

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

- between -

THE CITY OF NEW YORK,

DECISION NO. B-17-80

Petitioner,

DOCKET NO. BCB-396-79

- and -

PATROLMEN'S BENEVOLENT  
ASSOCIATION,

Respondent.

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**DECISION AND ORDER**

On November 21, 1979, the Patrolmen's Benevolent Association ("PBA") filed with the Office of Collective Bargaining a request to arbitrate a grievance which challenges an alleged unilateral imposition of a more restrictive policy regarding "permission to leave residence while on sick report." The City filed a petition challenging the arbitrability of this grievance on January 23, 1980. The PBA's answer to the petition challenging arbitrability was filed on March 5, 1980.<sup>1</sup>

**Nature of the Grievance**

The PBA alleges a violation of both a provision of the collective bargaining agreement (Article X, section 2b) and a rule, regulation or procedure of the Police Department (Patrol Guide section 120-1), as a consequence of the Police Department's issuance of Operations Order Number 33, concerning "permission to leave residence while on sick report."

Article X, section 2b of the agreement provides:

"The Chief Surgeon shall consult with

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<sup>1</sup> The delay which occurred from the date of filing of the request for arbitration until the date of filing of the petition challenging arbitrability was occasioned by the City's request that the case be held in abeyance until the PBA provided clarification of the grievance to be arbitrated. The further delay until the date of filing of the PBA's answer resulted from the PBA's request for additional time on the ground that it had misplaced the City's petition.

representatives of the PBA regarding the enforcement of the sick leave program in order to insure that undue restrictions will not be placed upon employees. Departmental orders in connection therewith shall be issued after consultation with the PBA."

In setting forth a detailed statement of the Police Department's sick leave program and the enforcement and implementation thereof, the Department's Patrol Guide states, at section 120-1 thereof:

"A member of the service on sick leave because of a heart condition, broken limb, post-surgical convalescence or prolonged illness who has not been designated 'chronic sick' will not be the subject of telephone calls or visits by personnel assigned to the Medical Section during the period of convalescence indicated on PERMISSION TO LEAVE RESIDENCE WHILE ON SICK REPORT (PD 429-051). Such member may not leave the confines of the resident counties without approval of the Police Commissioner."

The Police Department issued operations Order No. 33 on March 27, 1979. This document is entitled "Permission To Leave Residence While on Sick Report". The Order provides, in pertinent part:

"2. Uniformed members of the service, who have not been classified as chronic absent, and who have any of the following medical conditions, as per the Police Surgeon's diagnosis, will not be the subject of routine supervisory visits or telephone calls except as provided in Administrative Guide procedure 318-12 and paragraph 8 (below):

- a. Heart condition
- b. Broken limbs
- c. Post-surgical convalescence
- d. Illnesses diagnosed by Police Surgeons as likely to be of a duration in excess of six (6) months, after conferral with Chief Surgeon.

3. A member on sick leave in any of the above categories is permitted to leave his residence for a period of time as determined by his District Surgeon. Such permission will ONLY be granted in cases where, in the opinion of the District Surgeon, it will not adversely affect the member's health or impede recovery of the sick member.

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8. The privileges granted under this order can be revoked at any time by the Commanding Officer, Health Services Division, or his designee, upon appropriate notice to the member concerned and his District Surgeon. ...

9. Any provisions of the Department Manual or other departmental directives in conflict with this order are suspended."

The PBA contends that the terms of Operations Order No. 33 are more restrictive than the terms of Patrol Guide, section 120-1, and that the determination to issue said Order was made unilaterally by the Police Department, in violation of Article X, section 2b of the contract. The remedy sought by the PBA is elimination of the "undue restrictions" adopted by the Police Department.

**Positions of the Parties**

The City alleges that Operations Order No.33 was issued after several months of consultation with the PBA in accordance with Article X, section 2b of the contract. The City further states that in the course of negotiations for the 1978-80 contract, the PBA made a demand concerning "Lack of Confinement and Checking During Sick Leave", that the City took the position that the matter was not bargainable but was the subject of ongoing consultation discussions, and that the PBA did not pursue this demand any further in the negotiations and instead participated in another consultation session which was scheduled after the negotiations were completed.

