City v. PBA, 23 OCB 9 (BCB 1979) [Decision No. B-9-79 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of — Decision No. B-9-79

THE CITY OF NEW YORK, — DOCKET NO. BCB-325-79

Petitioner, — (A-844-78)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

In the Matter of

THE CITY OF NEW YORK, — DOCKET NO. BCB-340-79

Petitioner, — (A-889-79)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent

DECISION AND ORDER

On April 26, 1979, the Patrolmen's Benevolent Association (Respondent) filed a Request for Arbitration in Docket No. BCB-325-79, stating as the grievance to be arbitrated,

> "The unilateral determination made by the Department in assigning a uniformed member of the service who must appear in court on a scheduled day off to a 0900 to 1700 hour tour or otherwise appropriate tour for attendance of said court."

Respondent asserts that the right alleged to have been violated involves a "group" grievance. The remedy sought is "Assignment to the regular second platoon tour of duty."

On August 1, 1979, Respondent filed a further Request for Arbitration (Docket No. BCB-340-79) on behalf of three named patrolmen. The request alleges the same grievance as in BCB-325-79, and the remedy sought is "Regular second platoon scheduling in the future and appropriate compensation for the tours of duty performed and grieved."

Petitioner, appearing by the Office of Municipal Labor Relations (OMLR), has filed petitions challenging arbitrability in both instances. Petitioner asks that Respondent's requests for arbitration be denied.

Consolidation of Cases

Both of the petitions challenging arbitrability in these cases raise the same questions for the Board. In each case, the Union seeks to arbitrate the question whether Patrol Guide Amendment 114-7 violates the contractual procedure for scheduling court appearances for patrolmen. The City contends that the allegations do not raise arbitrable issues. Section 13.12 of the OCB rules provides, "Two or more proceedings may be consolidated or severed by the Board on notice . . . ." The Board has stated:

> "Consolidation is proper where where there is a plain identity between the issues involved in two or more controversies and a substantial right of one of the parties is not prejudiced by consolidation. (See Symphony Fabrics Corp. v. Bernson Silk Mills, 12 NY2d 409, 240 NYS2d 23; Vigo Steamship Corp. v. Marship Corp., 26 NY2d 157, NYSd 165.)"
>
> (City of New York and New York City Local 246. SEIU; Decision No. B-16-71)

In the instant case, the parties are identical, the issues of contract interpretation are the same, and it does not appear that a substantial right of either party will be prejudiced by consolidation. Therefore, we have consolidated the two cases for the purpose of decision.

Background

On or about February 9, 1979, a grievance was submitted on behalf of the PBA to Deputy Inspector Charles Reuther at Step III of the contractual procedure, stating:

> "The Association is grieving a new Patrol Guide amendment 114-7 with an effective date of February 9, 1979, revision number 79-1 regarding Court Procedure Notifications to Appear During Excusal Period. Said amendment indicates that 'a uniformed member of the service who must appear in court on a

> scheduled day off will be assigned to a 0900 to 1700 hour tour or as otherwise appropriate for attendance at court.' This unilateral change by the Department relative to the 0900 to 1700 hour tour or as otherwise appropriate for attendance at court is a violation of Article XXIII, Section la2 of our current collective bargaining agreement with the City of New York."

On or about April 17, 1979, the grievance was denied at Step IV. No satisfactory resolution of the dispute having been made, Respondent requests arbitration (Case No. BCB-325), and makes a separate request for arbitration (Case No. BCB-340), of the same alleged violation, naming Police Officers Ehlers, Zweigbaum and Bianculli as individual grievants.

Positions of the Parties

Petitioner seeks a determination that the issue is not arbitrable. With respect to Respondent's request, Case No. BCB-325, made immediately upon promulgation of the Patrol Guide amendment as a group grievance, Petitioner sets forth the claim that an arbitration proceeding is "premature," since "there does not appear to be a case or controversy underlying the instant Request."

Furthermore, Petitioner objects to the wording of Respondent's request:

> "The Request for Arbitration appears to contradict the other grievance papers attached to it. Therefore, it is impossible to determine the grounds upon which the Request is maintained. The Respondent appeared to be grieving the Patrol Guide Section . . . in the early steps of the grievance procedure and now is claiming a violation of that provision."

The City argues that Respondent has failed to allege any violation that could constitute a grievance. In Case No. 325, Respondent's Request for Arbitration cites Article XXIII (the grievance and arbitration provision of the contract) and Patrol Guide Amendment 114-7, as "the contract provision, rule or regulation which . . . has been violated." In Case No. BCB-340-79, the Request for Arbitration alleges a violation of Article XXIII of the contract, and also alleges a violation of Administrative Guide Section 304-2, which Petitioner claims is the prior procedure which has been replaced, in part by Patrol Guide Procedure 114-7. Petitioner repeats the contention made in Case No. BCB-325-79 that Respondent has not alleged a violation of any other provision of the collective bargaining agreement, or any rule, procedure, or policy of the Police Department, and therefore, "the request for arbitration is insufficient as it fails to state a specific claimed violation of a provision of the Agreement or any rule, procedure, or policy.

