City v. PBA, 23 OCB 13 (BCB 1979) [Decision No. B-13-79 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,
Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,
Respondent.

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DECISION NO. B-13-79

DOCKET NO. BCB-324-79

DECISION AND ORDER

The Patrolmen's Benevolent Association (PBA) filed a request for arbitration on behalf of Grievant, Police officer Thomas J. Connolly, stating as the issue to be arbitrated:

> "The Police Department's under estimation of reimbursement for loss of property by a member of the force while in the performance of duty."[1]

The remedy sought is "a fair reimbursement for the loss of property."

After a number of adjournments agreed to by the parties, the parties completed submission of the case on August 7, 1979.

The request for arbitration states that it is made pursuant, to Article XXIII, Section 1a2, of the contract between the parties. The request further states that the "contract

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[1] Grievant was operating his personal vehicle while on duty with the approval of his supervisor. The dispute arises from the Department's failure to pay Grievant the full amount he claimed as a loss when the automobile was destroyed in an accident. There is no contention that Grievant was responsible for the accident.

provision, rule or regulation" alleged to be violated is "Section 434a-3.10 Administrative Code of City of New York; Article XXIII, §la2 of the contract."

The City's Petition challenging arbitrability asserts that the contract between the parties "does not contemplate a grievance based upon a Section of the Administrative Code." The City requests dismissal of the demand for arbitration on the ground that the matter does not fall within the contractual definition of an arbitrable grievance.

The Union's Answer argues that the parties have adopted a "broad definition" of the term "grievance" and that the contract does not specifically exclude claims such as the one in the instant case from arbitration. The Union points out that the parties could not possibly have anticipated all the problems which might arise in the collective bargaining relationship, and argues that consequently only matters expressly barred by explicit contract language should not be sent to an arbitrator for resolution. The Union cites Long Island Lumber Co. v. Martin, 15 NY2d 380, 259 NYS 2d 142, (1965), for the proposition that "only when the parties have explicit black letter language clearly excluding matters to be determined by arbitration may said matters be found nonarbitrible (sic).

The parties have cited Matter of Acting Superintendent, Liverpool, 42 NY2d 509, 399 NYS 2d 189 (1977). The City relies on this case for the proposition that where the

parties never manifested an intent to submit a matter to arbitration, a request to arbitrate must be dismissed. In this case, the City urges: "The PBA has not and cannot point to any provision of the Agreement or any Department rule, regulation or procedure which has been violated, misinterpreted or misapplied." Further, the City argues that "issues of reimbursement for lost property are legal matters to be determined by the Courts because of the necessity of accounting for the use of public funds."[2]

The PBA contends that Liverpool is inapplicable to the instant case. The PBA argues that the definition of a grievance in Liverpool was far more restrictive than the definition in the contract between the parties herein. Further, the union asserts that PBA is not subject to the Taylor Law and thus the Board should not apply the analysis of the Court in Liverpool construing the Taylor Law limits on public sector scope of bargaining.

DISCUSSION

This case presents a very clear and simple question which has been unnecessarily obscured by the presentations of both parties.

The question before the Board is whether the Grievant's claim relating to reimbursement for a personal property loss

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[2] At an earlier step in the grievance procedure, the Department took the position that Grievant's only remedy lay in a civil suit.

falls within the definition of an arbitrable grievance under the contract between the parties. The PBA alleges that the Department's failure to reimburse grievant is a violation of Article XXIII, Section 1a2, of the contract and of Administrative Code Section 434a-3.10. Since Article XIII, §1a2, defines the term grievance, it is manifest that the failure to reimburse Grievant for personal property does not violate Article XXIII, §1a2. That article does not relate in any substantive way to Grievant's claim.

The contractual definition of an arbitrable grievance is, in pertinent part:

> "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. . . ."

It is clear that an alleged violation of the New York City Administrative Code does not come within the above mutually agreed definition of a grievance. The Administrative Code is a statute[3]; it is not a part of the contract, nor is it a rule, regulation or procedure. Therefore, we must find that the grievance is not arbitrable. If the

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[3] Section 434a-3.10 provides: "Reimbursement for loss of property by member of force while in performance of duty. Whenever any member of the uniformed force of the department shall, while in the actual performance of police duty, lose or have destroyed any of his personal belongings, satisfactory proof thereof having been shown to the commissioner, such member shall be reimbursed to the extent of the loss sustained, at the expense of the City."

Grievant has rights pursuant to the Administrative Code, they must be enforced in court.

Although we consider some of the parties' arguments to be inappropriate, we nevertheless address a few comments to the points raised.

First, we call the attention of the parties to Antonopoulou v. Beame, 32 NY2d 12 (1973), where the Court of Appeals conclusively stated that arbitrators may make awards out of public funds in a proper case. There is thus no basis for the City's allegation that the necessity to account for the use of public funds requires that certain matters be determined solely in the courts. Further, we note that Liverpool is not applicable to the instant case. In Liverpool, the Court held that where a grievance is both arguably within and without the contractual definition of then arbitration should be denied. In the Grievant's claim is not arguably arbitrable

As to PBA's specific assertions, an arbitrable claim, instant case the we note that the applicability of the Taylor Law to public sector employees in the City of New York is provided for in Civil Service Law §212. Although certain provisions of the Taylor Law may be superseded by the enactment of substantially equivalent local procedures in the NYCCBL, it is incorrect to assert as the PBA does that "the New York City Patrolmen's Benevolent Association does not come within the parameters of the Taylor

Law." The Long Island Lumber Co. case cited by PBA held that:

> "It is only where the parties have employed language which clearly rebuts the presumption of arbitrability, e.g., by stating that an issue either as to procedure or as to substance is not to be determined by arbitration that the matter may be determined by the courts. In the absence of such immistakably clear language, as here, the matter is sent to the arbitrator...." (emphasis in original) 15 NY 2d at 385, 259 NYS 2d at 147

The Court gave an example of a method that the parties might employ to rebut the presumption of arbitrability when it suggested that they might explicitly state that a certain issue was not for the arbitrator. However, the Court did not find that the given example was the only method that could be employed to rebut the presumption of arbitrability. In the instant case, by explicitly enumerating the types of violations that are subject to arbitration (violations of the Agreement, rules, regulations or procedures), the parties, on the principle inclusio unius est exclusio alterius, have clearly rebutted any presumption that other types of violations, including violations of a statute, are also arbitrable.

In Steelworkers v. American Mfg. Co., 46 LRRM 2414, (19 the Supreme Court held that the function of the forum determining arbitrability is

> "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

In the instant case, the PBA has not directed our attention to any contract provision which on its face governs claims for lost property.

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 City's Petition herein be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration bef and the same hereby is, denied.

DATED: New York, New York.
October 10, 1979.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EDWARD SILVER
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