

PBA, 3 OCB 2d 10 (BCB 2010)

(Arb.) (Docket Nos. BCB-2807-09).

Summary of Decision: The City filed a petition challenging the arbitrability of a Union grievance concerning union representation at a command discipline hearing. The City challenged the arbitrability of the grievance asserting that there is no nexus between the Union's allegations and the contractual provisions cited, and that pursuant to the parties' agreement, the matter was excluded from arbitration. The Union argued that the matter was arbitrable and fell within the parties' Agreement. The Board found the grievance presented in part an arbitrable question. Accordingly, the petition was denied in part and granted in part. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Arbitration

-between-

**THE CITY OF NEW YORK, and THE NEW YORK CITY POLICE
DEPARTMENT,**

Petitioners,

-and-

**PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW
YORK, on behalf of EMANUEL BOWSER,**

Respondent.

DECISION AND ORDER

On October 16, 2009, the City of New York ("City") and the New York City Police Department ("NYPD") filed a Petition Challenging Arbitrability of a grievance filed by the Patrolmen's Benevolent Association ("PBA" or "Union") on behalf of Emanuel Bowser ("Grievant"). The Union's grievance, filed on September 8, 2009, and citing Article XVII, § 2 and Article XVIII of the collective bargaining agreement ("Agreement"), alleged that the NYPD refused

to recognize him as an elected Union representative and also that Grievant was transferred in retaliation for union activity. While the City does not contest the arbitrability of that portion of the request for arbitration regarding the transfer, the City challenges the arbitrability of the portion of the grievance concerning recognition of union representatives. The City asserts that there is no nexus between the Union's allegations and the contractual provisions cited, and that pursuant to the parties' agreement, to the extent the grievance is based upon certain documents, the matter is excluded from arbitration. The Union argues that it stated an arbitrable grievance. The Board finds, in part, a nexus between the parties' collective bargaining agreement and the Union's grievance. Accordingly, the City's petition is denied in part, and granted in part.

BACKGROUND

The Union is the duly certified collective bargaining representative of Police Officers. Grievant is a member of the Union and is a former Union delegate. The City and the Union are parties to a collective bargaining agreement, with a term from August 1, 2002 to July 31, 2004. The parties signed a memorandum of understanding, effective from August 1, 2006 through July 31, 2010. The Agreement reads in pertinent part as follows:

ARTICLE XVII – UNION ACTIVITY

Section 1.

With respect to time spent by Union officials and representatives in the conduct of labor relations, the provisions of Mayor's Executive Order No. 75, Dated March 22, 1973, or any other applicable Executive Order or local law, or as otherwise provided in this Agreement shall be deemed applicable. No employee shall otherwise engage in Union activities during the time the employee is assigned to the employee's regular duties.

Section 2.

PBA Trustees and delegates shall be recognized as representatives of the PBA within their respective territories and commands. For the purpose of attending the regular scheduled monthly delegate meeting, PBA delegates shall be assigned to the second platoon and excused from duty for that day. In the event the delegate so assigned to the second platoon is unable to attend said monthly delegate meeting because of illness which requires remaining at home or hospitalization, or absence from the New York metropolitan area on leave or by assignment, or required court appearance, then and only then will a designated alternate delegate be excused from duty as spelled out in this Section. The Union will provide the City with a list of those attending each such meeting, which shall be the basis for their payment.

Section 3.

The parties shall explore a further clarification of Departmental rules and procedures to enable PBA delegates and officers to represent properly the interests of employees. An appropriate Departmental order in this regard shall be issued.

ARTICLE XVIII – NO DISCRIMINATION

In accord with applicable law, there shall be no discrimination by the City against any employee because of Union activity.¹

ARTICLE XXI – GRIEVANCE AND ARBITRATION PROCEDURE

- a. For the purpose 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 written rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term “grievance” shall not include disciplinary matters;
 - 3. A claimed improper holding of an open-competitive rather

¹ The City does not challenge the arbitrability of the portion of the grievance brought pursuant to Article XVIII.

than a promotion exam;

4. A claimed assignment of the grievant to duties substantially different from those stated in the grievant's job title specification.

(Pet. Ex. A).

Grievant was assigned to Transit District 4 and served as an elected PBA Delegate there until 2009. On or about June 16, 2008, a Police Officer, also assigned to Transit District 4, was at NYPD Transit District 4 to attend a command discipline adjudication with his commanding officer.² According to the Union, that Police Officer requested that Grievant represent him at the adjudication, but pursuant to orders from his commanding officer, his request was denied. The Union also contends that the commanding officer ordered that a junior PBA delegate personally chosen by the commanding officer represent the Police Officer.

