City v, Melia, PBA, 25 OCB 13 (BCB 1980) [Decision No. B-13-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-13-80

Petitioner, DOCKET NO. BCB-354-79

-and-

SAMUEL DE MELIA and the PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondents.

DECISION AND ORDER

On September 5, 1979, the Office of Collective Bargaining received a request for arbitration, dated August 29, 1979, in which the Patrolmen's Benevolent Association (hereinafter "PBA") sought to arbitrate a grievance concerning the rescheduling of a Police officer in alleged violation of overtime provisions of the contract. The City of New York (hereinafter "City") filed a petition challenging arbitrability on September 17, 1979, in which it alleged that the PDA's request for arbitration was untimely and was further barred by a decision of the Supreme Court, New York County in an action entitled Barretty. McGuire, apparently upon the grounds of collateral estoppel. The PDA filed its answer to the petition on October 10, 1979, in which it denied the City's contentions.

NATURE OF THE GRIEVANCE

The PBA's request for arbitration states the grievance in the following terms:

> "The rescheduling of Police officer Maye, not being the arresting officer, to the day tour from his regularly scheduled third platoon tour of duty on March 23, 1978, thereby circumventing the overtime provision of the contract."

The remedy requested is:

> "Overtime compensation for the reschedule [sic] tour of duty."

The PBA alleges that on March 22, 1978, Police Officers Maye and Abernethy entered the 34th Precinct with an individual under arrest for the crime of attempted grand larceny of an automobile. The grievants state that the perpetrator made statements to Abernethy after being advised of his rights, and that Abernethy searched the individual and discovered contraband. Nevertheless, after inquiring which tour of duty it was for each of the officers, the Precinct Desk Officer instructed officer Maye rather than Officer Abernethy to make the arrest. The Desk Officer's instructions were allegedly based upon the Commanding Officer's directive not to assign an arrest to an officer on his fifth tour of duty.[1]

[1] The fifth tour of duty constitutes an officer's last normal shift in a given week. Work performed in excess of the fifth tour would, under the collective bargaining agreement, require the payment of overtime or the grant of compensatory time off, at the rate of time and one-half. It is implied in the record that the Commanding Officer's directive was issued to avoid requiring officer on their fifth tour of duty to work overtime by having to attend the necessary court proceedings following the arrest of an individual.

The PBA filed a grievance on behalf of Officers Maye and Abernethy on April 27, 1978, alleging that the Police Department violated Article III, section 1 of the collective bargaining agreement by assigning the arrest to Officer Maye, thereby circumventing the overtime provisions of the agreement by denying overtime compensation to Officer Abernethy, who actually had made the arrest. Additionally, the PBA alleged that the assignment of the arrest to Officer Maye required that he work the next day tour, which was not his regularly scheduled tour of duty, thus forcing him to miss a scheduled doctor's appointment.

Article III, section 1 of the collective bargaining agreement provides:

> "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 completed 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. 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 (35)minutes. 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 three 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, Thanksgiving Day, Puerto Rican Day, West Indies Day and Christopher Street Liberation Day."

POSITIONS OF THE PARTIES

The City contends that the issues raised in this matter are identical to those raised in a grievance filed on behalf of another Police officer, Michael Barrett. While his grievance was still pending, Barrett, represented by the law firm which also serves as the PBA's attorneys, had commenced an action in Supreme Court, New York County, seeking an injunction against the Police Department's practice of rescheduling to avoid the payment of overtime compensation in alleged violation of the collective bargaining agreement.[2] The City answered on the merits and moved for summary judgment. The Court granted the City's motion and dismissed Barrett's complaint.

Subsequently, the PBA filed a request for arbitration on behalf of Barrett,[3] and the City challenged arbitrability. This Board granted the City's petition and denied arbitration, on the ground that having obtained a judgment of a court on

an issue, the grievant seeking arbitration of the same issue no longer has the capacity to make a waiver satisfactory to the

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[2] Our review of the pleadings in the court proceeding shows that case was brought on behalf of Barrett as an individual Police Officer, and there is no indication of any claim that it was brought on behalf of the PBA. In an affirmation submitted in support of Barrett's pleadings, his attorney described himself as Barrett's attorney and did not mention that his firm also represented the PBA. The PBA was not named as a party to the action, and it does not appear that it was served with any pleadings in the matter.

