

City v. PBA, 29 OCB 3 (BCB 1982) [Decision No. B-3-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Application

-between

THE CITY OF NEW YORK,

DECISION NO. B-3-82

DOCKET NO. BCB-492-81  
(A-1259-81)

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On April 20, 1981, the office of Collective Bargaining ("OCB") received a request for arbitration, filed by the Patrolmen's Benevolent Association (the "PBA"), which sought to redress:

the failure of the Police Department to pay police officers Daniel McCarthy, Anthony Vanis, and Constantine Lamb overtime for a tour of duty performed on November 27, 1980.

The City of New York, by its Office of Municipal Labor Relations (the "City"), filed a petition challenging arbitrability on May 11, 1981. Thereafter, the PBA submitted its answer on May 28, 1981, in response to which the City filed a reply on June 11, 1981.

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REQUEST FOR ARBITRATION

In its request for arbitration, the PBA identifies Article III, Section 1 of the Agreement as the contract provision allegedly violated and Article XXIII, Sections 1 and 2, as the provision pursuant to which the demand for arbitration is made. The applicable contract provisions provide as follows:

ARTICLE III - HOURS AND OVERTIME

Section 1.

a. All ordered and/or authorized overtime 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. Such cash payments or compensatory time off shall be computed on the basis of completed fifteen (15) minute segments.

b. 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. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory reassignment of personnel to different days off and/or tours of duty. In interpreting this Section, T.O.P. 336, promulgated on October 13, 1969, shall be applicable. Notwithstanding anything to the contrary contained herein, the Department shall not have the right to reschedule employees' tours of duty, except that on the following occasions the Department may reschedule employees' tours of duty by not more than three hours before or after normal starting for such tours, without payment of pre-tour or post-tour overtime provided that the Department gives at least seven days' advance notice to the employee whose tours are to be so rescheduled: New Year's Eve, St. Patrick's Day, Thanksgiving Day,

Puerto Rican Day, West Indies Day, and Christopher  
Street Liberation Day.

ARTICLE XXIII GRIEVANCE AND ARBITRATION PROCEDURE

Section 1.- Definitions.

- a. For the purposes of this Agreement the term, "grievance,"-shall mean:
  1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
  2. a. claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of-employment, provided that, except-as otherwise provided in this section-1(a), the term, "grievance" shall not include disciplinary matters:

The PBA seeks as a remedy "reimbursement pursuant to contract."

BACKGROUND

With the advent of the 24-squad system in 1972, the 8-hour tour for patrolmen was lengthened to 8½ hours. The change from a 270-squad system was responsive to the Department's need for greater flexibility in assigning its manpower. To compensate them for the lengthened tour, patrolmen worked fewer tours per year and thus gained more days off per-year; the average annual number of hours remained constant. Men efforts were made to obtain ratification of the 1971-73 contract between the City and fact that the reduction in scheduled appearances from 261 days per year to 243 days per year was limited to patrol personnel the PBA, great dissension arose over the only. This was evidenced by the rejection of two tentative settlement which failed to include a like reduction in the

scheduled number of appearances for police officers assigned to clerical and administrative duties. To overcome the disparity, city and union officials met for the purpose of accommodating non-patrol personnel.

On September 26, 1972, T.O.P. 268-1 issued to all commands from Michael J. Codd, Chief Inspector, on the subject of "Excusal of 16 Chart Days a Year for Certain Members of the City." The avowed purpose of T.O.P. 268-1 was to compensate patrolmen assigned to clerical, administrative, staff and other such duties with 16 excusal days -- i.e. chart days, each year. To minimize the impact on operations efficiency, T.O.P. 268-1 provided that:

The Commanding Officer shall designate the  
days for the excusal of such members.

Pursuant to the mandate of T.O.P. 268-1, a Memorandum, dated October 6, 1972, ("Canick Memorandum") designated Thanksgiving Day as a chart day.

In order to compensate members performing the 8½ hour tours, it is proposed that administrative units under the Deputy Commissioner, Administration be closed on legal holidays. New Year's Day, Washington and Lincoln's Birthday, Memorial Day, July 4th, Labor Day, Columbus Day, Veteran's Day, Thanksgiving and Christmas.

#### **POSITION OF THE PARTIES**

The PBA alleges that the Canick Memorandum, together with a transmittal memorandum from Chief Inspector Codd ("Codd Memorandum") endorsing its content, established

Thanksgiving Day as a chart day for clerical and administrative employees. According to an exposition of the facts submitted as part of Exhibit 1 to the Request for Arbitration,

[t]he practice of mandated chart days was carried through July 4, 1980. During this period when true field manpower emergencies surfaced, such as Columbus Day October 11, 1976 the department recognized the official mandated chart and recompensed members utilized on chart days at the contractual rate of time and one half.

