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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Lillian Roberts DC 37

- v -

MARVIN Williams

INDEX NO. 107904/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion petition denied

per attached

FILED

FEB 19 2008

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2/12/08

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

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In the Matter of the Application of
LILIAN ROBERTS, as Executive Director of
District Council 37, American Federation
of State, County and Municipal Employees,
AFL-CIO,

Petitioner,

For an Order and Judgment Pursuant to
Article 75 of the Civil Practice Law
and Rules,

Index No. 107904/07

-against-

MARVIN WILLIAMS, individually and as
President of the Local 1665,
District Council 37, American Federation
of State, County and Municipal Employees,
AFL-CIO; THE NEW YORK HALL OF SCIENCE;
AND THE AMERICAN ARBITRATION ASSOCIATION,

Respondents.

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Emily Jane Goodman, J.:

Petitioner Lillian Roberts, as Executive Director of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (DC 37), brings this proceeding to stay an arbitration commenced by respondent Local 1665, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (Local 1665), by its president, Marvin Williams (Williams), with regard to wage issues concerning employees of respondent Hall of Science (the Hall). DC 37 also seeks a preliminary injunction compelling the American

Arbitration Association (AAA) to cease processing the arbitration, and compelling the Hall to cease any further participation in the arbitration. In the alternative, DC 37 seeks leave to intervene in the arbitration. The proceeding was previously marked disposed because one of the parties filed for removal to federal court. However, as the federal court has remanded the proceeding to this court, the case is restored for disposition.

I. Background

DC 37 represents 56 local unions whose members are employed by various cultural institutions in New York City (City). Local 1665, one of the locals affiliated with DC 37, represents the employees of the Hall, as well as the employees of several other cultural institutions not involved in the present dispute. Williams is both an employee of the Hall, and president of Local 1665.

The affiliation between DC 37 and Local 1665 is mandated by the DC 37 Constitution (Constitution) (Petition, Ex. B), which states that "[a]ll AFSCME[1] local unions whose members are employed by New York City, New York and its departments, agencies, authorities, and cultural institutions ... shall be affiliated with [DC 37]." *Id.*, Article III, Section 1.

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[1]The American Federation of State, County and Municipal Employees.

The issue of wages and other parameters of employment by the City's cultural institutions is governed by a citywide Cultural Economic Agreement (Economic Agreement) which is negotiated among the City, DC 37 and the various employer cultural institutions. The Economic Agreement is effectuated through "Cultural Pay Orders" which apply to the employees of the various cultural institutions, and which include the terms of the Economic Agreement as to wages, salaries and other benefits.

The relationship between Local 1665 and the Hall is governed by a collective bargaining agreement (CBA). DC 37's Research and Negotiations Department is integral to the negotiation of the CBA. The CBA states, in its introductory paragraph, that it is an agreement between the Hall "and District Council 37 and its affiliated Local 1665 ... (hereinafter called the 'Union')." CBA, Aff. of Marvin Williams, Ex. A., at 3. DC 37 claims that it has negotiated all of the CBAs between the Hall and its employees since about 1969.

The CBA describes a four-step grievance procedure for employees who believe they have been wronged in the conditions of their employment. CBA, Article XIV, Section I. The employee's grievance proceeds through his or her immediate supervisor, followed by submission to the employee's Department Head, and then an appeal to the Hall's Director. Certain grievances which are not resolved following these three steps may proceed to

arbitration under Article XVI, Section 1, Step IV of the CBA, which provides that:

> [a] grievance involving the discharge of an Employee with one or more years of service with the Employer, or the interpretation of this Agreement, or an alleged violation thereof, may be presented for impartial, binding arbitration by either party to this Agreement to the American Arbitration Association. Both parties shall share equally the cost of such arbitration.

Some time before August 2006, the Hall commenced paying some, but not all, of its employees merit pay. In August 2006, Wendell Reid, DC 37's Council Representative assigned to represent Local 1665 members, referred a grievance concerning the issue of merit pay from Local 1665 to DC 37's Legal Department, for a determination as to whether the issue should be arbitrated. DC 37's Legal Department decided against arbitration, because it believed that the grievance lacked merit. DC 37's Legal Department reasoned that, as the CBA did not provide for merit pay, denial of merit pay could not be a violation of the CBA, and, therefore, was not a legitimate grievance.

