

City v. PBA, 21 OCB 7 (BCB 1978) [Decision No. B-7-78 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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CITY OF NEW YORK,

Petitioner

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

-----X

DECISION NO. B-7-78

Docket no. BCB-292-78
(A-728-78)

DECISION AND ORDER

The PBA request for arbitration in this case states that the grievance to be arbitrated is as follows

Rescheduling of tours of duty for members
assigned to the Brooklyn North Task Force.

The PBA seeks as a remedy the "[d]iscontinuance of the rescheduled tours and overtime compensation for those rescheduled tours performed."

The term of the contract between the parties, executed on November 28, 1977, is from July 1, 1976 to June 30, 1978. The applicable contract provisions are as follows:

ARTICLE III - HOURS AND OVERTIME

Section 1.

a. All ordered and/or authorized overtime in excess of the hours required of an employee by reason of the employee's regular duty chart, whether of an emergency nature or of a non-emergency nature, shall be compensated for either by cash payment or compensatory time off, at the rate of time and one-half, at the sole option of the employee. Such cash payments or compensatory time off shall be computed on the basis of fifteen (15) minute segments.

b. In order to preserve the intent and spirit of this section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory re-assignment of personnel to different days off and/or tours of duty. In interpreting this section, T.O.P. 336, promulgated on October 13, 1969, shall be applicable. Notwithstanding anything to the contrary contained herein, the Department shall not have the right to reschedule employees' tours of duty, except that on the following occasions the Department may reschedule employees' tours of duty by not more than two hours before or after normal starting for such tours, without payment of pre-tour or post-tour overtime provided that the Department gives at least seven days' advance notice to the employee whose tours are to be so rescheduled: New Year's Eve, St. Patrick's Day, and Thanksgiving Day.

ARTICLE XXIII - GRIEVANCE AND ARBITRATION PROCEDURE
Section 1. - Definitions.

- a. For the purposes of this Agreement the term, "grievance," shall mean:
1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
 2. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this section 1(a), the term, "grievance" shall not include disciplinary matters;
 3. a claimed violation, misinterpretation or misapplication of The Guidelines For Interrogation of Members of The Department referred to in Article XX of this agreement;
 4. a claimed improper holding of an open-

competitive rather than a promotional
examination;

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3.

This PBA request for arbitration arises from the alleged rescheduling of police officers assigned to the Brooklyn North Task Force from an 1800 x 0200 (6 P.M. to 2 A.M.) tour to a 1600 x 2400 (4 P.M. to 12 midnight) or 1000 x 1800 (10 A.M. to 6 P.M.) tour. The PBA alleges that between August 20, 1977 and October 21, 1977 one hundred eighty incidents of rescheduling took place, affecting over forty different police officers. (PBA Exhibit 2(b)). The PBA contends that the City's rescheduling of Task Force members was for the purpose of avoiding the payment of overtime. The PBA stresses that the Police Department requested volunteers for the Brooklyn North Task Force and that these volunteers were assured steady tours four days a week from 1800 to 0200, with a sixty-four hour swing. The PBA also contends that since the Brooklyn North Task Force was initially constituted, all Task Force members were asked to volunteer to work different tours when necessary; and that this practice continued until "arbitrarily changed without the consent of the Task Force Members" by the new borough commander. The PBA argues that the alleged rescheduling of members of the Brooklyn North Task Force to avoid the payment of overtime violates Article 3, Section (1)(b) of the present contract agreed to by the City and the PBA.

The City¹ does not specifically contest any of the PBA's factual allegations concerning either the assurances of a steady tour given to volunteers for the Brooklyn North Task Force or the rescheduling of certain Task Force members. Nor does the City specifically contest the PBA charge that the rescheduling of tours of duty was for the purpose of avoiding the payment of overtime. It is the position of the City that (1) the grievants in seeking overtime compensation for those rescheduled tours which they performed are seeking compensation for time not actually worked; (2) an award of overtime under these circumstances would constitute a gift of public funds which is prohibited by Article 8, Section 1 of the New York Constitution²; and (3) since the relief sought is not constitutionally permissible, the grievance is not arbitrable.

Discussion

The issue for decision by the Board is whether Article 8, §1 of the New York State Constitution, which prohibits gifts of public funds, bars the arbitration of the claims herein. The grievants demand payment of wages at overtime

¹ In addition to its Petition Challenging Arbitrability, the City has sent a letter dated 6/14/78 to the OCB which essentially restated the argument in its Petition.

² New York Constitution Art. 8, Section 1

[Gift or loan of property or credit of local subdivisions prohibited: exceptions for enumerated purposes].
No county, city, town or school district shall give or loan any money or property to or in aid of any individual ...

rates and assert that their rescheduled assignments to the performance of the tours in question were in violation of a specific contract provision relating to rescheduling and overtime. There is no dispute that the tours were actually performed.

In Antonopoulou v. Beame, 32 N.Y. 2d 126, 343 N.Y.S. 2d 346, 296 N.E. 2d 247 (1973), the Court of Appeals addressed a similar question: "whether the payment of public moneys pursuant to a grievance settlement awarding back salary for a period when concededly no services were rendered would constitute a gift of public funds in violation of Article VIII (51) of the New York State Constitution." (emphasis added). 343 N.Y.S. 2d at 348. In Antonopoulou, the Court upheld an award from public money of back pay to a college instructor pursuant to a grievance settlement under a collective bargaining agreement between the City Board of Higher Education and the UFCT for a period when an instructor was on forced maternity leave. The Court stated that:

... (T)he collective bargaining agreement, contemplating as it does a continuing process of grievance resolution through the prescribed grievance procedures, created an enforceable contractual right in the subsequent settlement. Absent a showing ... that the grievance did not relate to the terms or conditions of employment, the settlement is as binding as any other arbitration award. Consequently, there was a legal obligation on the part of the municipality to comply with the settlement decision, and a payment thereunder cannot be considered a gift."

In City of Rochester v. AFSCME, Local 1635, 54 A.D. 2d 257, 388 N.Y.S. 2d 489 (1976), the Appellate Division characterized Antonopoulou as holding "that where the collective bargaining agreement creates an enforceable contractual right, a payment awarded under that agreement cannot be considered a 'gift' in violation of the state constitution." 388 N.Y.S. 2d at 492.

In this case, the PBA, in substance, alleges that but for the employer's rescheduling of tours of duty, the grievants would have been entitled to overtime pay, and that the rescheduling was in violation of a specific contractual provision which, on its face, is intended "to preserve the intent and spirit of this section on overtime compensation...." The Union herein seeks an arbitral remedy through the contract grievance procedures of claims related to the wages of the police officers. Manifestly, an award of overtime pay based upon a finding of contractual obligation would not amount to an unconstitutional gift of public funds.

In support of its position that the grievance in this case is non-arbitrable, the City cites Matter of Burnell v. Anderson, NYLJ, Nov. 26, 1975, p.8, col.1 Sup. Ct., N.Y. Cty, Sp. Term, Part 1, Asch, J.; Konig v. McCoy, NYLJ, Oct. 1, 1971, p.19, col.8; and Vaccara v. Board of Education, 54 Misc. 2d 206, 282 N.Y.S. 2d 881 (1976). These cases do not provide

authority for the City's position. In Burnell³, the court stated that a grievance will be non-arbitrable "where the performance which is the subject of the demands for arbitration is prohibited by statute." In this case, as Antonopoulou has made clear, the "performance" requested, an award of overtime compensation for an alleged violation of a contractual prohibition against rescheduling, is not barred by the constitution. Burnell, therefore, does not apply to the instant case. Konig v. McCoy was an action brought by the estate of a city employee to recover the cash equivalent of accumulated and unused vacation and compensatory time to which the decedent was entitled at the time of his death. The Court in Konig held that the estate of the municipal employee had alleged a valid cause of action and denied the City's motion to dismiss. In Vaccara, the court held that the City's payment of accrued vacation pay to a terminated provisional employee would not violate the constitutional provision prohibiting gifts of public monies. Thus Konig and Vaccara, cited by the City, lend support to the position of the PBA.

Antonopoulou v. Beame is the controlling decision on the issue of arbitrability presented in this case. Antonopoulou held that the payment of back pay, arrived at through contractually prescribed grievance procedures, is not a "gift" in violation of the state constitution.

³ The Burnell decision was legislatively overruled with the signing by Governor Carey of an amendment to §100 of the Civil Service Law (Chapter 255, Laws 1978), providing that an arbitrator may grant a money remedy for the violation of a contract agreement barring assignment of employees to duties substantially different from those appropriate to the title to which the employees are certified.

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8.

The City does not dispute either the existence of an agreement with the PBA whereby contract grievances are to be resolved through arbitration or that the PBA has alleged a violation of the agreement. The grievance is therefore clearly arbitrable.

In determining arbitrability, we do not comment on the merits of the claim to be arbitrated. Thus, we do not inquire as to the substance of the PBA allegation that there has been a contract violation, nor will we intrude into the power of the arbitrator to award a remedy, if he or she deems relief appropriate.

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 the request for arbitration of the Patrolmen's Benevolent Association be, and the same hereby is, granted; and it is further

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9.

_____ORDERED, that the petition of the City of New York con testing
arbitrability be, and the same hereby is, denied.

DATED: New York, N.Y.

July 5, 1978

Arvid Anderson
Chairman

Eric J. Schmertz
Member

Walter L. Eisenberg
Member

Thomas J. Herlihy
Member

Edward J. Cleary
Member