issue exists, the Union must allege specific facts which demonstrate a nexus between the alleged acts and the rule or regulation the Union claims has been violated. In the instant case, the City maintains, the Union has failed to allege specific facts which establish a substantial nexus between the alleged acts of discrimination and E.O. 83, Section 6.

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[5]Section 12-307(b) of the NYCCBL provides in relevant part:

"It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of selection for employment; direct its employees; take disciplinary action; ... maintain the efficiency of governmental operations..."

[6]Decision Nos. B-40-86; B-9-81; B-8-81.

[7] Decision Nos. B-19-92; B-9-81; B-8-81.

Finally, the City contends that the Union's answer is time barred.[8] Citing Decision Nos. B-5-70, B-9-70 and B-32-80, the City maintains that the Board should consider only its petition challenging arbitrability and the Union's request for arbitration when rendering its decision.

Union's Position

The Union contends that the definition of a grievance is not strictly limited to an order of the employer, but also encompasses violations of regulations, rules or written policies of the employer. It maintains that the Department has a written policy against discrimination which the City violated. The Union further contends that the cases cited by the City in its petition are inapposite. The Union notes that, in Decision No. B-13-77, one of the cases cited by the City, this Board held that when a rule is "in the form of an executive order," it remains, a rule and its character as a rule does not change merely because it was promulgated in the form of an executive order. Thus, the Union argues, a violation of an executive order may constitute a

[8] Title 61, Section 1-07(h) (Answer-service and filing) of the Rules of the City of New York states:

"Within ten (10) days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10) days of the receipt of notice of finding by the executive secretary, pursuant to §1-07(d), that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board."

grievance under Article VI, Section b(l) of the parties' collective bargaining agreement. The Union maintains that the City does not specify which "inconsistencies or conflicts" might occur if the instant grievance were submitted to arbitration.

The Union asserts that no pattern of harassment or discrimination is permitted by the NYCCBL under the guise of a claim of management rights. The Union maintains that it has set forth sufficient facts to establish an arguable case of harassment and discrimination, and that more significant facts will be introduced at arbitration.

DISCUSSION

At the outset, we will consider the City's assertion that the Union's answer is time-barred. The City argues that the Board should make its determination based solely on the City's petition challenging arbitrability and the Union's request for arbitration. We are reluctant to allow a short delay to bar the adjudication of serious issues on the merits, unless a delay is so egregious as to cause prejudice to the interests of a party.[9] Here, the time limit was established by the OCB. and was not statutory, and the City has not argued that it was prejudiced by the brief delay. Therefore, we will consider the Union's answer.

When a public employer challenges the arbitrability of a grievance, we must determine whether the parties have obligated

[9] Decision No. B-73-88, see also, B-29-89; B-9-89.

themselves to arbitrate controversies and, if so, whether the contractual obligation is broad enough to encompass the act complained of by the Union.[10] This Board may not create a duty to arbitrate where none exists, nor can it enlarge a duty beyond the scope established by the parties.[11] In the instant case, the parties do not dispute that they have incorporated a grievance and arbitration procedure into their collective bargaining agreement. Therefore, we must determine whether the Union's claim, on its face, demonstrates an arguable relationship between the acts complained of and the source of the rights the Union alleges was violated.[12] If an arguable relationship is shown, the Board will not consider the merits of the case; it is for an arbitrator to decide whether the cited provision applies to the grievance.[13]

The Union asserts that the Department has a written policy prohibiting discrimination, but it has failed to cite such a written policy. In its request for arbitration, the Union claims a violation of Article VI, Section l(b) of the collective bargaining agreement, but fails to cite a specific rule, regulation, written policy or order which it asserts was

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[10] Decision Nos. B-59-90; B-19-89; B-65-88; B-28-82.

[11] Decision Nos. B-28-92; B-41- 90; B-10-90; B-35-89; B-26-88; B-28-83; B-36-80; B-15-79; B-7-79.

[12] Decisions Nos. B-12-94; B-27-93; B-29-92; B-19-89.

[13] Decision Nos. B-12-94; B-27-93; B-24-92; B-59-90.

violated; rather it appears to rely on E.O. 83 Section 6 as the source of the right it claims the City violated.[14]

We find the Union's reliance on E.O. 83 to be misplaced. E.O. 83 provides a grievance and arbitration procedure in cases where the parties have not incorporated such a procedure into their collective bargaining agreement.[15] E.O. 83, Section 6 protects from discrimination those employees who utilize the grievance and arbitration procedure provided by that executive order. In the instant case, E.O. 83, by its own terms, does not provide a grievance and arbitration procedure, because the parties have incorporated such a procedure into their collective bargaining agreement. Therefore, because the parties are not

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[14] The Union does not cite E.O. 83, Section 6 in its Request for Arbitration. The grievant, in her Statement of Grievance, however, alleges that the Department harassed her in violation of Section 6 of an executive order which she did not identify. At the Step II determination, the hearing officer noted that the grievant referred to E.O. 83, Section 6 and the Union, in its response to the City's Petition Challenging, disputed the City's contention that E.O. 83 may not form the basis of an arbitrable dispute. We will assume that the Union relies on E.O. 83, Section 6 as the basis of the right it alleges the City violated.

[15] Section 5a.(l) (Grievance Procedures) of E.O. 83 provides:

"The following grievance procedure shall be applicable to all mayoral agency employees who are eligible for collective bargaining under the New York City Collective Bargaining Law except:

(B) All other employees in a bargaining unit for which the collective bargaining representative recognized or certified to bargain on wages, hours and working conditions has executed a written collective bargaining agreement containing a grievance procedure."

See also Decisions Nos. B-74-90; B-17-84; B-18-83; B-9-83; B-13-77.

governed by the grievance and arbitration procedures set forth in E.O. 83, the Respondent may not rely on E.O. 83 Section 6 as the basis for her grievance.

Additionally, since E.O. 83, Section 6 implements provisions of the NYCCBL, it does not constitute a rule, regulation, written policy or order of the employer within the meaning Article VI, Section 1(b) of the collective bargaining agreement. An allegation of discrimination or harassment in retaliation for filing a grievance is a claimed violation of the NYCCBL[16] and would constitute a claim of improper practice.[17] Here, the Union alleges that the City discriminated against the grievant because she filed a grievance; essentially, this is a claim of an improper practice. An alleged violation of the NYCCBL is a matter which is properly within this Board's jurisdiction, and not within the jurisdiction of an arbitrator.[18]

In sum, we find that the Union has failed to demonstrate an arguable grievance under the collective bargaining agreement.

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[16] Section 12-306(a)(1) of the NYCCBL provides in relevant part that it is an employer improper practice to:
"[T]o interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;"

Section 12-306(a)(3) provides that it is an improper practice for an employer to:
"[To] discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization."

[17] Decision Nos. B-8-85; B-19-84.

[18] Decision No. B-50-90.

Accordingly, for all the above reason challenging arbitrability is granted.

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 instant petition challenging arbitrability docketed as BCB-1552-93 be, and the same hereby is, granted, and it is further,

ORDERED, that the instant request for arbitration be, and the same hereby is, denied.

Dated: New York, New York
March 29, 1995

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

RICHARD WILSKER
MEMBER

JEROME JOSEPH
MEMBER

THOMAS GIBLIN
MEMBER