Moreover, the City alleges that the PBA has failed to show how Operations Order No.33 is more restrictive than the prior directive on this subject and how it violates either the contract or the Patrol Guide.

For all of the above reasons, the City contends that this matter is not arbitrable.

The PBA denies that Operations Order No.33 was issued after consultation with the Union. The PBA further denies the City's allegations concerning an alleged PBA bargaining demand on "Lack of Confinement and Checking During Sick Leave", except that it denies knowing whether the City took the position that the demand was not bargainable and was the subject of ongoing consultation discussions.

The PBA asserts that Operations Order No.33 is more restrictive than the prior Police Department procedure because the benefits granted to individuals under Operations Order No.33 can, by its terms, be revoked at any time by the commanding officer, Health Services Division, or his designee.

The PBA argues that, inasmuch as Operations Order No.33 is more restrictive than Patrol Guide section 120-1 and prior Police Department policy, and it was promulgated without consultation with the Union as required by the contract, the grievance clearly states a dispute concerning interpretation of the contract and is arbitrable.

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#### **Discussion**

The City appears to argue that the grievance herein lacks merit because the relevant provision of the contract was complied with through consultation with the Union, and because the Operations Order complained of is no more restrictive than past departmental procedures. Based upon these allegations,

the City contends that the grievance is not arbitrable. However, this argument goes to the merits of the grievance, not to its arbitrability, and as such is appropriately a question for the arbitrator to determine.<sup>2</sup>

It is well established that in determining questions of arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies, and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue.<sup>3</sup> In deciding these questions, we will not inquire into the merits of the dispute.<sup>4</sup>

It is clear that the grievance sought to be arbitrated herein is within the scope of the parties' agreement to arbitrate. On its face, the request for arbitration alleges a violation of a provision of the contract (Article X, section 2b) and a rule, regulation or procedure of the Police Department (Patrol Guide section 120-1). Both of these claimed violations constitute of "grievances", within the contractual definition of that term,<sup>5</sup>

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<sup>2</sup> See Decision Nos. B-15-80, B-2-68.

<sup>3</sup> See Decision Nos. B-10-77, B-5-77, B-1-77, B-11-76, B-5-76, B-1-76, B-28-75, B-18-74, B-14-74, B-8-74, B-4-72, B-8-69, B-2-69.

<sup>4</sup> Decision Nos. B-10-77, B-5-76, B-1-75, B-19-74, B-8-74, B-12-69.

<sup>5</sup> See Article XXIII, section 1a. With respect to a claimed violation of a rule, regulation, or procedure, the contract provides that such a violation is a grievance only if it affects a term or condition of employment. It should be noted that this Board has held that sick leave policy - the general subject of Patrol Guide section 120-1 - is a term and condition of employment. Decision No. B-3-75.

and thus within the ambit of the grievance arbitration provisions of the contract. The relevance or applicability of the cited contractual provision and/or departmental regulation to the facts of the case and to the basic grievance propounded is a matter going to the merits of the case and, hence, for the arbitrator to determine.<sup>6</sup> We observe that the terms of Operations Order No. 33 are not identical to those of Patrol Guide section 120-1. Whether the effect of the differences can be deemed "more restrictive" is for the arbitrator to determine, not this Board. And, clearly the factual dispute as to whether there was consultation between the City and the Union prior to the issuance of Operations Order No. 33, in alleged satisfaction of the contractual requirement, is a question determinable solely by an arbitrator. For these reasons, we will direct that this matter be submitted to arbitration.

**ORDER**

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

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<sup>6</sup> Decision Nos. B-1-76, B-25-75, B-25-72.

Decision No. B-17-80  
Docket No. BCB-396-79  
(A-944-79)

8

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

DATED: New York, N.Y.  
June 3, 1980

ARVID ANDERSON  
CHAIRMAN

WALTER L. EISENBERG  
MEMBER

DANIEL G. COLLINS  
MEMBER

EDWARD F. GRAY  
MEMBER

EDWARD J. CLEARY  
MEMBER

EDWARD SILVER  
MEMBER