According to the Union, the Police Officer expressed his dissatisfaction with this assigned representative and reasserted that he wanted Grievant's representation. The Police Officer's request was denied and he was told that he would be suspended if he did not adjudicate the command discipline right away. Thereafter, according to the Union, a PBA Transit Trustee telephoned the commanding officer to resolve the matter; the commanding officer told him that Grievant would not be permitted to represent the Police Officer or any other officer because he did not want Grievant to tape-record the hearing. Although the City denies this statement was made, it did allege that

² Command Discipline is a procedure outlined in an internal NYPD policy, Patrol Guide Procedure No. 206-02, which describes Command Discipline as "[n]on-judicial punishment available to a commanding/executive officer to correct deficiencies and maintain discipline within the command." (Pet., Ex. B). Command discipline is utilized for transgressions not requiring formal charges. It is handled by an employee's commanding officer and is less formal than a departmental trial. Minutes are not recorded at command discipline hearings.

Grievant “was known by [the commanding officer] to carry a concealed tape recorder, which compromises the informal nature of Command Discipline.” (Pet. ¶ 24). The commanding officer also allegedly told the Union trustee that the Police Officer would be suspended if he did not adjudicate the command discipline within 30 minutes. The adjudication hearing was then held with the Police Officer represented by the junior PBA delegate. As a result of the hearing, the Police Officer was reassigned to another platoon. Also according to the Union, the following day, Grievant requested that the commanding officer allow him to represent the Police Officer at another command discipline adjudication; the request was denied.

Within weeks thereafter, Grievant was notified that he would be transferred to another precinct effective August 7, 2008, when he was scheduled to return from a vacation.

The Union filed a Step III grievance, which was denied by the NYPD in a letter dated January 30, 2009. The Union’s Step IV grievance was denied by letter dated August 17, 2009. The Union filed a request for arbitration on September 8, 2009. In its request for arbitration, the Union articulated its grievance as follows:

Whether the Police Department . . . violated Article XVII, section 2 of the Collective Bargaining Agreement and Patrol Guide Procedure No. 206-02, by failing to recognize Police Officer Emanuel Bowser as a representative of the PBA within Transit District 4 and by mandating a delegate of the Captain’s choosing to represent a police officer at a command discipline adjudication hearing despite the requests of the union and the affected police officer that [Grievant] act as the representative; and whether the Police Department violated Article XVIII of the Agreement by retaliating against [Grievant] by transferring him out of Transit District 4 for engaging in protected union activities over a protracted period, culminating in, but not limited to, asserting his right to be recognized as a representative of the PBA within his Command and attempting to enforce a police officer’s right to representation under Procedure No. 206-02.

(Pet. Ex. B).

The Union sought “an award ordering the Police Department . . . to:

(1) cease and desist from mandating which PBA representative will represent a police officer at disciplinary adjudication hearings and in other circumstances where police officers are entitled to representation; (2) cease and desist from denying recognition to duly elected PBA representatives in their respective territories and commands; and (3) cease and desist from discriminating against [Grievant] or any other PBA officials based on protected union activity. We request further that the arbitrator direct that the Police Department rescind [Grievant’s] transfer and compensate him for any lost compensation, including but not limited to any loss of night shift differential and overtime opportunities resulting from the transfer and any other retaliatory acts proven at hearing in this matter, and that the Department post an appropriate notice of the violation in Transit District 4.

(Pet. Ex. B).

The Union filed its request for arbitration on September 8, 2009.

POSITIONS OF THE PARTIES

City’s Position

The City argues that there is no nexus between the Union’s allegations and the Agreement. According to the City, the Union seeks an arbitration award that would allow the Union to have more than one representative at command discipline adjudications; however, the Agreement does not provide for such a right. There is no contractual provision covering the grievance; therefore the Union attempts to tie its claim to Article XVII, which has “only a vague and attenuated connection” to the issue. (Pet. ¶ 29). In the request for arbitration, the Union did not allege that the NYPD refused to grant Grievant release time, and the Union did not allege that the NYPD failed to recognize his status as a Union delegate. The City asserts that the Union makes no claims that would draw a nexus between the facts alleged and the Agreement. Although the Union alleges that

Article XVII provides a right to recognition of Grievant, a former delegate, Article XVII in fact deals with release time. The Board has previously addressed a similar issue in *PBA*, 41 OCB 37 (BCB 1988), when it specified that a clause related to release time could not be expanded to other treatment of a union delegate outside the realm of release time.

The Union has attempted to grieve the Patrol Guide; however, the explicit language of the Agreement delineates that the Patrol Guide section that the Union attempts to grieve is not subject to arbitration. That section, Procedure 206-02, concerns command discipline and “deals specifically and exclusively with disciplinary matters. To allow a grievance to proceed on a policy so deeply intertwined with the disciplinary process would be contrary to the express language and clear intent of the parties as evidenced in Article XXI, § 1(a)(2). (Pet., ¶ 48). Article XXI, § 1(a)(2) states that “the term ‘grievance’ shall not include disciplinary matters.” Therefore, to the extent that the grievance is based upon Procedure 206-02, the City argues it must be dismissed.

Even assuming that Patrol Guide Procedure 206-02 is arbitrable, there is no nexus between the Union’s allegations and the Patrol Guide. The Patrol Guide does not give “a union delegate the right to intervene during a command discipline adjudication involving a member being represented by another delegate” and in fact states that members should be advised that one representative may be present at an interview. (Pet. ¶ 54).

