

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-4-81

Petitioner

DOCKET NO. BCB-446-80
(A-1103-80)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

A request for arbitration was filed by the Patrolmen's Benevolent Association of the City of New York (hereinafter "PBA") with the office of Collective Bargaining on August 6, 1980. The grievance to be arbitrated was stated as:

"Not permitting any authorized leave to members until all details are filled on every weekend during the summer months."

The Office of Municipal Labor Relations, on behalf of the City, filed a petition challenging the arbitrability of the PBA's grievance on August 29, 1980. After several extensions of time, the PBA submitted its answer to the City's petition on December 10, 1980, although such submission was not completed until the filing of the required

verification of the answer¹ on December 19, 1980. The City filed a letter in reply to the PBA's answer on January 12, 1981.

Nature of the Grievance

The request for arbitration alleges violation of two provisions of the collective bargaining agreement between the City and the PBA (hereinafter the "Agreement") relating to the selection and use of personal leave days and individual vacation days. The PBA claims that the City's actions in restricting the use of leave days on weekends during the summer months are violative of Article X, section 1, and Article XI, section 2 of the Agreement. Article X is entitled "Leaves", and section 1 thereof provides:

"Each employee shall accrue one personal leave day with pay for each fiscal year during which the employee is employed by the Police Department, which the employee shall be entitled to take, at the employee's discretion, subject to the exigencies of the Police Department, in the following fiscal year. A leave day shall consist of an excusal from one regular tour of duty."

¹See Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") §7.7.

Article XI bears the heading "Vacations", and section 1 thereof provides:

"Employees may select individual vacation days at the time vacations are picked, provided that the maximum number of employees allowed to take such individual vacations days at any time shall be 2% of the Force and provided further that no employee may choose more than one of the following holidays as an individual vacation day: Independence Day, Labor Day, Thanksgiving Day, Christmas Day and New Year's Day. Any employee who fails to select such individual vacation days at the time the employee makes his regular vacation pick may select such individual vacation days at a later time subject to the exigencies of the Department. Such individual vacation days shall be treated as regular vacation picks."

The request for arbitration also cites page 5 of section 104-1 of the Police Department's Patrol Guide as being violated by the City's actions. This page deals with, inter alia, certain provisions of the Department's vacation policy and procedures for applying for authorized leave.

The PBA contends that the above provisions of the Agreement and the Patrol Guide have been violated by the City's actions in refusing to grant authorized leave to police officers on weekends during the summer months until all "details" during those time periods are filled, and in

establishing a figure of 20% as the maximum number of men who may be excused on any given tour of duty. The PBA asserts that these actions by the City have made it "all but impossible" for police officers to avail themselves of personal leave and individual vacation days during the summer months.

Positions of the Parties

City's Position

The City concedes that the request for arbitration alleges a violation of provisions of the Agreement and of the Patrol Guide which would arguably fall within the terms of the contractual definition of an arbitrable grievance.² However, the City argues that the provisions of the Agreement and the Patrol Guide claimed to have been violated are "totally inapplicable" to the subject matter, facts, and circumstances of the alleged grievance.

The City notes that the provisions of the Agreement concerning both the selection of individual vacation days (Article XI, section 2) and personal leave days (Article X, section 1) state that such selection is:

²Petition ¶11.

"... subject to the exigencies of the Department."

The City also points out that the Patrol Guide provision on authorized leave (section 104-1, page 5) states that:

"...leaves may be terminated at the discretion of Police Commissioner."

Based upon these provisions, the City asserts that the terms of the Agreement:

"...do not guarantee in any manner or form that an employee will have the right to take such leave at the time of his or her choice. All leave must be approved by the agency and such approval will depend, inter alia, upon the available manpower and resources. The summer is, of course, a peak period of demand for requests to take leave and agencies like the Police Department must maintain an appropriate level of services."

For this reason, the City submits that no provision of the Agreement nor any rule, regulation or order of the Department has been violated. Therefore, the City asks that this Board bar this matter from proceeding to arbitration.

Union's Position

The PBA contends that the Agreement creates a clear entitlement to the use of accrued personal leave and individual vacation days. The PBA observes that the express terms of Article X, section 1 provide for personal leave days,

"...which the employee shall be entitled to take, at the employee's discretion...."

Similarly, the PBA notes that Article XI, section 2 specifies that employees "may select" individual vacation days, subject to designated limitations.

The PBA argues that the further contractual restriction relied upon by the City, i.e., the phrase "subject to the exigencies of the Department", is inapplicable to this grievance because the Police Department has failed to show the existence of any exigency which would bar the selection of personal leave and individual vacation days. In this regard, the PBA alleges that the mere occurrence of the summer months does not qualify as an exigency, within the proper meaning of that word.

The PBA concludes that the City's actions in limiting, arbitrarily, the granting of permission to use personal leave and individual vacation days during the summer months without having shown any exigency to justify such limitation, constitutes a clear violation of Article X, section 1 and Article XI, section 2 of the Agreement, and therefore forms the basis of an arbitrable grievance.