Regardless, on January 3, 2007, Williams filed a Demand for Arbitration (Demand) with the AAA, Case No. 13 300 00046 07. Petition, Ex. F. At this time, the AAA has filed and docketed the Demand, and the parties, including Hall, have participated in the selection of an arbitrator, and have scheduled hearing dates, although no hearings have yet been held.

In the Demand, Williams described the nature of the

grievance as "[i]mproper payment of merit pay; discriminatory payment of merit pay; unfair denial of merit pay." Demand, Notice of Petition, Ex. I. The relief sought in the Demand is "[p]ayment of equal amount of merit pay to all employees, retroactively; creation of agreed upon criteria for all wage payments (see attached grievances)." *Id.* The attached "Grievance Forms" state, among other things, that merit pay was given without any proper protocol, and was done so in a discriminatory manner. Grievance Forms, Ex. I.

II. Nature of Arguments

The crux of the parties' disagreement is simple: DC 37 argues that, under the Constitution and the CBA, Local 1665 had no authority to unilaterally commence the arbitration of the merit pay issue, after DC 37's Legal Department had declined to give its approval, and that Local 1665's actions are in violation of the Constitution and the CBA. In the forefront of this argument is Article X, Section 3(b) of the Constitution.[2] This section, to which both parties attach significance, reads:

> [DC 37] shall be a party to any negotiations and a signatory of any written instrument resulting therefrom between any local or locals and an employer if the agreement in the opinion of the [DC 37] executive board affects members of a local or locals other than the contracting local or locals and the execution of such instrument must have the prior approval of the executive board.

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[2]Article X is entitled "Relationships of Locals and Council."

DC 37 maintains that a decision reached in an arbitration between a local and a cultural institution/employer can implicate either the Economic Agreement or the Cultural Pay Orders, and thus, has the potential to affect members of locals other than the arbitrating local. Therefore, DC 37 claims the right to approve or disapprove commencement of an arbitration of the present nature before the local may resort to arbitration.

Local 1665, on the other hand, argues that it has always had the right to choose whether to arbitrate matters itself, without regard to DC 37's determination as to the merit of the grievance; has often done so in the past, using its own choice of counsel; and that DC 37 has often supplied counsel from its own Legal Department to prosecute an arbitration, even if it had earlier indicated its belief that the grievance was without merit.

Williams claims that DC 37 woefully misrepresents its role in contract negotiations and, particularly, in the grievance process. Williams protests that "[t]his is just not the way things are done" and that the petition "paints a wholly inaccurate picture of how local unions in DC 37 conduct their collective bargaining." Williams Aff., at 2.

Williams first seeks to cement his claim that Local 1665 has broad negotiating power to chart its own contractual course as well, independent of DC 37. According to Williams, each local votes for its own president and executive board, which conduct

independent negotiations with the members' employers. Local presidents, such as himself, sit on the DC 37 Negotiating Committee in negotiating the Economic Agreements, and the ensuing Pay Orders, as to wages and benefits. He maintains that, after the citywide Economic Agreement is reached, locals are free to vote to "add to or delete from" the terms of the Economic Agreement. Williams Aff., at 3. Further, with regard to contracts between the locals and their members' employers, Williams states that "[t]he decision about what demands to make of an institution is a decision made by the local, the decision about whether to settle a contract is made by the local's Negotiating Committee, and the final power is exercised by its members, who get to ratify their contracts." *Id.*

Williams also cites to Article X, Section 3(b) of the Constitution, highlighting the fact that that section indicates that DC 37 need only be a party to negotiations "*if the agreement* in the opinion of the executive board *affects the members of a local or locals other than the contracting local or locals* ... [emphasis supplied by Williams]." Reasoning that, since the language in that provision apparently does not require DC 37's input on contracts which do not affect locals other than Local 1665, Local 1665 can contract independently from DC 37 in certain contractual matters.

