

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- - - - - x

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-against-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

- - - - - x

DECISION NO. B-7-81

DOCKET NO. BCB-469-80
(A-1149-80)

DECISION AND ORDER

The Patrolmen's Benevolent Association of the City of New York (hereinafter "PBA") filed a request for arbitration with the Office of Collective Bargaining on November 20, 1980, in which the grievance to be arbitrated was stated as:

"Denial of requests by police officers in Midtown South Precinct to work overtime due to being On the chronic sick list."

The Office of Municipal Labor Relations, on behalf of the City of New York, filed a petition challenging the arbitrability of the PBA's grievance on December 1, 1980. The PBA submitted its answer to the City's petition on December 9, 1980, although such submission was not completed until the filing of the required verification¹ of the

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

answer 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 PBA alleges that the Police Department has denied certain police officers the opportunity to work over-time solely because of those officers' designation as being on the "chronic sick list".² It is claimed that the City's

²Although the parties have failed to define what is meant by the "chronic sick list", the Board takes administrative notice of the fact that the Police Department's Interim Order No.6, a copy of which is annexed to the City's petition, establishes a listing of uniformed members of the force who are designated "chronic absent" in two categories:

"CATEGORY A

A member who reports sick for any reason, except an initial line of duty absence or for hospitalization at any time, four (4) times or more within a twelve (12) month period.

CATEGORY B

A member who reports sick for any reason, except an initial line of duty absence or for hospitalization at any time, six (6) or more times within a twelve (12) month period; OR

For any reason, except an initial line of duty absence or for hospitalization at any time, four (4) times or more within a twelve (12) month period AND loses forty (40) or more WORKDAYS (not calendar days)."

actions in denying these officers' requests to be permitted to work overtime are violative of Article III, section 1; Article X, section 2; and Article XXIII, sections 1 (a) (1) and 1(a) (2) of the collective bargaining agreement between the parties (hereinafter the "Agreement"), relating to overtime compensation, sick leave and grievances.

The PBA contends that by denying officers on the "chronic sick list" the opportunity to work overtime, the City is placing an undue restriction upon the use of sick leave, in violation of Article X, section 2, and is disregarding the parties' intent that employees be given the "untrammelled right", allegedly under Article III, to work overtime whenever physically capable of doing so. The remedy requested by the PBA is the opportunity to work overtime.

Positions of the Parties

City's Position

The City admits that it has denied permission to work overtime to police officers who are on the "chronic sick list", and states that such denial is one aspect of its policy of "... revocation and denial of discretionary benefits and privileges ..." under the Police Department's chronic absence control program, as set forth in departmental Interim order Nos.5 and 6.

The City submits that the PBA has failed to allege any rule, regulation or procedure of the Police Department which it claims has been violated, misinterpreted or misapplied, and thus no grievance has been stated under Article XXIII, section 1(a)(2) of the Agreement.

The City also alleges that although the PBA does allege a violation of Article III, section 1 and Article X, section 2 of the Agreement, it has failed:

"...to establish a nexus between the actions of the Department with respect to the named grievants and those substantive provisions of the Agreement."

The City contends that Article III, section 1, provides for payment for all ordered or authorized overtime, but neither governs nor guarantees the assignment to work overtime. It is asserted by the City that the assignment of such overtime is an unrestricted managerial prerogative", and thus is not controlled by Article III, section 1.

The City further argues that Article X, section 2, provides for what is commonly referred to as "unlimited sick leave" and for the issuance of departmental orders (after consultation with the PBA) concerning enforcement of the Department's sick leave program. The City notes that no claim has been made that the grievants have been denied unlimited sick leave in violation of this Article of the

Agreement. The City concludes that Article X, section 2, as well as Article III, section 1, are not arguably related to the substance of the PBA's asserted grievance, i.e., the denial of permission to work overtime.

The City argues, alternatively, that if the Board finds that the PBA's claim in the instant matter is arbitrable, then said claim should be consolidated with the PBA's grievance now pending before the arbitrator in case number A-846-79. The City alleges that the issue in the present case,

"... would be a subcategory of the issues that could potentially be raised in A-846-79."

The City states that A-846-79 involves the issue of whether aspects of the Police Department's absence control program place undue restrictions on police officers in violation of Article X, section 2 of the Agreement. It is contended that the issue raised herein is subsumed within the broader issue raised in A-846-79. The City asserts that if the present matter is found arbitrable,

"Efficiency and sound labor relations require that these two matters be consolidated."

Union's Position

The PBA alleges that Article III, section 1 of the Agreement:

"...expresses an intent understood by both parties that any employee shall have the untrammelled right to work overtime should he be physically capable of doing so."

The PBA contends that the Police Department's denial of the opportunity to work overtime to officers designated on the "chronic sick list" is arbitrary and violative of the intent and spirit of Article III of the Agreement.

The PBA further argues that Article X, section 2 of the Agreement grants police officers an entitlement to unlimited sick leave, and guarantees that the Police Department will not place "undue restrictions" upon employees in connection with their use of such sick leave. The PBA claims that the overtime restriction placed by the Department on officers who are on the "chronic sick list" constitutes the imposition of an undue restriction upon the use of sick leave, in violation of Article X, section 2.

Finally, the PBA contends that the instant grievance should not be consolidated with the grievance before the arbitrator in case number A-846-79. The PBA alleges that:

"... the factual situation surrounding the instant grievance is different from that found in Arbitration A-846-79."

It is also alleged that the remedy requested in the present case is more limited than that sought in A-846-79. The PBA concludes that the filing of one grievance cannot estop the Union from presenting a second similar grievance arising out of a different factual situation.

Discussion

It is clear in this case that the City and the PBA have agreed to arbitrate grievances, as defined in Article XXIII of their Agreement. The question presented here, initially, is whether the parties' obligation to arbitrate grievances is broad enough in its scope to include the particular controversy at issue in this proceeding. Therefore, the Board will first examine the question of whether the PBA's claim is within that range of matters which the parties, by contract, have agreed to submit to arbitration.

Article XXIII of the parties' Agreement defines a grievance as including, inter alia,

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

and also,

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

The PBA's request for arbitration alleges a violation of three provisions of the Agreement: Article III, section 1; Article X, section 2; and Article XXIII, section 1, subdivisions (a) (1) and (a) (2). Thus, on its face, the request appears to allege three claims which would fall within the contractual definition of a grievance.

However, it is apparent that a claimed violation of Article XXIII, section 1, subdivisions (a) (1) and (a) (2) cannot form the basis of a grievance. As we have previously held, Article XXIII, section 1 of this Agreement merely defines terms used in the Agreement, including the term "grievance", and does not furnish an independent basis for a grievance.³ It has not been alleged, nor can it be, that any of the definitions in that section have been violated, misinterpreted or misapplied. Rather, it is the claimed violation of other articles of the Agreement which may constitute a grievance as that term is defined in Article XXIII.

With respect to the claimed violations of Article III, section 1, and Article X, section 2 of the Agreement, the City argues that the PBA has failed:

³Decision No. B-21-80 at footnote 2.

"...to establish a nexus between the actions of the Department with respect to the named grievants and those substantive provisions of the Agreement."

This Board has a responsibility to 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 arbitration. In circumstances such as these, we have held that a grievant, where challenged to do so, has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.⁴ Therefore this Board must determine whether the provisions relied upon by the PBA, i.e., Article III, section 1, and Article X, section 2, are arguably related to the subject of the PBA's claim.

Article III, section 1 of the Agreement provides, in pertinent part:

"a. All ordered and/or authorized over-time 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...."

⁴Decision Nos. B-4-81, B-21-80, B-15-80, B-15-79, B-7-79, B-3-78, B-3-76, B-1-76.

This Board agrees with the City that the unambiguous language of Article III, section 1, merely provides for payment for the performance of such overtime work as is ordered and/or authorized by the Police Department, and does not guarantee that any employee will be assigned to perform overtime work. Far from granting an "untrammelled right to work overtime", as asserted by the PBA, this section expressly recognizes that overtime must be "ordered and/or authorized" by the Police Department in order to be compensable.

The City has alleged that the assignment of overtime is an unrestricted managerial prerogative". We agree that in the absence of a contractual or other limitation, the assignment of overtime is within the City's statutory management right to:

"...determine the methods, means and personnel by which government operations are to be conducted...."⁵

We do not find that Article III, section 1 creates any limitation on the City's exercise of its prerogative regarding the assignment of overtime.⁶ Therefore, the

⁵NYCCBL §1173-4.3(b).

⁶We note that subdivision (b) of this section appears limit the City's right to reschedule days off and/or tours of duty in order to avoid the payment of overtime. However, no such rescheduling has been alleged in this case, and we do not find this limitation to be relevant to the PBA's claim herein.

Board holds that this provision of the Agreement cannot serve as the basis of the PBA's request for arbitration herein.

The PBA also relies upon Article X, section 2 of the Agreement, which provides:

"Section 2. - Sick Leave

a. Each employee shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service-connected.

b. The Chief Surgeon shall consult with 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."

The PBA contends that this section guarantees that the Police Department will not place "undue restrictions" upon employees in connection with their use of sick leave. The PBA further alleges that the overtime restriction placed by the Department upon officers who are designated on the "chronic sick list" constitutes the imposition of an undue restriction upon the use of sick leave, in violation of Article X section 2. The PBA argues that to penalize officers who make use of this contractual right to sick leave, by depriving them of the opportunity to be considered for the assignment of overtime work, is to unduly restrict their use of sick leave.