As to the Union’s argument that the City’s claim against arbitrability is waived; this argument is without merit. The Union’s request for arbitration was its first submission of this matter to the Board, and the City’s petition challenging arbitrability was the City’s first opportunity to address this matter.

Thus, the Board should grant the City’s petition and dismiss the Union’s request for

arbitration.

Union's Position

The Union argues that there is a nexus between the Agreement and the alleged facts. The Union claims that when the NYPD refused to allow the Grievant to represent a member at a command discipline hearing and instead required that the member be represented by a less experienced Union delegate, the NYPD failed to recognize Grievant as a Union delegate in contravention of Article XVII, which requires such recognition.

Further, the City's statement that the Union is seeking to allow multiple representatives at a command discipline adjudication is not relevant and misconstrues the Union's claim. The Union is not claiming that it is entitled to multiple representatives but instead is objecting to a NYPD supervisor selecting which Union delegate should represent a Union member. That decision should be made by the member and the Union.

Also, while the City argues that Article XVII does not provide for recognition for Union representatives, such issue is beyond the jurisdiction of the Board. Determination of substantive rights is not a matter for this Board and is not required in order to make a determination regarding the existence of a required nexus between the alleged violation and the Agreement.

The City has also waived its argument that the Union's claim is a non-grievable disciplinary matter as the City denied the Step III and IV grievances on substantive grounds that there was "no violation, misinterpretation, or misapplication of the current collective bargaining agreement, nor has there been any violation, misinterpretation, or misapplication of the rules and procedures of the Department." (Ans. ¶ 69). The City's failure to raise the arbitrability of this matter at earlier steps of the grievance process precludes it from doing so here.

Although the City argues that an alleged violation of the Patrol Guide Procedure No. 206-02 is not arbitrable, the Union contends that it is not grieving a disciplinary matter. This claim is arbitrable pursuant to Article XXI based on the Union's assertion that the NYPD violated the right to union representation specified in the Patrol Guide. There is also a direct nexus between the alleged violation and the Patrol Guide Procedure No. 206-02 in that the latter gives the supervisor the authority to advise union members that one representative may be present at a command discipline adjudication. However, that procedure does not give supervisors the right to choose the union representative; that decision is left to the union and the member. For these reasons, the Union contends that the City's petition challenging arbitrability should be dismissed.

DISCUSSION

In accordance with NYCCBL § 12-302, we favor arbitration as a dispute resolution mechanism. While "doubtful issues of arbitrability are resolved in favor of arbitration . . . the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *NYSNA*, 2 OCB2d 6, at 7 (BCB 2009) (citations omitted).

We use the following two-pronged test to determine whether a matter is arbitrable:

(1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

Id. at 8 (citations and internal quotation marks omitted).

The parties' Agreement provides for the arbitration of certain disputes. Therefore, the matter

for our determination is whether that obligation extends to the facts presented here. The Union's grievance concerns whether the employer had the right to select a particular union representative to represent an employee. In its request for arbitration, the Union cites to two alleged sources of right: the Patrol Guide and the Agreement. To the extent that the Patrol Guide addresses Union representation, it provides for the Commanding/Executive Officer to "[a]dvice member that one local representative of a line organization may be present at the interview." (Pet., Ex. B). The Union did not allege that the NYPD failed to advise the member regarding this representation. Therefore, after examining the record, we see no apparent nexus between the Patrol Guide and the Union's allegations.

There is, however, a reasonable relationship between Article XVII of the Agreement and the Union's claim. Section 2 of Article XVII states that "PBA Trustees and delegates shall be recognized as representatives of the PBA within their respective territories and commands." We find that by precluding a particular Union delegate from representing a member during a meeting where union representation is permitted, the NYPD arguably may have failed to recognize a union delegate as a representative of the PBA. Whether, by this action the NYPD violated the Agreement is a matter of contract interpretation properly determined by an arbitrator.

The City points to an earlier determination we made regarding the arbitrability of a grievance brought by this Union pursuant to this contract language.³ *PBA*, 41 OCB 37 (BCB 1988). In *PBA*, which concerned an allegation that the employer harassed a union delegate, we found that the matter was not reasonably related to the contractual language. That case is distinguishable from this matter

³ At the time of our earlier decision, the contractual provision currently entitled Article XVII was then entitled Article XVIII.

as the Union delegate in that case was neither acting as a Union representative nor precluded by the employer from representing Union members. Here, in sharp contrast, the NYPD restricted the Union representation to an individual NYPD selected. We find that such facts arguably present a question of whether the NYPD violated Article XVII, § 2 of the Agreement.

ORDER

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 petition challenging the arbitrability docketed as BCB-2807-09 is denied as to Article XVII of the Agreement, and granted, as to Patrol Guide Procedure 206-02, and it is further

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association, docketed as A-13225-09 hereby is granted only as to Article XVII of the Agreement.

Dated: February 25, 2010
New York, New York

MARLENE A. GOLD
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