City v. PBA, 23 OCB 8 (BCB 1979) [Decision No. B-8-79 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,

Decision No. B-8-79

Petitioner

-and-

Docket No. BCB-329-79

THE PATROLMEN'S BENEVOLENT
ASSOCIATION, INC.,

Respondent
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DECISION AND ORDER

On May 14, 1979, the Patrolmen's Benevolent Association filed a request for arbitration alleging a violation of Article III, §1, of the 1979-1980 collective bargaining contract between the PBA and the City of New York. The grievance to be arbitrated is stated as:

> "The rescheduling of Police Office Michael Barrett, not being the arresting officer, to the 0800 to 1635 tour from his regularly scheduled tour of duty of 1530 to 0005 on November 28, 1978."

The remedy requested is overtime compensation for the rescheduled tour of duty.

The City of New York submitted a letter in lieu of a formal petition challenging arbitrability on May 31, 1979.

Background

The papers submitted by the parties reveal the following facts in substance:

On November 28, 1978, the grievant, Michael Barrett, a police officer for the City of New York, was rescheduled from his normal tour of duty for the purpose of a court appearance.

A grievance was filed on December 29, 1978, seeking the immediate cessation of the rescheduling of patrolmen or, in the alternative, overtime compensation or compensatory time off for such work. The provision of the contract allegedly violated is Article II, Section 1(b), which reads as follows:

> "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. Notwithstanding anything to the contrary contained herein, tours rescheduled for court appearances may begin at 8 am and shall continue for eight (8) hours thirty-five (35) minutes."

Prior to completion of the grievance steps and by Order to Show Cause, dated March 2, 1978, and a Summons and Verified Complaint dated on the same day, the grievant represented by counsel for PBA instituted a proceeding in the Supreme Court, New York County, against the Police Commissioner and the Police Department of the City of New York alleging a violation of the 1978-1980 contract between the City of New York and the PBA. The relief sought from the court was an injunction

against the practice of rescheduling to avoid the payment of overtime compensation. The Corporation Counsel responded for the City by submitting an Answer and a Motion for Summary Judgment. The City's Answer was based on the merits of the case including its right under Section 434a-14.0 of the Administrative Code. The City did not allege the exclusive remedy of arbitration under the contract as a bar to a plenary action in the courts. On April 27, 1979, the Court denied injunctive relief and dismissed the complaint.

The City requests that the PBA's Request for Arbitration be dismissed.

By letters dated August 15 and August 24, 1979, counsel for PBA has suggested that the proceeding in Supreme Court constituted only "an attempt . . . to receive injunctive relief prior to a resolution of the underlying grievance by the Office of Collective Bargaining."

The submissions of the parties have put into issue the question whether a party waives its right to arbitration of a contract dispute if it has already litigated the "identical" dispute in another forum.

The waiver provision of the NYCCBL §1173-8.0(d) provides:

> "As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other tribunal except for the purpose of enforcing the arbitrator's award."

We have consistently held that this statutory requirement imposes a condition precedent to arbitration. (City of New York and UFA, Dec. No. B-10-74; City of New York and UFOA, Dec. No. B-11-75; City of New York and UFOA, Dec. No. B-15-75)

The significance of the principle that the waiver requirement of §1173-8.0(d) constitutes a condition precedent to arbitration is that the waiver requirement must be satisfied before the request for arbitration may be considered, regardless of the merits of the underlying grievance. "Therefore, if the waiver requirement of the law has been violated, the grievance may not be submitted to an arbitrator even if the grievance is otherwise arbitrable." (NYC Housing Authority v. New York City Housing PBA, Inc., Decision No. B-7-76)

The purpose of the rule is to prevent multiple litigations of the same dispute and to assure that a grievant who elects to seek redress through the arbitration process will not attempt at another time to relitigate the matter in another forum. It would be senseless to interpret this rule as barring the submission of a matter to the courts subsequent to an arbitration but permitting a matter adjudicated on the merits by a court thereafter to be submitted to arbitration. Such a construction would ascribe to the law, at least by implication, the intent to give superior status to arbitral awards over court judgments. That is clearly not the purpose of the law which is intended only to force an

express and conclusive election as a precondition to obtaining the remedy of arbitration. Commencement of a court proceeding for adjudication of the underlying dispute in a matter such as this constitutes at least a provisional election; permitting the matter to proceed to the point of judgment renders the election conclusive and irreversible for purposes of §1173-8.0(d) of the NYCCBL. Having obtained a judgment of a court on an issue, a party seeking arbitration of the same issue no longer has the capacity to make a waiver satisfactory to the statutory requirement.

In this case, counsel for PBA commenced a proceeding in Supreme Court by Order to Show Cause and Complaint reciting all of the alleged contractual rights which it here seeks to arbitrate, and demanding injunctive relief. The demand for relief is so worded that it might be argued that the plaintiff was not seeking permanent relief, as the Union now maintains, but only a temporary stay pending arbitration of the underlying issues. That is clearly not how it was understood by the defendant in that matter, the City of New York, which responded with an Answer addressing the substantive issues and a Motion for Summary Judgment. The plaintiff made no response to the Motion, took no action to apprise the Court of the fact that the sole purpose of its complaint was to seek a temporary stay and not permanent relief in a plenary action. It is not surprising therefore that the Court perceived the matter, in

light cast by the City's Answer and Motion for Summary Judgment, as a plenary action for adjudication by the Court with an application for a temporary stay pending final judgment. In any event, it was on that basis that the Court rendered its decision and not only refused a temporary stay but found that plaintiff's underlying complaint was without merit and must be dismissed. In the final analysis, it is that finding which dictates our ruling in the instant proceeding.

In his letter of August 10, 1979, Counsel for PBA hazards the guess that ". . . OCB is cognizant of the fact they cannot provide Injunctive Relief prior to the arbitration of contract grievances . . ." We are also aware that we have no power of review over decisions of the New York State Supreme Court. In dismissing grievant's complaint, Justice Shapiro, deprived of the additional insight which a response to the Motion to Dismiss might have supplied, held in pertinent part:

> "There appears to be no question but that the language above quoted [from Article III Section 1(b) of the contract]]permits the type of rescheduling sought to be enjoined. Nor is there anything in the papers submitted by plaintiff which indicates the contrary. As a result there appears to be no merit to the complaint."

That decision was not appealed to the Appellate Division of the Supreme Court; it cannot be appealed to this Board or to an arbitrator appointed pursuant to the New York City Collective Bargaining Law.

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

ORDERED, that the Union's Request for Arbitration herein be, and the same hereby is denied.

DATED: New York, New York
September 11, 1979.

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

WALTER L. EISENBERG
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