Williams cites to several other sections of Article X of the

Constitution as support for the premise that Local 1665 holds a high level of autonomy in matters of contract, and that DC 37 is contractually constrained in its ability to control locals. Williams refers to Article X, Section 2(a)(concerning the power of "delegates in council" or DC 37's executive board to form policy "binding all affiliated local unions in matters of basic trade union concern"); Section 2(b)(that delegates in council "shall recommend to the respective locals the acceptance or rejection of collective bargaining agreements, memoranda of understanding or any other agreements affecting terms and conditions of employment *that are citiwide in nature* [emphasis by Local 1665]); and Section 2(d)("[t]he executive board may make no decision of any kind specifically affecting an affiliated local union or its membership without first affording a hearing to the local union and giving it reasonable notice thereof ...").

With regard to arbitrations, Williams presents documents purporting to show that grievances brought to arbitration in the past by Local 1665 have always been brought in the name of Local 1665, and that awards are received only in the name of Local 1665, with no reference to DC 37 as a party. Markedly, however, all of the demands presented as evidence by Williams show that they were approved by DC 37 representatives. And Williams admits that, in all these instances, DC 37 eventually provided counsel, even on one occasion in which DC 37 originally disapproved the

arbitration grievance as being without merit.

In that case, which involved a disciplinary action against one Tom Pierce (Pierce), DC 37's General Counsel, Eddie M. Demmings (Demmings), first recommended, in an internal document, that the grievance not be pursued (Williams Aff., Ex D), although the document suggested that further information concerning the grievance would be accepted. A DC 37 council representative not associated with DC 37's Legal Department, Pam R. Lilley (Lilley), then sent a letter to Pierce stating that the Executive Board of DC 37 would be voting on his grievance.

In this letter, Lilley informed Pierce that, despite the impending vote, "the Executive Board of Local 1665 can decide to proceed to Arbitration regardless of the recommendation from the Legal Department." William's Aff., Ex. E; *see* footnote 3 *infra*. Regardless, Exhibit F to Williams' affirmation indicates that DC 37's Associate General Counsel eventually signed off on the arbitration Demand, notwithstanding DC 37's prior reservations. Further, there is no evidence to show that DC 37 did so while still refusing to approve of the arbitration, as Williams implies.

Williams avers that DC 37 wrongly characterizes the arbitration as one to support merit pay to all Hall employees, despite the fact that the CBA does not provide for merit pay. Williams contends, in contrast, that "Local 1665 is not grieving

the denial of merit pay, it is grieving the award of merit pay under unilaterally created rules, to a select group of members." Williams Aff., at 12. As previously quoted from the Demand, this argument is not wholly correct, as the Demand does seek "[p]ayment of equal amount of merit pay to all employees, retroactively."

III. Discussion

CPLR 7503 (b) states, in pertinent part, that "a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with ... ." DC 37 argues that Local 1665 had no contractual authority to commence the present arbitration; essentially, that there was no valid agreement to arbitrate, which would allow Local 1665 to proceed alone.

Despite the parties' initial focus on the language of the Constitution regarding who has authority to contract for Local 1665, the key to whether DC 37's support is required before the present matter can be arbitrated resides primarily in the language of the CBA. The language of the CBA does not support Local 1665, and indicates that DC 37's support must be acquired before Local 1665 may to proceed to arbitration. This key involves the interpretation of the word "parties" in the CBA.

The initial paragraph of the CBA characterizes the parties

thereto as the "Employer" [Hall] "and District Council 37 and its affiliated Local 1665 ... (hereinafter called the 'Union')." Thereafter, the CBA consistently refers to its "parties" as the Hall and the Union, with no further reference to Local 1665 as a separate, autonomous, contracting party.

The use of the conjunctive word "and" between "District Counsel 37" and "affiliated Local 1665" indicates that these parties shall, and must, proceed as one unit. The Court of Appeals, in a case involving the use of the phrase "sudden *and* accidental [emphasis supplied]" in an insurance policy, recognized that, where the conjunctive "and" is used in the contract, "both requirements must be met ... ." *Technicon Electronics Corporation v American Home Assurance Company*, 74 NY2d 66, 75 (1989); *see also Campaign for Fiscal Equity, Inc. v State of New York*, 29 AD3d 175, 177, n 1 (1st Dept), *affd as mod* 8 NY3d 14 (2006)(in the context of legislation requiring action by New York's Governor "and" its Legislature, "[a]s the conjunctive indicates, both must act"); *see also RSP Properties, LLC v Performance Properties, Inc.*, 10 Misc 3d 1051 (A), 1051 (Civ Ct, Kings County 2005)(use of the word "and" "cannot be construed to mean 'either,' which would arise out of use of the term 'and/or'").

