City v. L. 237, CEU, 9 OCB 20 (BCB 1972) [Decision No. B-20-72 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

OFFICE OF LABOR RELATIONS — DECISION NO. B-20-72
-and
CITY EMPLOYEES UNION, LOCAL 237, I.B.T., — DOCKET NO. BCB-119-72

DECISION AND ORDER

The City's petition herein seeks a determination that a grievance urged by Respondent Union is not arbitrable.

Local 237, I.B.T., the certified representative of a unit of various dietician titles, filed its request for arbitration of a grievance alleging that two Head Dieticians at Bellevue Hospital have been assigned to weekend work contrary to "past practices." The request does not cite a contract provision but instead asserts that "past practices which result in long time benefits to the employees have the validity and standing equal to written contracts." The City contests the arbitrability of the grievance arguing that the grievance is not arbitrable under Executive Order 52 and that the action complained of is a management prerogative. The Union's answer cites §8a(2)(B) of Executive Order 52 which defines a grievance as:

> "a claimed violation, misinterpretation, or misapplication of the rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of employment."

The Union argues that a "past practice" affecting the terms and conditions of employment has developed pursuant to which all employees in the title of Head Dietician at Bellevue Hospital excepting the two grievants were assigned to infrequent weekend work, The grievants were not called upon to perform weekend work because the teaching and clinic

activities which comprise their normal assignments do not occur on weekends. The Union argues that the employer's recent order requiring the grievants to share weekend work with the other Read Dieticians violates the past practice..

In the absence of a written contract, the arbitrability of a grievance is determined by §8a(2)(B) of E052. The Union urges the Board to find the grievance arbitrable as a "rule or regulation" on the rationale that a past practice becomes a rule or regulation within the meaning of E052 "when the employer continues a policy on a day to day basis ... for more than twenty years, without change that policy, though unwritten, has the force and effect of a written rule or regulation."

We do not agree that the passage of time without more converts a practice into a rule or regulation. Therefore, we find that Respondent's claim does not constitute an arbitrable grievance within the definition of E052, because the Union has not cited a rule or regulation within the meaning of E052 alleged to have been violated.[1]

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[1] See, City of New York and Local 246, SEIU, Dec. No. B-16-72; (City's petition contesting arbitrability granted where union did not identify the pertinent rule or regulation); City of New York v. Assistant Deputy Wardens Association, Dec. No. B-11-69; (City's petition granted where claim did not come within definition of grievance); City of New York v. Local 1180, CWA, Dec. No. B-10-71 (City's petition granted where Board's "attention has not been directed to any specific contractual provision"): but, compare OLR v. Social Service Employees Union, Dec. No. B-7-68 (City's petition contesting arbitrability denied where contract defined grievance as violation of "existing practice"); City of New York v. Local 420, Dec. No. B-5-69 and City of New York v. UFA, Local 94, Dec. No. B-7-69 (City's petition denied where contract defined grievance as violation of "existing policy").

In a letter to Deputy Chairman Bennett, the Union further argued that the City's participation in the first four steps of the grievance procedure estopped it from asserting that the claim is not a grievance within the definition of E052. The NYCCBL provides that challenges to arbitrability are properly raised when the union files a request for arbitration. We find that the City is not estopped.

Were we to take a contrary view we might be discouraging participation in the step grievance procedures since the City, to preserve its right to challenge arbitrability, would at the outset refuse to participate in a particular case where it believed that the matter complained of was not grievable, and, therefore, not arbitrable.

We shall grant the City's petition. in view of the basis for the disposition of the question raised in this case, there is no need to consider the City's argument that the action complained of is a management prerogative.

0 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 herein be, and the same hereby is, granted; and it is further

ORDERED, that the Respondent's request for arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.
October 24, 1972

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
il e m b e r

MORRIS IUSHEWITZ for HVA
Alternate Member

THOMAS J. HERLIHY
Alternate Member

EDWARD SILVER
M e m b e r

N.B. Labor Member Michelson is a Director of the Health and Hospitals Corporation and therefore abstains from the decision herein.