[3] Docket No. A-853-79.

statutory requirement contained in NYCCBL §1173-8.0(d).[4]

The City argues in the instant case that the above mentioned decision of the Court in the action brought by Barrett should bar arbitration of this grievance on the basis of collateral estoppel. The City claims that inasmuch as the PBA had an opportunity to litigate the same issues in the Barrett court action, it should now be estoppel from relitigating these issues before an arbitrator in the present case.

The City also challenges the timeliness of the PBA's request for arbitration. Article XXIII, section 8 of the agreement requires that any request for arbitration be filed within 20 days after receipt of the Police Commissioner's Step IV decision. The City asserts that the PBA failed to comply with the 20 day time limitation in this case.[5]

The PBA maintains that the City's contentions as to the applicability and effect of the Court's decision in the Barrett case should constitute part of the City's proof to be addressed to an arbitrator in the present case; such contentions, it is claimed, should hot be considered by this Board. Hence, the PBA submits that the Court's decision in Barrett does not collaterally estop the parties from arbitrating this grievance.

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[4] Decision No. B-8-79.

[5] The record shows that the PBA received the Step IV decision on August 17, 1979. The PBA alleges it filed its request for arbitration on August 29, 1979, although it was not received by the City and OCB until. September 5, 1979.

In response to the City's timeliness objection, the PBA asserts that the request for arbitration was timely mailed, and it asks this Board to take notice of the frequent delays and mishaps in the delivery of mail in New York City which may account for the delay in the City's receipt of the request for arbitration.

DISCUSSION

It is clear that the subject of the PBA's grievance falls within the scope of the parties' agreement to arbitrate. article XXIII, section 1 of the collective bargaining agreement defines a grievance as including:

> "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement...."

The grievance herein alleges facts claimed to constitute a violation of the overtime and scheduling provisions found in Article III, section 1 of the agreement. Thus, in the absence of any other considerations, the PBA's grievance would be arbitrable.

However, the City has urged two grounds for barring arbitration of this matter. One ground, that based upon the assertion that the PBA's request for arbitration was not timely filed, may be disposed of summarily. We have repeatedly held that the question of the timeliness of a request for arbitration is an issue of procedural arbitrability, which is to be resolved by the arbitrator.[6] Moreover, we note that the City's factual

[6] See, e. g., Decision Nos. B-14-79, B-6-78, B-11-77, B-14-76, B-9-76, B-3-76.

allegations show that the request for arbitration was, indeed, timely filed.[7]

The other ground raised by the City is one of first impression before this Board. The City contends that the PBA and the individual grievants, Police officers Maye and Abernethy, should be collaterally estoppel by the decision of the Supreme Court, New York County, in a case brought by another grievant, Police officer Barrett.

No legal precedent has been brought to our attention in which a prior court decision has been held to collaterally estop the arbitration of a new grievant's claim arising out of a new set of facts. Although the parties have not submitted any case law on this issue, our own independent research indicates the inapplicability of the doctrine of collateral estoppel to this case.

While it has been said that:

> ... the New York courts have set a hectic pace in expanding the applicability of collateral estoppel..."[8]

nevertheless several fundamental elements are recognized by the courts to be necessary prerequisites to the application of collateral estoppel. We find that at least two necessary elements are absent in the present case so as to render collateral estoppel inapplicable.

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[7] The City alleges that the Step IV decision was issued on August 17, 1979, and that it received the request for arbitration on September 5, 1979. A simple counting of the days shows that the request was filed 19 days after the Step IV decision, thus clearly within the contract's 20 day time limitation.

[8] Rosenberg, "Collateral Estoppel in New York," 44 St. Johns L. Rev. 165, 171.

It is clear that the doctrine of Collateral e requires identity of issue:

> "There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action" Schwartz v. Public Administrator of County of Bronx, 24 N.Y. 2d 65, 71 (1969).

Accord, Gramatan Home investors Corp. v. Lopez, 46 N.Y. 2d 481, 485 (1979). our analysis of the pleadings in the Barrett case shows that the issue raised therein and decided by the Court in that matter is not identical to the issues raised in the present case.