The language employed in the CBA's grievance provisions reveals that Local 1665 does not hold individual rights under the

CBA to arbitrate disputes. Article XIV, Section 1, Step IV, provides that grievances "may be presented for impartial, binding arbitration by *either* party to this Agreement [emphasis supplied]" and that "[*b*]*oth* parties shall share equally the cost of such arbitration [emphasis supplied]." CBA, at 24. Since the parties have been defined initially as the "Employer" and the "Union," "either" and "both" must refer to the Hall and the "Union," i.e., DC 37 and Local 1665 acting together as a unit. Therefore, there is no place in the CBA for the assertion that Local 1665 may bring an arbitration on its own behalf, by its own counsel.

The court sees no import in the fact that arbitrations have been brought in the name of Local 1665 in the past, or that awards have been rendered in the name of Local 1665. The demands which Local 1665 has produced, except for the present one, all show that, despite what Williams avers, none of the grievances went to arbitration without DC 37's approval, and the representation of DC 37's General Counsel of choice. The fact that demands for arbitration are made in the name of Local 1665, rather than Local 1665 and DC 37 together, is without import. It only reflects that the various grievances arose in the case of Local 1665 employees, and that the determinations affected Local 1665 employees. It does not reflect that Local 1665 has ever

been free to act without the approval of DC 37.[3]

Also unavailing is Local 1665's implication that its right under the Constitution to contract on its own behalf in certain circumstances gives it the right to pursue arbitration without the support of DC 37. To the extent that the Constitution does allow for independent negotiations between Local 1665 and the Hall in certain parochial matters after the Economic Agreements are negotiated, this fact has no bearing on the issue of the parties' rights and obligations in regard to arbitration, which are governed by the CBA. And, to the extent that the Constitution's Article X, Section 3(b) applies, it certainly can be argued, as DC 37 does, that an award or agreement reached in the present arbitration may negatively impact other locals. According to Demmings, the issue of merit pay is a matter for collective bargaining, and not arbitration. In fact, Demmings states that the matter has already been placed before the Hall as a bargaining demand.

The court finds that none of the other sections of the

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[3]The only suggestion of a policy which might allow Local 1665 to proceed on its own to arbitrate is the letter from Lilley, quoted above. DC 37's General Counsel, Demmings, avers that Pam Lilley is only a council representative, and not a member of the Legal Department, and that she has no authority to make policy for the Legal Department. What is more, there is no indication that her statement was relied upon by Local 1665 when it commenced the present arbitration. Rather, Williams bases his right to lead Local 1665 to arbitration on his interpretation of the parties' contractual rights, and what he describes as prior practice.

Constitution which Local 1665 cites in opposition to the petition (as set forth above) serve to alter this determination. Local 1665's discussion of a local's right to contract under the Constitution does not resolve the issue of who may bring an arbitration on the behalf of a Local 1665 member under the CBA.

III. Conclusion

This court finds that the terms of the CBA and Constitution do not permit Local 1665 to bring an arbitration unilaterally. Local 1665 was obligated to obtain DC 37's authorization before proceeding to arbitrate the merit pay issue. As a result of its failure to do so, DC 37 is entitled to an order staying the arbitration. A preliminary injunction is not necessary to effectuate this decision.

Accordingly, it is

ORDERED that the Clerk is directed to restore this proceeding to the calender as a result of the federal court's remand of the matter to this court; and it is

ORDERED and ADJUDGED that the petition for an order staying the arbitration in Case No. 13 300 00046 07, filed with the American Arbitration Association, is hereby stayed; and it is further

ORDERED that the motion for a preliminary injunction is denied; and it is further

ORDERED that the motion to intervene in the arbitration is

denied as moot.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: February 13, 2008

ENTER:

J.S.C.

EMILY JANE GOODMAN