Discussion

There is no dispute in this case that the City and the PBA have agreed to arbitrate grievances, as defined in

Article XXIII of their Agreement. And it is clear that the request for arbitration herein, on its face, alleges a violation of provisions of the Agreement and of a rule or procedure of the Police Department which would fall within the contractual definition of a grievance. Specifically, the PBA alleges violations of Article X, section 1 and Article XI, section 2 of the Agreement, which are claims within the Article XXIII, section 1(a)(1) definition of a grievance as:

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

Similarly, the PBA alleges a violation of page 5 of section 104-1 of the Patrol Guide, which is a claim within the Article XXIII, section 1(a)(2) definition of 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,..."³

However, this Board has held that in determining arbitrability, we will inquire as to the prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through

³We have previously held that the Patrol Guide is a rule, regulation or procedure of the Police Department. Decision Nos. B-15-80, B-8-78.

arbitration. Accordingly, we have held that a grievant, where challenged to do so, has a duty to show that the contract provision or departmental rule invoked is arguably related to the grievance to be arbitrated.⁴ In the present case, the City contends that the provisions of the Agreement and the Patrol Guide relied upon by the PBA are "totally inapplicable" to the subject matter, facts and circumstances of the alleged grievance, and do not create the rights claimed by the PBA to have been infringed by the City's actions. Therefore, the Board will direct its inquiry to the prima facie relationship, if any, between the subject of the PBA's grievance and the provisions of the Agreement and the Patrol Guide upon which it relies.

The PBA's grievance complains of allegedly arbitrary limitations placed by the Police Department upon the use of personal leave and individual vacation days by police officers during the summer months. The PBA alleges, and the City does not deny, that the City has refused to grant authorized leave days to police officers on weekends during the summer months until all "details" during those time periods are filled, and has established a figure of 20% as the maximum number of officers who may be excused on any

⁴Decision Nos. B-21-80, B-15-80, B-15-79, B-7-79, B-3-78, B-3-76, B-1-76.

given tour of duty. The PBA contends that these restrictions make it "all but impossible" for police officers to avail themselves of personal leave and individual vacation days during the summer months.

The provisions of the Agreement relied upon by the PBA do deal with the subject of the selection and use of personal leave and individual vacation days. Article X, section 1 provides for the accrual of personal leave days,

"...which the employee shall be entitled to take, at the employee's discretion, subject to the exigencies of the Police Department...."
(Emphasis added)

Article XI, section 2 provides that:

"Employees may select individual vacation days at the time vacations are picked, ... " (Emphasis added)

subject to specified limitations, and further provides that:

"Any employee who fails to select such individual vacation days at the time the employee makes his regular vacation pick may select such individual vacation days at a later time subject to the exigencies of the Department...."
(Emphasis added)

This Board finds that there is a sufficient connection between the issue raised by the PBA and the above-quoted provisions of the Agreement to warrant submitting this matter

to arbitration. We cannot say that these provisions relied upon by the PBA are not arguably related to the grievance to be arbitrated.

The City's argument that the quoted provisions of the Agreement do not create rights subject to arbitration because use of the benefits of these provisions is,

"...subject to the exigencies of the Department..."

is not persuasive. Whether or not the selection of personal leave and individual vacation days was restricted in the present case because of the "exigencies of the Department" is a question of fact going to the merits of this case, and, hence, is one for the arbitrator to determine.⁵

We note that the PBA alleges that the City has failed to indicate the existence of any exigency barring the selection of personal leave and individual vacation days. In the face of this allegation, the City has continued to refrain from alleging any specific exigency, but has responded with the general statement that:

"All leave must be approved by the agency and such approval will depend, inter alia, upon the available manpower and resources. The summer is, of course, a peak period of demand

⁵See Decision Nos. B-17-80, B-1-76, B-25-75, B-25-72.

for requests to take leave and agencies like the Police Department must maintain an appropriate level of services."

Determination of whether this explanation offered by the City constitutes an "exigency" within the meaning of the Agreement requires interpretation of that Agreement. Moreover, the question posed by the City as to whether police officers possess at any time an enforceable right under the Agreement to select specific personal leave and/or individual vacation days, when confronted with the inclusion of the "subject to the exigencies of the Department" clause, requires interpretation of Article X, section 1 and Article XI, section 2 of the Agreement. Clearly, these are questions involving the merits of the grievance, matters into which this Board will not inquire.

We have long held that the interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator and not for the forum dealing with the question of the arbitrability of the dispute.⁶ Additionally, we note, in this regard, that Section 7501 of the CPLR similarly provides that a Court, in determining questions of arbitrability,

⁶Decision Nos. B-17-80, B-15-80, B-10-77, B-6-77, B-5-77, B-2-77, B-1-76, B-25-72, B-4-72, B-8-68.

"... shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."

Based upon all of these considerations, we are not persuaded by the City's arguments, and we shall order that this matter be submitted to arbitration.⁷

While we find that the PBA has raised an arbitrable grievance based upon alleged violations of provisions of the Agreement, we agree with the City that the PBA's reliance upon page 5 of section 104-1 of the Patrol Guide is misplaced. That document, the substance of which is mainly procedural, does not in any way deal with the subject of entitlement to or selection of Personal leave or individual vacation days. Its text is largely irrelevant to the subject of the PBA's claim, and the only possibly-relevant provision does no more than mandate the time, place and form for submitting an application for a leave of absence. We find that this document is not arguably related to the subject of the PBA's claim, and thus cannot form the basis of an arbitrable grievance. Accordingly, that part of the PBA's claim which is based upon the provisions of the Patrol Guide will not be permitted to be submitted to the arbitrator.

⁷However, in finding this grievance arbitrable, we in no manner express our view on -the merits of the underlying dispute. Decision Nos. B-15-80, B-9-78, B-7-77.

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 City's petition challenging arbitrability be, and the same hereby is, denied, except as to the claim based upon section 104-1 of the Patrol Guide, and as to such claim only, it is granted; and it is further

ORDERED, that the PBA's request for arbitration be, and the same hereby is, granted, to the extent that it is based upon claimed violations of Article X, section 1 and Article XI, section 2 of the collective bargaining agreement.

DATED: New York, N.Y.
February 3, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MARK CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER