

City v. PBA, 31 OCB 25 (BCB 1983) [Decision No. B-25-83 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK,

DECISION NO. B-25-83

Petitioner,

DOCKET NO. BCB-667-83
(A-1692-83)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On July 22, 1983, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Patrolmen's Benevolent Association (hereinafter "the Union" or "the PBA") on behalf of Police officer Lawrence Cox on May 10, 1983. The PBA filed an answer on August 10, 1983, to which the City replied on August 18, 1983.

Request for Arbitration

The request for arbitration alleges that the City violated Patrol Guide Section 104-1.1 (Residence Requirements), which requires that Police Officers "(r)eside within City of New York or Westchester, Rockland, Orange Putnam, Nassau or Suffolk Counties."

The Union claims that the above cited Section was violated through the alleged "(i)mproper transfer of grievant from 90th Pct. to 83rd Pct., based on grievant's residence in 90th Pct." As a remedy, the Union seeks to have Grievant Cox transferred back to the 90th Pct.

Positions of the Parties

The City's Position

OMLR contends that Patrol Guide Section 104-1.1 has nothing to do with the Union's claim that C ox was improperly transferred. Assuming, arguendo, that the provision does bear some relationship to the grievance, the City maintains that the relationship is de minimis. Thus, OMLR urges that the PBA has failed to meet its burden of establishing a nexus between the act complained of and the source of the alleged right.

Article XXIII, Section 1(a) of the collective bargaining agreement (hereinafter "the Agreement") entered into between the parties defines the term "grievance," in pertinent part, as follows:

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 1a, the term "grievance" shall not include disciplinary matters.

The City argues that the Union has failed to allege a violation of any substantive provision of the Agreement or of a rule, regulation or written policy of the Police Department (hereinafter "the Department"), and has therefore failed to state a grievable matter. OMLR submits that under the contractual definition of a grievance, the alleged violation of a past practice and an unwritten policy cannot serve as the basis for proceeding to arbitration.

The City further contends that the Department has the unfettered right to transfer employees. The City states that for reasons of public policy and sound management, the Department has long prohibited the assignment of police officers to precincts in which they reside; and that grievant was transferred in keeping with this policy.

OMLR notes that the PBA attempted to place limitations on the right to transfer by proposing the following demand during the course of 1982-84 negotiations:

TRANSFERS

- a) When the employee has been in a precinct for five (5) years or more, he may not be transferred without his consent and, if he consents, Without allowing him his choice of precincts.

- b) Administrative transfers prior to an employee being tried on disciplinary charges shall be prohibited.

The demand was subsequently withdrawn. OMLR contends that the PBA is now trying to gain in arbitration that which it was unable to achieve through collective bargaining.

The Union's Position

The PBA argues that the Department's right to transfer employees is restricted, for if the transfer interferes with an established and understood past practice and policy, the matter is grievable. It is alleged that the Patrol Guide "only limits residence as far as county, and past practice has never placed any limitation on precinct, whether it be the precinct where the employee works or not."

The PBA urges that for at least the last twenty years, the Department has maintained a policy whereby police officers are allowed to work in their residence precincts; grievant relied on this policy for twelve years. The Union contends that the Department violated this policy when it transferred Cox and should not be allowed to deprive grievant of a right earned through past practice.

The PBA maintains that, in any event, questions relating to whether or not grievant was allowed to reside in his

work precinct for twelve years with the knowledge of the Department, whether a practice has been established, whether the Department violated its policy of allowing employees to work in their residence precincts, and whether the transfer was arbitrary, are all matters for determination by an arbitrator rather than by this Board.

Furthermore, the Union denies that there is any connection between its demand on transfers in the bargaining for the 1982-84 contract and the instant grievance.

Discussion

We have long held that it is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.¹ However, we have also stated repeatedly that this 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 by contract or otherwise. A party may be required to submit to arbitration only to the extent that it has previously consented and agreed to do so.²

¹ See NYCCBL Section 1173-2.0 and Decision Nos. B-8-68, B-1-75, B-19-81, B-15-82, B-41-82.

² Decision Nos. B-12-77, B-15-82, B-41-82.

We have previously recognized that the transfer of employees is within the City's managerial rights.³ In Decision No. B-9-81, presently on appeal,⁴ we found that grievant had established a sufficient nexus between the transfer there in question and the contractual right to grieve a claimed wrongful disciplinary action so as to warrant presentation before an arbitrator. In the instant matter, however, grievant neither claims to have been subject to wrongful disciplinary action nor does he cite any Patrol Guide provision, rule, regulation or procedure which places any restrictions on management's right to transfer, regardless of its reasons for effectuating the transfer. Patrol Guide Section 104-1.1, the only Patrol Guide provision cited by PBA, deals only with the listing of those counties within and surrounding New York City in which persons must live in order to be eligible to obtain and/or retain employment as police officers in the NYPD. This provision does not relate to or in any way limit the prerogative of the City to consider residency as a factor in the assignment

³ Decision No. B-8-81.

⁴ Matter of City of New York and District Council 37, Sup. Ct., N.Y. Cty., Index No. 41479/81 (Pecora, J. New York Law Journal, p.6, October 23, 1981).

or transfer of, police officers.

Nor can the Union successfully argue that Cox acquired a grievable right by virtue of past practice. The alleged violation of a past practice or an unwritten policy does not fall within the contractual definition of a "grievance" as the parties have defined that term. The mere passage of time, in and of itself, does not convert practice into a rule, regulation⁵ or procedure.

The contract is clear and explicit in its terms as to the duty to arbitrate grievances. The PBA has failed to show that the instant matter comes within those terms. Accordingly, we find that this matter is not arbitrable.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

⁵ Decision No. B-5-72.

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Patrolmen's Benevolent Association's request for arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.
October 19, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

MARK CHERNOFF
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
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