

City v. PBA, 25 OCB 31 (BCB 1980) [Decision No. B-31-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration between

THE CITY OF NEW YORK,

Petitioner

DECISION NO. B-31-80

-against-

DOCKET NO. BCB-434-80
(A-1056-80)

THE PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On May 21, 1980, the Patrolmen's Benevolent Association (hereinafter "PBA") filed a request for arbitration (Docket No. A-1056-80) in which it stated the grievance to be arbitrated as:

"The Department's issuance of Operations Order 15 c.s., and the Resultant Tour scheduling as indicated in paragraph 2d of said order."

The City filed a petition challenging the arbitrability of this grievance on June 13, 1980, and the union filed an answer on July 22, 1980.

NATURE OF THE GRIEVANCE

The PBA grieves the Police Department's issuance and implementation of Operations Order 15, dated February 2, 1980, which is entitled "Evening Trial Part - Supreme Court Kings County". This document deals with the procedures to be followed in order for

police officers to be assigned to appear, when required, in the newly created Evening Trial Part of the Kings County Supreme Court. Specifically, the PBA objects to the implementation of paragraph 2d of the order, which provides for the scheduling of tours of duty for officers required to appear in the Evening Trial Part.

This paragraph states:

" TOUR SCHEDULING

Officers scheduled for any appearance in the Evening Trial Part will perform duty with the third platoon, in uniform and respond from his command to court, unless otherwise directed by competent authority. The court will attempt to schedule as many appearances as possible when the officer concerned is performing duty with the third platoon. However, when the member of the service concerned is not scheduled to perform duty with the third platoon, the member concerned will attend, as directed, as indicated below:

- (1) Officer on regular day off will report for duty with the third platoon on an overtime basis.
- (2) officer scheduled to the second platoon will be rescheduled to perform duty with the third platoon.
- (3) Officer scheduled to the first platoon will be rescheduled to the third platoon. if the officer performs duty with the third platoon for a court appearance, he will perform the next scheduled 1st platoon tour immediately following that court appearance. If any period of-time exists between the end of the officer's third platoon tour and the beginning of his scheduled first platoon tour, he may be utilized in accordance with the needs of the command on an overtime basis."

The PBA contends that this order and its implementation violate Article III, section 1b of the collective bargaining agreement, as well as page 12 of the "Memorandum of Understanding" between the parties, and Administrative Guide, section 304-2. The union claims that these documents require that police officers rescheduled for court appearances be assigned to a tour of duty commencing at 8:00 A.M. (allegedly corresponding to duty with the "second platoon"). Therefore, argues the PBA, to the extent that Operations Order 15 requires rescheduling to the "third platoon", it is violative of the documents referred to above. The union contends that this violation has the effect of depriving affected police officers of overtime compensation, to which they are entitled under the collective bargaining agreement. The remedy requested by the PBA is "Appropriate compensation for Rescheduled tours".

POSITIONS OF THE PARTIES

The City alleges initially that the PBA has commenced a proceeding in Supreme Court, New York County, seeking to enjoin the Police Commissioner from enforcing that part of Operations Order 15 which provides for the rescheduling of officers from the first platoon to the third platoon for purposes of court appearances, and which compels them to perform the next scheduled first platoon tour immediately following the court appearance. The City argues that "if" the court proceeding is still pending, then the request for arbitration:

Decision No. B-31-80
Docket No. BCB-434-80
(A-1056-80)

4

"... should be stayed pending either a withdrawal by the PBA thereof, or a final disposition on the merits or the Court's dismissal thereof."

The City also contends that the Board of Collective Bargaining held, in Decision No. B-9-79, that neither the Memorandum of Understanding nor Administrative Guide section 304-2, can form the basis of an arbitrable grievance against the promulgation and implementation of a Department rule, regulation or procedure. The City asserts that the holding of the Board in B-9-79 disposes of the union's claim based upon an alleged violation of the Memorandum of Understanding and Administrative Guide section 304-2, and precludes arbitration of those aspects of the PBA's grievance.

Finally, the City admits that the union's claim based upon an alleged violation of Article III, section 1b of the collective bargaining agreement is within the

"... category of disputes which the parties have agreed to arbitrate...."

The City submits that if arbitration is not stayed on account of the pending court proceeding, only the issue of the alleged violation of Article III, section 1b should be permitted to go to arbitration.

The PBA does not dispute the City's allegations concerning the union's commencement of a court proceeding relating to the instant matter. Further, the PBA does not dispute the City's allegations concerning the decision of the Board in B-9-79 and the

effect of that decision upon claims based upon the Memorandum of Understanding and Administrative Guide section 304-2 in the present case.

Without further explanation, the PEA quotes from provisions of the Memorandum of Understanding, the collective bargaining agreement (which the union concedes succeeded the Memorandum of Understanding), Administrative Guide section 304-2, and the challenged Operations Order 15. The union states that the promulgation and implementation of Operations Order 15, requiring the rescheduling of certain police officers to the third platoon for court appearances, is violative of the term of the above-mentioned documents, which allegedly,

"... prohibit the rescheduling of tours for Court appearances beginning at any time other than 8 a.m."

The PBA concludes that as a result of the alleged violation, the City:

"... must pay the effected [sic] Officers compensation at the overtime rate of any tours rescheduled to necessitate their appearance at the evening trial part."

DISCUSSION

A threshold question to be determined by the Board is whether the alleged pendency of the court proceeding commenced by the PBA in Supreme Court, New York County, provides sufficient cause to stay arbitration of this matter, as requested by the City. The simple answer to this question is, that the court proceeding is no

longer pending. We take administrative notice of the fact that in a decision reported in the New York Law Journal on June 30, 1980 at page 7 thereof, Justice Oliver Sutton of the Supreme Court, New York County, granted the City's cross-motion to dismiss the PBA's petition in that court proceeding, holding that:

"... petitioners must first resort to established grievance procedures regarding whether the provisions of the parties' collective bargaining agreement dealing with changes in hours and working conditions are violated by the challenged operations order."

Inasmuch as the court's dismissal of the PBA's petition was premised on the PBA's right to resolve its grievance through the contractual grievance mechanism, we cannot find that the decision in the court case should operate to stay arbitration in this matter.

However, a broader ground exists to refuse to stay arbitration under the circumstances present in this case. The PBA's order to show cause, petition, and affirmation in the court matter (copies of which were annexed to the City's petition challenging arbitrability herein) demonstrate that the PBA was not requesting that the court render a decision on the merits of the controversy at issue in the request for arbitration. Rather, the PEA only sought to enjoin the Police Commissioner from implementing section (d)(3) of Operations order 15 pending the determination of the grievance.

Specifically, the union advised the court that it had institution grievance under the collective bargaining contract, and it that:

"The processing of grievance through the proper channels is time consuming, and if the stay prayed for herein is not granted pending the final outcome of that grievance, severe and irreparable harm will accrue to the members of the department."

Thus, the PBA requested an order enjoining the police Commissioner, "... pending the determination of the grievance."

Clearly, the PBA was not attempting to circumvent the contractual grievance process, but was seeking to obtain temporary relief pending the final resolution of the grievance, in order to protect members of its bargaining unit from what it mistakenly believed to be irreparable harm.¹ Under these circumstances, there would be no basis for this Board to stay arbitration, even if the court proceeding were still pending. The simultaneous pursuit of both the request for arbitration and the court case would not be inconsistent in any manner with the grievance/arbitration process which is favored under the NYCCBL,² nor would it interfere with the grievant's capacity to file, as a prerequisite to arbitration, a waiver satisfying the statutory requirement.³

¹ In dismissing the PBA's petition, the court stated that the union had failed to show "... that there is a danger that the Patrolmen affected by Operations Order No. 15 will be irreparably harmed by its implementation..."

² NYCCBL §1173-2.0.

³ NYCCBL §1173-8.0d; see Decision No B-8-79

The next aspect of the City's petition challenges the PBA's reliance on the Memorandum of Understanding and Administrative Guide section 304-2 as grounds for its grievance. The City contends that the Board considered and disposed of this issue in its Decision No. B-9-79, involving the same two parties herein.

A review of our holding in B-9-79 supports the City's position. In that case, the PBA also grieved the rescheduling of police officers for court appearances. As in the present matter, the PBA alleged violations of Article III of the collective bargaining agreement, the Memorandum of Understanding, and Administrative Guide section 304-2. The City asserted, as it does herein, that the latter two documents could not support the PBA's grievance. This Board held, with respect to the Memorandum of Understanding,

"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."⁴

We also held, with respect to the union's claim that the issuance of a new amendment to the Patrol Guide⁵ violated the provisions of Administrative Guide section 304-2, that such claim,

"... does not present an arbitrable grievance since [the PBA] 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 [the PBA] does not have a right to the preservation of such a rule,

⁴ Decision No. B-9-79 at p. 7.

⁵ Patrol Guide Amendment 114-7 (concerning rescheduling of tours of duty for-court appearances).

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."⁶

Our decision B-9-79 regarding these issues is equally applicable in the present case. Both cases involve reliance upon the same Memorandum of Understanding, which in the instant case the PBA expressly admits was superseded by the collective bargaining agreement.⁷ Both cases allege that section 304-2 of the Administrative Guide has been violated by the issuance of a new rule, regulation or procedure of the Department: in B-9-79, the promulgation of Patrol Guide Amendment 114-7, and in the present matter, the issuance of Operations Order 15 (which, by its terms, constitutes an "adjustment" to "existing department court procedures"). Therefore, the reasons stated by this Board for rejecting the union's reliance on the Memorandum of Understanding and Administrative Guide section 304-2 in Decision No. B-9-79 are dispositive of the PBA's arguments based upon those same documents herein. Accordingly, we find that these aspects of the PBA'S claim are not arbitrable.

⁶ Decision No. B-9-79 at pp.7-8.

⁷ PBA Answer ¶4.

The arbitrability of the remaining element of the PBA's grievance, that based upon an alleged violation of Article III, section 1b of the collective bargaining agreement, is not in dispute. This section provides, in pertinent part,

"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"

The City admits that the union's claim based upon this section is within the "... category of disputes which the parties have agreed to arbitrate", and concedes that if this matter is not stayed on account of the court proceeding, this claim "... should be allowed to proceed to arbitration...."⁸

We note that we have found similar alleged violations of Article III of the collective bargaining agreement between the City and the PBA to be arbitrable in numerous earlier cases.⁹ This Board has observed that there exists a:

"... long standing controversy surrounding the interpretation and application of Article III of the contract between the parties."¹⁰

⁸ City petition, ¶¶ 16-17.

⁹ See, e-g., Decision Nos. 8-5-78, B-7-78, B-8-78, B-9-78, B-9-79, B-13-80.

¹⁰ Decision No. B-9-79.

Decision No. B-31-80
Docket No. BCB-434-80
(A-1056-80)

11

This continued controversy led us to suggest, in Decision No. B-9-79, 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 [of Article III]"

In view of the further continuance of this dispute concerning the interpretations and application of Article III, we renew our above-quoted suggestion, and add that it would appear that this controversy could most appropriately be resolved through collective bargaining.

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 request of the City of-New York to stay arbitration be, and the same hereby is, denied; and it is further

ORDERED, that the petition of the City of New York challenging arbitrability of claimed violations herein of the Memorandum of Understanding and Administrative Guide section 304-2 be, and the same hereby is, granted; and it is further

Decision No. B-31-80
Docket No. BCB-434-80
(A-1056-80)

12

ORDERED, that the request for arbitration of the Patrolmen's Benevolent Association be, and the same hereby is, granted, only to the extent that it is based upon a claimed violation of Article III, section 1b of the collective bargaining agreement.

DATED: New York, N.Y.
September 4 , 1980

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

FRANKLIN J. HAVELICK
MEMBER

JOHN D. FEERICK
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD J. CLEARY
MEMBER