This writing also stresses the productivity savings which have directly resulted from the utilization of legal holidays as chart days. The PBA maintains that against this background, the assignment of these officers to work on Thanksgiving Day 1980, a chart day, constituted an assignment to overtime within the contemplation of Article III of the 1980-82 Collective Bargaining Agreement ("Agreement") between the PBA and the City of New York, entitling Vanis, Lamb and McCarthy to overtime pay.

The City neither questions the existence of an agreement with the PBA whereby grievances are to be resolved through arbitration nor disputes that the PBA has alleged a violation of that agreement. The City argues, however, that Article III, speaking as it does to the remedy of overtime pay, does not fulfill the contractual definition of a grievance as set forth in Article XXIII, Section 1(a)(1), to wit: "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." The City maintains that Article

III does not create a substantive right, the violation of which would give rise to a grievance, but only provides a remedy in the event a substantive right, created by some other provision of the contract, or by a "rule, regulation or procedure," as contemplated in Article XXIII, Section 1(a)(2), is violated.

In response to the PBA's assertion that the Canick and Codd Memoranda created such a substantive right, the City draws our attention to the Department's repeated reservation of power to designate excusal days in a manner "consistent with the operational efficiency of the command."<sup>1</sup> To substantiate this claim the City attached to its petition several examples of operational orders concerning duty scheduling and excusal days containing express language to this effect. Such reservation of power, the City argues, taken in conjunction with the underlined portion of T.O.P. 268-1, to wit: "the commanding officers shall designate the days for the excusal of such members," provides ample authority for the elimination of Thanksgiving Day as a Chart day.

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<sup>1</sup> Operational Order No. 105-1, dated November 10, 1978;  
Operational Order No. 82-3, dated October 4, 1976.

DISCUSSION

The PBA's request for arbitration arises from the alleged rescheduling of Vanis, Lamb and McCarthy to a tour of duty on Thanksgiving Day, November 27, 1980. The PBA, in substance, alleges that but for the aforementioned rescheduling, the grievants would have been entitled to overtime pay, and that the rescheduling was in violation of a specific contractual provision, i.e. Article III, Section 1(b), which, on its face, is intended "to preserve the intent and spirit of this section on overtime compensation."

We cannot accept the City's characterization of Article III as a mere remedy provision. To the extent that Article III, at Section 1(a), refers to "all ordered and/or authorized overtime in excess of the hours required of an employee by reason of the employee's regular duty chart," and provides, at Section 1(b), that "in order to preserve the spirit of this section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty," the rescheduling which resulted in the elimination of Thanksgiving Day as a chart day was, it is alleged, a violation of this Article. Furthermore, a determination as to the entitlement of these officers to overtime pay under Article III, Section 1(a) must be preceded by a determination as to the propriety of the rescheduling herein, which determination would necessitate an inquiry into the substance of the PBA's allegation that there has been a contract violation.



It is well established that the question before the Board on a petition challenging arbitrability is one of substantive arbitrability -- i.e. is there an agreement between the parties to subject their disputes to arbitration, and, if so, is the obligation broad enough in its scope to include the particular controversy presented.<sup>2</sup> Thus, the authority of the Board to find a matter arbitrable rests upon the contractual obligation incurred by the parties to arbitrate such disputes. Here, there is no question that the parties have included a grievance procedure in their collective bargaining agreement, culminating in final and binding arbitration.

The City does not dispute either the existence of an agreement with the PBA whereby contract grievances are to be resolved through arbitration or that the PBA has alleged a violation of the agreement. The grievance is therefore clearly arbitrable.

In determining arbitrability, we do not comment on the merits of the claim to be arbitrated. Thus, we do not inquire as to the substance of the PBA allegation that there has been a contract violation, nor will we intrude into the power of the arbitrator to award a remedy, if he or she deems relief appropriate.

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<sup>2</sup> Decisions Nos. B-22-80; B-15-77.

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 request for arbitration of the Patrolmen's Benevolent Association be, and the same hereby is, granted; and it is further

ORDERED, that the petition of the City of New York contesting arbitrability be, and the same hereby is, denied.

DATED: New York, New York  
January 11, 1982

ARVID ANDERSON  
CHAIRMAN

MILTON FRIEDMAN  
MEMBER

DANIEL G. COLLINS  
MEMBER

CAROLYN GENTILE  
MEMBER

MARK J. CHERNOFF  
MEMBER

EDWARD SILVER  
MEMBER

JOHN D. FEERICK  
MEMBER