

City v. DC 37, 7 OCB 7 (BCB 1971) [Decision No. B-7-71 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-7-71

Petitioner

DOCKET NO. BCB-54-69

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
Respondent.

DECISION AND ORDER

The petition herein challenges the arbitrability of a grievance urged by Respondent. Issue was joined by service of Respondent's answer and Petitioner's reply.

Upon consideration of the pleadings, herein, as amplified by the parties in letters to the Board, the Board of Collective Bargaining issues the following decision:

The underlying grievance herein arises out of the "denial to grievant of his promotion to Supervisor II (Social Work)."

Respondent alleges that grievant is blind, and that he was employed for 18 years by the Department of Hospitals, prior to establishment of the New York City Health and Hospitals Corporation which succeeded the Department of Hospitals and which continues to employ grievant in the title of Super-

visor I (Social Work). Pursuant to Section 55 of the Civil Service Law¹ and to Civil Service Rule 4.3.2 and Regulation E.17.2² grievant was examined by the New York State Commission for the Blind and, on the basis of that examination, was certified to the Department of Hospitals by the New York City Civil Service Commission for limited service in the title of Supervisor II (Social Work). In its report to the Civil Service Commission on a form entitled "Disposition of Certification of Eligible List," the Department of Hospitals made the following statement with regard to grievant:

"No appointment made
Not considered - no position available
for limited service."

On the basis of these facts, grievant alleges that his rights under Section 55 of the Civil Service Law and related rules and regulations and under Section 61 of the Civil Service Law³ and related rules and regulations have been violated. He maintains that the matter is a proper subject for grievance and is therefore arbitrable under the terms of the contract between the parties which, in pertinent part, in Article XXII, paragraph 4, Section 1, defines a grievance as:

"A claimed violation, misinterpretation or misapplication of rules or regulations, existing policy or orders applicable to the agency by whom the grievant is employed affecting the terms and conditions of employment. "

The City raises a number of objections to a finding of arbitrability in this matter; they are:

1. the matter "fails to constitute grounds for a grievance pursuant to Executive Order 52 and Local Law 53 of 1967."
2. "the grievant is seeking redress of his grievance at the Commission on Human Rights and is, therefore, in violation of the rules of the Board of Collective Bargaining by seeking remedy in two forums at the same time."
3. nothing in Section 61 of the Civil Service Law requires arbitration of any issue arising under its provisions.
4. the contract between the parties does not provide for arbitration of alleged violations of statute nor does the contract or its grievance and arbitration provisions relate to promotion procedures.
5. the facts alleged do not constitute a violation of Section 61 CSL. In support of this contention, the City argues that it is not arbitrary for an appointing agency or officer to refuse to consider a candidate for promotion where no limited duty positions are available.

The positions of the parties have changed and developed considerably during the course of this matter. Thus, the City's sole initial objection to arbitrability the fact that grievant was also seeking relief before the Commission on Human Rights, has ceased to be an issue in the matter almost from the outset since grievant withdrew his complaint to the Commission on Human Rights shortly after issue was joined herein. Consideration of the possible applicability of Section 61 of the Civil Service Law arose only when this Board, itself, raised the question.

We find that the contract between the parties in defining a grievance as an alleged violation of rules and regulations applicable to the employer agency contemplates violations of such rules and regulations of the Civil Service Commission as those cited by grievant. However, the assertion of grievant's rights under Section 55 of the Civil Service Law coupled with the facts alleged (and essentially unrefuted) do not present an arbitrable issue. The facts relate exclusively to the actions of the Department of Hospitals following grievant's certification for limited service in the title Supervisor II (Social Work). The statute and regulations cited relate only to the processes whereby a blind candidate may obtain certification by the Civil Service Commission. In this connection they prescribe the powers and duties of the State Commission for the Blind and of the New York City Civil Service Commission; they make no reference to the powers and duties of an appointing officer or agency in dealing with a blind candidate once he has been certified. Accordingly, we find that so much of grievant's request for arbitration as relates to alleged violation by the employer of grievant's claimed rights under Civil Service Law Section 55 and related rules and regulations is not arbitrable.

Grievant alleges that the failure to promote him involved a misapplication or violation of Section 61 of the Civil Service Law and Section 4.7.3 of the Rules of the New York

City Civil Service Commission does raise an arbitrable issue. The acts complained of are governed by the statute and rule cited and under the language of the contract between the parties an action allegedly in violation of "rules or regulations . . . applicable to the agency by whom the grievant is employed" is grievable and arbitrable. We therefore find that that portion of grievant's request for arbitration which is addressed to an alleged violation of Section 4.7.3 of the Rules of the New York City Civil Service Commission , i.e. that he was not considered for promotion, is arbitrable.

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 this proceeding be and the same hereby is, referred to an arbitrator to be agreed on between the parties, or appointed pursuant to the Consolidated Rules of the Office of Collective Bargaining, to arbitrate the question

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of whether there was a violation of Section 4.7.3 of the Rules of the New York City Civil Service Commission, namely, that the grievant was-not considered for promotion.

DATED: New York, N.Y.

March 16 , 1971

/s/ Arvid Anderson
CHAIRMAN

/s/ Walter L. Eisenberg
MEMBER

/s/ Timothy W. Costello
MEMBER

/s/ Earl Shepard
MEMBER

/s/ Eric J. Schmertz
MEMBER

/s/ Edward Silver
MEMBER

~~MEMBER~~_____

FOOTNOTES

1 §55. Examination of blind or physically handicapped applicants.

1. Notwithstanding any provision of law to the contrary, except as herein provided, neither the state civil service department nor the state civil service commission nor any municipal civil service commission shall hereafter prohibit, prevent, disqualify or discriminate against any person who is physically and mentally qualified, from competing, participating or registering for a civil service competitive or promotion examination or from qualifying for a position in the classified civil service solely by reason of his or her blindness or other handicap; and any such rule, requirement., resolution or regulation shall be void.

2. The state civil service department and, each municipal civil service commission shall cooperate with the commission for the blind and visually handicapped in the state department of social welfare and the education department to the end that there shall be no discrimination against blind or handicapped persons applying in the civil service, unless the condition of blindness or other handicap be such as to prevent the blind or handicapped person from satisfactory performing the duties of the position to which he seeks appointment.

3. Upon request of an applicant or an eligible for a civil service position who has been found to be blind or otherwise handicapped, the commission for the blind and visually handicapped in the state department of social welfare, or in the case of an otherwise handicapped person, the state education department,, shall obtain from the state civil service department or the appropriate municipal civil service commission a detailed description of all duties of such position and shall investigate the extent of the alleged disability by examination of such applicant or otherwise, and shall determine and report its findings to the state civil service department appropriate municipal civil service commission, as to the physical ability of such applicant or eligible to perform the duties of such position. Such findings shall be given due consideration by the state civil service department or municipal civil service commission.

4. Where the applicant for a civil service position is not so physically disabled by blindness or other handicap as to prevent him from satisfactorily performing the duties of the

position for which he is applying, to insure competitive equality between the blind or other handicapped person and persons not so handicapped in connection with the taking of written civil service test, the commission for the blind and visually handicapped in the state department of social welfare, or in the case of an otherwise handicapped person, the state education department, may request from the state civil service department or appropriate municipal civil service commission the furnishing of an amanuensis when necessary, allowing additional time for such test to insure equality. As amended L.1966, c.309, §3, eff. May 10, 1966.

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Subds. 2-4 amended L.1966, c.309, §3 eff. May 10, 1966.
L.1966 added "and visually handicapped", to the title of the commission in each subdivision.

2 4.3.2.

(a) Satisfactory character and reputation shall be deemed a part of the established minimum requirements and qualification for admission to an examination or for appointment to a position.

(b) A person convicted of petit larceny or dishonorably discharged from the armed forces of the United States shall not be examined, certified or appointed as a patrolman or fireman.

(c) Except as provided in subdivisions (d) and (e) hereof, any physical or mental disability, disease, injury, abnormality, defect or the history thereof, which renders a person unfit for the performance of the duties of the position he seeks or which may reasonably be expected to render him unfit to perform such duties or the failure to meet the required medical or physical standards of a position, shall constitute grounds for the disqualification of such person.

(d) In the case of blind or physically handicapped persons as described in section fifty-five of the civil service law, who do not qualify under subdivision (c) hereof, due consideration shall be given to such findings as may be submitted by the state commission for the blind or the state education department, as the case may be, and such persons, if otherwise qualified, may be certified to positions from eligible lists upon which their names appear either generally or upon limited terms and conditions, as provided by regulations and procedures adopted by the commission and the personnel director.

(e) Where a person on an eligible list does not qualify under subdivision (c) hereof for the position for which the list was established, and where such list is declared appropriate for a position requiring lesser medical and physical standards than those required for the original position, he shall, if he meets such lesser standards, be qualified for the latter position and shall be certified thereto in his regular order on such list.

E.17.3 In the case of a blind or physically handicapped person as defined by law, due consideration shall be given to such findings as may be submitted by the state commission for the blind or the state education department, as the case may be, and such person, if otherwise qualified, may be certified to positions from a list upon which his name appears either generally or limited upon appropriate terms and conditions in accordance with procedures adopted by the department of personnel. Such person shall be required to furnish an appropriate certificate in the case of each examination for which he is an applicant in accordance with the provisions of section fifty-five of the civil service law.

3 §61. Appointment and promotion

1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; provided, however, that the state or a municipal commission

may provide, by rule, that where it is necessary to break ties among eligibles having the same final examination ratings-in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or higher than the final examination rating of the third highest standing eligible willing to accept such appointment or promotion. Appointments and promotions be made from the eligible list most clearly appropriate for the position to be filled.

2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out-of-title work. L.1958, c.790, eff. April 1, 1959.

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4.7.2

Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the director as standing highest on such list who are qualified and willing to accept such appointment or promotion. Appointments or promotions shall be made from the eligible list most nearly appropriate for the position to be filled.