The City attempts to refute this argument by asserting that no claim has been made by the PBA that the grievants have been denied the right to sick leave, pursuant to Article X, section 2. The City contends that the restriction placed on the performance of overtime by those on the "chronic sick list" does not constitute a restriction on the use of sick leave. Accordingly, the City submits that the right to sick leave, granted in Article X, section 2, is not arguably related to the PBA's claim which challenges the denial of the opportunity to work overtime, and therefore cannot serve as the basis for an arbitrable grievance.

The Board finds that there is at least an arguable connection between the subject of the PBA's grievance and Article X, section 2. The PBA alleges that the City's actions with respect to overtime have had the effect of unduly restricting the use of sick leave. In the opinion of this Board, this question of whether a restriction placed on the opportunity to work overtime, on account of an employee's use of an amount of sick leave sufficient to place the employee on the "chronic sick list", constitutes an "undue restriction" on employees within the meaning of Article X, section 2, is a matter requiring interpretation of the Agreement. This question involves the merits of the grievance, and, hence, is a matter into which this Board will not inquire.⁷

⁷Decision Nos. B-4-81, B-17-80, B-10-77, B-5-76, B-1-75, B-19-74, B-8-74, B-12-69.

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 arbitrability of the dispute.⁸ Therefore, we hold that that part of the PBA's grievance which is based upon an alleged violation of Article X, section 2, should be submitted to an arbitrator for determination.

The City has argued that if this matter is found arbitrable, it should be consolidated with another, allegedly similar, grievance now pending before an arbitrator in Docket Number A-846-79. The PBA has opposed the requested consolidation.

The Board has reviewed the request for arbitration filed by the PBA in A-846-79. The grievance in that case is stated as:

"The Department's placing of undue restrictions upon our members while on unlimited sick leave and the lack of the Department for [sic] provide full and meaningful consultation with the Chief Surgeon that would have eliminated these undue restrictions."

More specifically, the grievance challenges the issuance and implementation of the Police Department's Interim Order Nos .5 and 6 (copies of which are annexed to the request

⁸Decision Nos. B-4-81, 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.

for arbitration) which establish the Department's Chronic Absence Control Program and performance evaluation procedures incident thereto. The PBA contends, in its request for arbitration in A-846-79, that the Department's promulgation of this program is violative of Article X, section 2 of the Agreement.

The Board finds that the issue raised in the instant case is one aspect of the broader issue raised in Docket No. A-846-79. The instant matter challenges a restriction placed on the opportunity to work overtime, a restriction which the City alleges is an authorized part of the chronic absence control program pursuant to the provision in Interim Order No.6 for the "... revocation and denial of discretionary benefits and privileges including extra compensation...." The grievance in A-846-79 challenges all of the "undue restrictions" alleged to have been placed upon police officers as a result of the promulgation of the chronic absence control program established in Interim Order No.6. Both proceedings involve claims that the Department's actions are violative of Article X, section 2 of the Agreement. The determination of the merits of both grievances will involve the interpretation of Article X, section 2 of the Agreement, particularly that section's provision relating to consultation with the PBA,

"... to insure that undue restrictions will not be placed upon employees",

and the application of that interpretation to the facts and circumstances of each case. Additionally, the City has alleged that:

"The parties will need many of the same witnesses for each of the two matters and the City would probably be in a position to stipulate to the facts in the instant matter."

In view of the identity of parties and issues of contract interpretation in these two cases, and because of the other similarities mentioned above, the Board agrees with the City that efficiency and sound labor relations would be promoted by the consolidation of these two grievances. such consolidation is authorized by §13.12 of the OCB Rules. We have previously held that:

"Consolidation is Proper where there is a plain identity between the issues involved in two or more controversies and a substantial right of one of the parties is not prejudiced by consolidation."⁹

We find that this test is satisfied in the present case. While opposing consolidation, the PBA has failed to demonstrate that a substantial right of the Union would be prejudiced by consolidation. Therefore, we will order that the instant proceeding be consolidated with the grievance in Docket No. A-846-79 for determination by the arbi-

⁹Decision Nos. B-8-74, B-18-71.

trator. The Board is informed that hearings have begun in that matter, but that the PBA has not completed the presentation of its case therein. Accordingly, there is no impediment to the PBA's presentation of the specifics of the instant grievance in the course of the proceedings before the arbitrator.

O R D E R

Pursuant to the Dowers 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 Union's claim based upon Article III, section 1 of the Agreement, and as to such claim only, it is granted; and it is further

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 X, section 2 of the Agreement; and it is further

ORDERED, that the instant grievance be, and the same hereby is, consolidated with the pending grievance in

Office of Collective Bargaining Docket No. A-846-79, for
determination by the arbitrator.

DATED: New York, N.Y.
March 4, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

CAROLYN GENTILE
MEMBER

MARK CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER