

City v. PBA, 25 OCB 9 (BCB 1980) [Decision No. B-9-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Decision No. B-9-80

Petitioner

Docket No. BCB-353-79

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION

Respondent

DECISION AND ORDER

On August 14, 1979, the Patrolmen's Benevolent Association (hereinafter "PBA" or the "Union" mailed a request for arbitration of a grievance of the Police Department's "revocation of its original order that authorized the payment of portal to portal pay to those members assigned to paint barriers for the St. Patrick's Day Parade." The request was received and filed by the Office of Collective Bargaining and the Office of Municipal Labor Relations (hereinafter "OMLR" or "the City") on September 5, 1979. The City of New York, appearing by OMLR, challenged the arbitrability of the grievance in a petition filed September 17, 1979.

BACKGROUND

On March 2, 1979, the Restricted Duty Unit temporarily assigned twenty-three police officers to the Police Department's barrier shop in Manhattan to paint barriers for a two week period commencing March 5, 1979.

The assignment was transmitted via the following telephone message sent to the affected commands:

"By direction of Chief of Personnel, direct (Names of Police Officers) to report to 400 East 60th Street in civilian clothes Monday, March 5, 1979 direct at 1600 hours (Tour 4 x 12). Portal to Portal and full night differential will be paid for a two week assignment."

After the grievants' completion of the assignment the Department transmitted the following telephone message on Thursday, April 5, 1979:

"Restricted Duty Unit is directed to notify all commands which supplied personnel for the barrier detail of March 5, 1979 that portal to portal payment is not to be paid. Telephone message issued to this effect was transmitted in error."

The PBA submitted its grievance on behalf of the twenty three officers to the Joint Personnel and Grievance Board on April 20, 1979. By letter dated July 3, 1979, the PBA was notified that the grievance was denied by the Informal Grievance Board at its July 16, 1979 meeting. Thereafter on July 16, 1979 the PBA submitted a letter appealing the Step III decision. Pursuant to Step IV of the grievance procedure the Police Commissioner notified the PBA by letter dated July 27, 1979 that the grievance was denied.

The Union claims violation of Article XXIII Section 1(a) (2) of the July 1, 1978 to June 30, 1980 collective bargaining agreement of the parties. The clause defines a grievance as

"... a claimed violation, misinterpretation or misapplication of the rules regulations or procedures of the Police Department affecting terms and conditions of employment."

The Union seeks arbitration of the grievance under Article XXIII Section 8 of the contract which gives the Union "the right to bring grievances unresolved at Step IV to impartial arbitration."

POSITIONS OF THE PARTIES

The City challenges the arbitrability of the grievance on the grounds that the claim is time barred and that it does not constitute an arbitrable grievance within the meaning of Article XXIII of the agreement.

Article XXIII, Section 8 of the PBA Agreement for the period July 1, 1978 to June 30, 1980, gives the Union the right to bring a grievance unresolved at Step IV to impartial arbitration within twenty days of receipt of the Police Commissioner's Step IV decision.

The Step IV decision is dated July 27, 1979 (no receipt date is mentioned in the pleadings). Petitioner alleges that it did not receive the Union's request for Arbitration until September 5, 1979, although the letter is dated August 14, 1979. Accordingly, the City asserts that the grievance is time barred for the Union's failure to comply with the 20 day time limitations set forth in the Agreement.

Additionally, the City contends that the actions taken by the Police Department in changing its original directive are in complete conformance with the contract and the rules, regulations and procedures of the Police Department, citing Chief of Operations Memo No. 4 and T.O.P. 12. The two cited rules deal with portal-to-portal pay and prescribe the circumstances and conditions under which such payments accrue. Article XXII, Section 4 (Overtime Travel Guarantee) of the contract incorporates the Arbitrator's Award in A-114-70 and provides:

"In the administration of the provisions of this Article the arbitrator's award in OCB Docket No. A-114-70 shall be applicable except that provisions of this Article shall apply to employees assigned to the Article Patrol Unit."

The Award provides that non-uniform assignments are not subject to the portal to portal benefits.

The Union states that the President of the PBA submitted a request for arbitration, dated August 14, 1979, well within the twenty day provision of Section 8 of Article XXIII of the contract. In this regard, the PBA requests this Board to take judicial notice of delays caused by the New York City postal system and claims that the City by raising the issue of timeliness, has placed the question of good faith and intent of the parties "in the grave- jeopardy."

The PBA also claims that any question concerning the clarity or specificity of time frames contained in the current contract should be addressed during contract negotiations between the parties, not in this forum.

The Union further argues that even if the request for arbitration was received more than 20 days after receipt of the Step IV decision, the City was not prejudiced thereby, and this action constitutes, at most, harmless error.

The PBA maintains that the definition of "grievance" embodied in section 12 of Article XXIII of the contract is broad and includes any "claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment...." The Union continues that the grievance alleges a misapplication of the Police Department rules, regulations and procedures affecting the terms and conditions of employment; and similarly section 1(a) 1 of Article XXIII includes

any "claimed violation, misinterpretation or inequitable application of the provisions of this agreement...." as a grievance which the Union characterizes as "extremely broad" language.

The PBA bases its contention, that the police officers who painted barriers for the St. Patrick's Day Parade are entitled to portal-to-portal payment, on long standing department practices, the contract, and the opinion and Award in A-114-70. (G. Allen Dash, Jr., Arbitrator.)

The Union submits that the validity of the grievance must be decided by an arbitrator, while the Board of Collective Bargaining should determine only whether the grievance is properly raised pursuant to the contract.

DISCUSSION

The City raises two bases for challenging the arbitrability of the grievance brought by the PBA. The first questions the timeliness of the grievance. The City claims that since it did not receive the request for arbitration until forty days after the Step IV decision was rendered, the request is time barred.

Article XXIII, Section 8 of the collective bargaining agreement provides that the Union has the right to bring to arbitration any grievances unresolved at Step IV, within twenty days following the Union's receipt of the Police Commissioner's Step IV decision.

The Union's request for arbitration is dated August 14, 1979 which is within twenty days of the rendering and assumed receipt of the decision (although the date received is absent from the

pleadings). It is well settled that questions of precise compliance with contractual provisions as to time periods in pursuing the steps of the grievance and arbitration procedures,

are matters of procedural arbitrability - matters of interpretation and application of contract provisions - and are to be resolved by the arbitrator. (See B-6-68, B-7-68, B-18-72, B-6-75, B-25-75, B-28-75, B-3-76, B-14-76, B-11-77 and B-6-78). In the case at bar whether the PBA timely mailed its request for arbitration of the grievance within the time prescribed by the contract is a question for the "arbitrator whose function it is to apply and interpret the contract." Health & Hospitals Corporation v. Local 237, IBT, Decision No. B-25-75. In this connection, however, we note that September 5, 1979 - the date on which OMLR alleges it was served - the same date on which the Union's Request for Arbitration was received by the Office of Collective Bargaining.

The City also charges that the request for arbitration fails to state the basis of a grievance within the meaning of Article XXIII of the Agreement. The City supports this allegation by submitting Police Department memoranda and Article XXII of the contract governing overtime travel guarantees to show that the complained of actions were in conformance with the rules, regulations and procedures of the Department and the provisions of the Agreement. However, this goes to the merits of the grievance. The question before this Board is whether this matter is submissible to arbitration.

It is the function of the Board to determine only whether the matter at issue falls within or without the category of the disputes which the parties have previously agreed to submit to arbitration. Questions as to the intrinsic merit, soundness and worth of the issue are to be determined not by the Board but by the arbitrator:

"[T]he relevance or applicability of the cited statute or departmental regulation to the situation herein and to the basic grievance propounded by the Union, ... is a matter going to the merits of the case, and, hence, one for an arbitrator to determine." City of New York v. Local 1180, Communications Workers of America, AFL-CIO, Decision No. B-25-72.

Thus, we find that both challenges raised by the City involve questions which are in the purview of the arbitrator and should be left for his determination. Therefore, we will deny the City's petition challenging arbitrability.¹

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

¹ (we note, however, that our decision finding this matter arbitrable is in no manner a reflection of our view of the merits of the underlying dispute (see Decision No. B-7-77).)

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.
April 9, 1980

ARVID ANDERSON
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