Respondent alleges that Patrol Guide Amendment 114-7 violates Administrative Guide Section 304-2 (Case No. BCB-340), as well as a provision of the Memorandum of Understanding between the parties dated June 16, 1978 (Case No. BCB-325), which states, "[T]hat any tours rescheduled for court appearances shall begin at 8:00 A.M. and shall continue eight (8) hours thirty-five (35) minutes." In its answer to the challenge to arbitrability in Case No. BCB-325, Respondent also cites Article III of the collective bargaining agreement; this provision deals with hours and overtime, and states:

> "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 8:00 A.M. and shall continue for eight (8) hours thirty-five minutes."

Thus, Respondent contends:

> "Protestations to the contrary notwithstanding, a change by the Police Department of court appearances on a police officer's day off immediately following a ratification of a new contract violates the intent and spirit of the collective bargaining agreement of the parties, if not the very language of the Memorandum of Understanding."

Discussion

Article XXIII, Section la, of the parties collective bargaining agreement, defines a grievance as, inter alia, "a claimed violation, misinterpretation or inequitable application of the provisions of the Agreement . . . [or] the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment."

Respondent offers several bases for its grievance against promulgation and implementation of Patrol Guide Amendment 114-7; one such is the claimed inconsistency of the Patrol Guide Amendment with the terms of a Memorandum of Agreement between the parties. That matter can be of no concern to us here since the Memorandum of Understanding has been superseded by the subsequently executed and currently effective contract which was also in force and effect at all times relevant to this inquiry; thus the Memorandum of Understanding can provide no basis for the assertion of an arbitrable grievance herein. It is also readily apparent that the facts alleged by Respondent do not relate to "a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department," a category of grievance defined in Article XXIII, Section la2 of the contract. Respondent's reference to Administrative Guide Section 304-2 and the claim that it is violated by Patrol Guide Amendment 114-7 thus does not present an arbi-

trable grievance since Respondent does not allege that the contract limits the general right of the employer to promulgate amendments of existing rules, regulations and procedures; nor is it claimed that the contract imposes a duty upon the employer specifically to retain unchanged the provisions of Administrative Guide Section 304-2. If Respondent does not have a right to the preservation of such a rule, regulation or procedure, as such, it cannot justify its request to arbitrate a claim that amendment or revocation of the regulation is a violation of the regulation. If it is the Union's claim that conditions provided for in the regulation are also prescribed by the terms of the contract, then its right to continuation of those conditions, if any, derive from the contract and not from the regulation.

There remains the question whether the promulgation and implementation of Patrol Guide Amendment 114-7 is arbitrable as a claimed violation, misinterpretation, or misapplication of any provision of the collective bargaining agreement which is another category of grievance defined in Article XXIII, Section 1a1, of the contract.

The gravamen of Respondent's complaint in Case No. BCB-325 is that promulgation of the Patrol Guide Amendment violated specific provisions of the contract. The

Respondent alleges in Case No. BCB-340 that the same provision of the contract has been violated and three Police Officers actually deprived of rights under the contract by implementation of the same Patrol Guide Amendment.

The facts alleged by Respondent in Case No. BCB-340 thus complement those set forth in Case No. BCB-325 and, supposing that there were any validity to Petitioner's contentions as to the prematurity of the complaint in the latter case, the allegations contained in Case No. BCB-340 would effectively moot the issues Moreover, Petitioner's argument would not be persuasive even in the absence of specific allegations of injury. As mentioned, the contract defines a grievance as, inter alia, "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." [emphasis added] Thus, contrary to Petitioner's contention, the collective bargaining agreement requires no "underlying case or controversy" as a condition precedent to arbitration, but merely a dispute over interpretation of the agreement. The City bases its challenge to arbitrability ,in part, upon what it calls a failure to "state a specific claimed violation of a provision of the Agreement or any rule, procedure or policy of the Department," as well as an apparent contradiction between the request for arbitration and the grievance papers which preceded it. Petitioner asks that we dismiss the request for its failure to cite explicitly a claimed violation of a relevant contract provision.

However, Respondent does not forfeit its right to arbitration of the dispute by its faulty completion of the request form. Although it is true, as Petitioner claims, that Respondent cites inappropriate contract provisions in its request for arbitration, this lapse is corrected in the Union's Answer to the Petition. Paragraph 9 of Respondent's Answer to the challenge to arbitrability clearly sets forth the Union's claim with respect to Article III. We will not dismiss an otherwise valid request for arbitration where insignificant omissions or oversights do not obscure the real issues as to which arbitration is sought. To do so would be inconsistent with the clear mandate of §1173-2.0 of the NYCCBL and with our own well-established policy favoring the resolution of grievances through impartial arbitration. But no such question is presented here. The issue raised by the Petitioner is a technical one. Technically speaking, however, the issue in a case such as this is joined, not with the filing of a Request for Arbitration and a Petition Challenging Arbitrability, but with the filing of a Petition addressed to the arbitrability of a grievance and of an Answer to the Petition. Issue has thus been joined in this case on the question whether promulgation and implementation of Patrol Guide Amendment No. 114-7 was in violation of Article III of the contract and therefore grievable pursuant to Article XXIII 1a of the contract.

The City has not presented convincing evidence to show that the dispute herein is not arbitrable. The Union, in Case No. BCB-325, maintains that the promulgation and, in Case No. BCB-340, that implementation of Patrol Guide Amendment 114-7 violate rights set forth in Article III of the parties' collective bargaining agreement. We have consistently held that the arbitrability of a grievance depends upon whether the parties are subject to the arbitration process for resolving such disputes and whether the particular grievance alleged is within the scope of that agreement to arbitrate. If the answer to both of those questions is "Yes," the matter is arbitrable. The Union's grievance in this case meets this well-settled arbitrability standard and therefore we will order the dispute to arbitration. For the same reasons stated in connection with our consolidation of Cases Nos. BCB-325 and BCB-340 we will direct that the matters be consolidated for arbitration.

Our determination that the issues presented in this matter are arbitrable does not constitute nor should it be construed, in any degree, as a finding or comment upon the merits of those issues. Our decision says only that the controversy between the parties insofar as it relates to alleged violation of the contract between them is within the category of disputes which the parties have agreed to arbitrate. Beyond that point it is for the arbitrator to determine whether there is merit to the allegations of contract violation and, if so, what remedy, if any, is appropriate.

We believe it appropriate to comment in this decision upon the long standing controversy surrounding the interpretation and application of Article III of the contract between the parties. Examination of the decisions of this Board, without inquiry as to the number of disputes arising out of Article III of the contract which have been submitted to arbitration without challenge or decision by the Board, discloses that in a little over a year there have been six cases submitted to and decided by this Board based upon the on-going controversy.

In Decision No. B-5-78, we dealt with the PBA claim that the ten and one-quarter hour tour created by the Police Department and agreed to by the PBA for the purpose of meeting a need for increased patrol manpower during high crime night hours was being misused by the Department in that ten and one-quarter hour tours were being scheduled during day time hours where Police Officers were required to appear in court allegedly for the wrongful purpose of depriving affected police officers of overtime pay to which they would otherwise be entitled. The matter was found to be arbitrable.

In Decision No. B-7-78, we considered the Union contention that rescheduling of tours of duty of employees in the Brooklyn-North Task Force was made for the purpose and with the effect of depriving grievants of overtime to which they were entitled under the contract. The matter was found to be arbitrable.

In Decision No. B-8-78, we rejected the City's contention that an alleged misapplication of a Patrol Guide Rule was not arbitrable by reason of the fact that the particular application of the rule might also constitute a violation of the State Law. We held that the Union's contention that the scheduling practices of the Police Department were in violation of specific contract provisions was arbitrable.

In Decision No. B-9-78, it was claimed by the Union that implementation of the so-called "Court Alert System" had gradually undergone changes and that it was current policy of the employer, with the cooperation of the courts and the District Attorneys' offices, to avoid scheduling court appearances of Police Officers on their scheduled days off in order to avoid paying overtime, and that persistent scheduling of court appearances only during periods when employees were scheduled to work, frequently resulted in employees having only eight hours off, instead of the scheduled sixteen hours, between their court appearance day tour and their next regularly scheduled night tour, all to the detriment of the health and welfare of the affected employees. The claim that these circumstances and conditions were in violation of contract was found to be arbitrable.

We note that this matter was relitigated on application of the City for reconsideration and that upon a more complete presentation of the relevant facts by the City but, most significantly, on the basis of a radical change in the Union's theory of the case as well as the relief sought, none of which were relevant to the issues with which we are concerned here, the Board in Decision No. B-10-78 reversed its prior decision and found the matter not arbitrable.

We would suggest on the basis of the record of controversy and dispute in this area that efforts should be made by the parties, guided by their own experience, by the decisions of this Board and by the awards of arbitrators, to arrive at a more accurate and complete understanding as to their respective rights and obligations with regard to the subject matter with which we have again dealt in this decision.

0 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 above captioned proceedings be and they hereby are, consolidated for the purposes of decision by the Board and hearing by an arbitrator; and it is further

ORDERED, that the petitions herein of the City challenging arbitrability should be, and the same hereby are, denied; and it is

ORDERED, that Respondent's requests for arbitration of the claimed violations of contract herein be, and the same hereby are, granted.

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

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
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