SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK COUNT : IAS PART 11

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THE CITY OF NEW YORK, HERMAN JENKINS, as City Personnel Director of the City of New York, and EMILY LLOYD, as Commissioner of the Department of Sanitation of the City of New York,

Petitioner,

- against -

Index No. 43764/92

PLUMBERS LOCAL UNION NO. 1 OF BROOKLYN AND QUEENS and MALCOLM D. MacDONALD, as Chairman of the New York City Board of Collective Bargaining, the NEW YORK CITY BOARD OF COLLECTIVE BARGAINING

Respondents.
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LEWIS R. FRIEDMAN, Justice

In this Article 78 proceeding, Petitioners City of New York ("City"), the Department of Personnel ("DOP") and the Department of Sanitation ("DOS") seek an order annulling in part, a decision by Respondent New York City Board of Collective Bargaining ("Board"), which held that alleged violations by DOS of DOP Rules and Regulations are arbitrable disputes. Petitioners further seek an order permanently enjoining Respondent Plumbers Local Union No. 1 of Brooklyn and Queens ("Union"), the representative of the grievant DOS employee, from proceeding with an arbitration based on the challenged decision.

In November 1989, Todd Zimmerman, a DOS civil service plumber, and Respondent Union filed a grievance alleging, *inter alia*, that DOS had violated DOP Rules 4.7.1, 4.7.2 and 4.7.3 by failing to appoint a Supervisor of Plumbers for the DOS Facility Maintenance Unit and by filling the vacancy with a provisional employee who had failed the examination for that position. The grievance was filed pursuant to "Step 2" of a four-step grievance procedure created by Mayoral Executive Order No. 83 (July 26, 1973) ("E.O.83"). E.O.83 provides a grievance procedure for all mayoral agency employees, such as the grievant, who are eligible for collective bargaining, but whose representative labor organizations are not signatories with the City to a written collective bargaining agreement containing a grievance procedure. In late

1990, pursuant to "Step 4" of the procedure, the Union filed a request for arbitration with Respondent Board. Petitioners in turn filed a petition with the Board challenging the arbitrability of the Union's claims. In June 1992, the Board granted the Union's request.

Petitioners challenge the Board's decision primarily on the grounds that a grievance which alleges violations of DOP Rules and Regulations is beyond the scope of the definition of "grievance" as that term is defined in E.O.83. Section 5(b)(B) of E.O.83 defines a grievance as "a claimed violation, misinterpretation, or misapplication of the written rules and regulation of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment." Petitioners contend that the Rules and Regulations of DOP, which the Union claims to have been violated, are not the written rules and regulations of DOS, where the grievant is employed.

In an Article 78 proceeding, a reviewing court's task "where the question is whether the administrative agency made a correct legal interpretation***is merely to see whether the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803, subd. 3)." W. Irondequoit Teachers v, Helsby, 35 NY2d 46, 50. Thus, the question to be answered by this inquiry is whether the Board rationally interpreted the scope of the grievance procedure contained in E.O.83 to include alleged violations by DOS of DOP Rules and Regulations.

It is the general rule that the "construction given by the agency charged with administering [a] statute is to be accepted if not unreasonable." W. Irondequoit Teachers v Helsby, supra. Pursuant to Section 12-309(a)(3) of the New York City Collective Bargaining Law ("NYCCBL"), it is established that the Board of Collective Bargaining is the body empowered to "make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established under Section 12-312 of [the NYCCBL]." Section 12-312, which lists various guidelines to be followed by the Board in establishing grievance and arbitration procedures, states in pertinent part:

> (a) ***The board of collective bargaining shall establish procedures for impartial arbitration which may be incorporated into executive orders and collective bargaining agreements between public employers and public employee organizations.
> (b) Executive orders, and collective bargaining agreements between public employers and public employee organizations, may contain provisions for grievance procedures, in steps terminating with impartial arbitration of

unresolved grievances.***

Rule 7.3 of the Revised Consolidated Rules of the Office of Collective Bargaining further provides that a public employer which is a party to a disagreement as to "whether a matter is a proper subject for the grievance and arbitration procedure established pursuant to Section 11738.0 [recodified as Section 12-312] of the [NYCCBL] or under an applicable executive order***may petition the Board for a final determination thereof." As the administrative agency empowered to determine the grievability and arbitrability of civil service disputes therefore, the Board ought to be accorded broad deference in its determination.

Respondent Board justified its position by first noting that DOP Rules and Regulations are applicable to DOS employees (See DOP Rule II, Section V, 2.5). Consistent with the NYCCBL's and E.O.83's express policy favoring arbitration of grievances, the Board explained that because DOP Rules and Regulations were binding on DOS employees, those rules could properly be deemed the rules and regulations of DOS for purposes of E.O.83. An analogous case which involved a violation of Mayoral Executive Order No. 4 (*Board Decision No.* B-1377) and which was later upheld by Special Term in City of New York v. Anderson, Index No. 40532/78 (Sup. Ct., New York Co. July 17, 1978), was cited as a precedent by the Board.

The court finds here that the Board's decision was neither unreason-able nor arbitrary and capricious.

Although Petitioners attempt to distinguish City of New York v. Anderson by arguing that the holding there was entirely limited to executive orders, this court finds that extending the holding to other agency rules is not unreasonable. As Special Term in that case stated:

> No reasonable purpose can be observed in distinguishing between a rule or regulation promulgated by an individual agency and an executive order of the Mayor directing all mayoral agencies to follow specific policy. Regardless of the source of the directive, it affects both the employee and the employing agency in exactly the same manner. From another point of view, Executive Order No. 4, applicable by its express terms to all city agencies, may be considered as becoming part of the rules and regulations of each agency, just as if it were a rule or regulation promulgated by the individual agency. [Emphasis added.]

City of New York v Anderson, supra.

Petitioners' further argument that DOP Rules and Regulations, having the "force and effect of law," are therefore inappropriate subject of arbitration is equally unconvincing. The one case cited by Petitioners, New York City Transit Authority v. Transport Workers Union of America, Local 100, 177 A.D.2d 695, does not stand for the proposition that claimed violations

of law are not arbitrable. In any event, since Petitioners did not raise this argument in the underlying hearing, Petitioners may not advance it now on Article 78 review. 114 A.D2d 599.

As for the "express, direct and unequivocal" standard set forth in Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association, 42 N.Y.2d 509, this court finds that the standard is inapplicable to the instant case. Unlike Liverpool, the agreement to arbitrate in this case is backed by an express policy favoring impartial arbitration of civil service grievances. Moreover, the narrow view of arbitrability expressed by the court in Liverpool, unlike the instant case, specifically limited arbitrable disputes to health and safety matters. The City of New York in this instance agreed to arbitration of rules and regulations of mayoral agencies, without limit as to the subject matter.

The petition is denied and the proceeding dismissed.
This shall constitute the decision, order and judgment of the court.

Dated: August 13, 1993

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J.S.C.