The issue in Barrett, as framed by the City's pleadings, concerned the City's right to reschedule an officer's tour of duty for the purpose of a court appearance resulting from reassignment of such court appearance to an officer other than the one who made the arrest. However, the City represented to the court that reassignment of court appearances to other than the arresting officer only occurred (1) where the complainant is not the police officer but rather a citizen, or (2) where it is clear that the case will not be disposed of at arraignment, e.g., where the District Attorney intends to proceed with an indictment,[9] or (3) where the arresting officer has no personal knowledge of the case. [10]

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[9] Affidavit of Charles G. Reuther in support of City's cross motion for summary judgment, ¶9.

[10] City's Verified Answer, ¶19.

This differs from the present case, insofar as it has not been demonstrated, nor even alleged, that any of the three above-mentioned reasons existed in this case to justify the reassignment of the court appearance to other than the arresting officer. To the contrary, the record shows that Police Officer Abernethy, the actual arresting officer, alleges that he had personal knowledge of the crimes committed, and that he personally recovered contraband from the perpetrator. We express no opinion as to whether these facts would warrant a result different from that reached by the court in Barrett; but clearly, they are sufficient to render the issue herein non-identical to that presented in Barrett.

Our conclusion that this factual difference renders the issues non-identical is consistent with applicable case law.[11]

Moreover, this case differs from Barrett to the extent that Barrett claimed that he was assigned a court appearance in a matter in which he was not the arresting officer and he sought to enjoin such reassignment, while in the present case, Officer Abernethy claims that he was deprived of assignment to a court appearance (and the accompanying overtime compensation) in a matter in which he was the arresting officer, and he seeks payment for such overtime. For this additional reason we conclude that the issues in these two cases are not identical.

[11] See Vincent v. Thompson, 50 A.D.2d 211 (2d Dept. 1975).

In applying collateral estoppel, the courts have also required that the party against whom collateral estoppel is asserted have been a party or privy to the prior litigation. In this -regard, it has been held:

> "(I)t must be shown that the party against whom collateral estoppel is sought to be invoked had been afforded a full and fair opportunity to contest the decision said to be dispositive of the present controversy." Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979).

In the present case, the request for arbitration was filed by the PBA on behalf of grievants Maye and Abernethy. It is apparent that Maye and Abernethy were not parties to the Barrett court action, and had no opportunity to contest that matter. Our review of the pleadings filed in the Barrett action convinces us that the PBA was also not a party in that matter (see footnote 2 supra). Legally, the PBA was not a party of record in Barrett and was apparently not served with the City's pleadings therein. Barrett's attorney, whose firm coincidentally represents the PBA, never purported to speak for the PBA in that matter. We find no legal basis to conclude that the City's suspicion concerning Barrett's representation by an attorney who represents the PBA in other matters is sufficient to warrant a finding that the PBA was a party therein.

The issue of collateral estoppel -raised in this case is analogous to that raised in General Motors Corporation and Goldener, 158 NLRB 1723, 62 LRRM 1210 (1966).In that case, involving

an unfair labor practice charge, it was argued that the individual charging party was barred by collateral estoppel or res judicata because the NLRB General Counsel had previously brought an unfair labor practice charge against the same employer involving the same issue. In upholding the individual's right to maintain his charge, the NLRB noted the requirement that the identical parties, or their privies, be involved in both proceedings, and stated that inasmuch as different charging parties had initiated the two cases, the decision in the prior proceeding would not bar the subsequent one.

Based upon all of the above, we find that the doctrine of collateral estoppel is inapplicable to bar arbitration of the present case.

In addition to our finding that the legal requirements for the application of collateral estoppel are not present in this case, we observe that it has always been Board policy to favor settlement of disputes by arbitration when the parties have agreed to a mechanism for arbitration.[12] Based upon these considerations, we find that this grievance should be submitted to arbitration.

[12] Decision Nos. B-1-78, B-12-71, B-8-68; See NYCCBL §1173-2.0.

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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the PBA's request for arbitration be, and the same hereby is, granted

DATED: New York, N.Y.
May 20, 1980

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD F. GRAY
MEMBER