City v. PBA, 31 OCB 4 (BCB 1983) [Decision No. B-4-83 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK,
Petitioner,
-and-

PATROLMEN'S BENEVOLENT ASSOCIATION

Respondent.
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DECISION NO. B-4-83
DOCKET NO. BCB-575-82
(A-1438-82)

DECISION AND ORDER

On February 8, 1982, the Patrolmen's Benevolent Association (hereinafter "the PBA" or "the Union") filed a request for arbitration of a grievance alleging that the request of Police Officer Alex Ford for compensatory time off was arbitrarily denied in violation of the 1980-11082 collective bargaining agreement between the parties (hereinafter "the contract" or "the agreement"). On March 5, 1982, the City of New York by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR") filed a petition challenging the arbitrability of the grievance. The PBA filed its answer to the petition on March 23, 1982. The City filed a reply on March 26, 1982.

Background

By memorandum dated August 22, 1981, Police officer Ford explained to the PBA the circumstances and nature of

his grievance:

"1. On August 21, 1981, I was informed that my request for leave on August 22, 1981 was denied due to manning requirements in the 122 Pct.

"2. Upon reporting for duty at 0700 on August 22, 1981, I was informed by the SHO [Station House officer] that I was being removed from Patrol duty and assigned to P.B.S.I. [Patrol Bureau Staten Island] to perform clerical duties because no personnel had been previously assigned, nor arrangements made for such assignment.

6. My grievance is:

A. I feel that it is grossly unfair to be denied a request for leave because minimum manning must be maintained and then be removed from patrol anyway for non-precinct or non-emergency duty.

B. That uniform [sic] personnel (not on restricted duty) are utilized for this type of work when there are civilian workers available in the P.B.S.I. office capable of performing this function but are not utilized because of present practice.

C. That I was denied a day off because of manning requirements when ... manning requirements may be arbitrarily disregarded by P.B.S.I. for non-emergency assignments."

The Union contends that the above-described facts demonstrate that the denial of Police officer Ford's request

for time off was arbitrary and unreasonable. An informal

grievance was presented by the PBA in a letter dated October 29, 1981.[1] The grievance was denied by the Police Department's Office of Labor Policy (OLP) on December 30, 1981 on the ground that there was "no violation, misapplication, or inequitable application of the terms of the current collective bargaining agreement ... nor ... of the rules, regulations or procedures of the Police Department." The claim, processed through the successive steps of the contractual grievance procedure, was denied at Step IV on January 27, 1982.

Request for Arbitration

The PBA contends that the arbitrary and unreasonable denial of the grievant's request for leave violates Article III, Section 1(a) of the agreement which provides:

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

[1] The length of time between submission of the grievance and the issuance of a decision is explained by an exchange of letters in which OLP sought and the PBA provided information as to the contract provision on which the grievance was based and the remedy requested.

employee. Such cash payments or compensatory time off shall be computed on the basis of completed fifteen (15) minute segments.

Arbitration is demanded pursuant to Article XXIII, Sections 1 (a) (1) and (2):

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 la, the term "grievance" shall not include disciplinary matters; ....

As a remedy, the Union requests that Police officer Ford be given twelve hours of compensatory time for the day off that was denied and that the Police. Department be ordered prospectively not to deny similar requests for time off.

Positions of the Parties

The Union contends that the contractual provision for compensation in the form of cash payment or time off at the employee's option for overtime work performed implicitly

includes a requirement of reasonable application. The arbitrary denial of the benefit provided for in the contract provision, as occurred in the case of Police Officer Ford, constitutes a violation of that provision, according to the PBA.[2] The Union argues that a reasonable application of Article III, Section l(a) in the case of officer Ford would have resulted in his request for a day off being granted.

According to the City, the contract provision relied upon by the PBA merely authorizes compensation for overtime worked and prescribes the method of computing such compensation; it does not entitle a police officer to a particular day off. Thus, the City claims that the PBA has failed to establish, as required by this Board in its prior decisions, a prima facie relationship between the act complained of the denial of a requested day off - and the source of the alleged right - Article III; Section l(a). According to the City, if the cited clause is at all relevant to the grievance presented, it can only be with respect to a possible remedy.

In addition, the City emphasizes that it is management's

[2] That the leave day denied herein was in the category of accrued compensatory time off selected as a form of payment for previously performed overtime duty is nowhere expressly stated. However, it is implicit in the PBA's arguments for arbitration in this case and is not disputed by the City.

prerogative to assign employees and to schedule days off. Since the PBA has not demonstrated that any contract provision, or rule,. regulation, procedure or policy of the Police Department limits the City's right to act unilaterally in such matters, OMLR maintains that the petition challenging arbitrability should be granted.

In its answer to the City's petition, the PBA acknowledges that management enjoys certain statutorily protected rights, including the right to assign employees. In the instant matter , however, the Union asserts that a contract benefit has been denied. The PBA maintains that a claim of this nature, constituting a grievance as the term is defined in the parties' agreement, should be distinguished from a challenge to the City's unilateral right to assign employees.

Discussion

At the outset, we note that it is undisputed that the City and the PBA are obligated by contract to arbitrate their controversies. Nor is it disputed that an alleged violation of a substantive provision of the contract is a proper subject for arbitration pursuant to the Grievance and Arbitration Procedure of that contract. However, in determining questions of arbitrability, the Board is sometimes required to inquire further 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.[3] Such is the focus of our inquiry in the instant case.

The PBA maintains that the contractual guarantee of Article III, Section l(a) that overtime work shall be compensated for either by cash payment or by time off "at the sole option of the employee" was violated when Officer Ford's request to exercise his option by taking compensatory time Off on August 22, 1981 was unreasonably denied. According to the PBA, the contract provision relied upon is therefore sufficiently related to the grievance sought to be arbitrated to permit arbitral consideration of the intent of that provision and its application to the grievant's claim.

OMLR argues, however, that the PBA's complaint concerning the denial of a specific day off rather than a per se denial of compensation in cash or time, cannot be founded upon Article III, Section l(a) which merely authorizes compensation for overtime work performed. OMLR asserts further that the decision to deny officer Ford's request for leave was justified because of management's unfettered right to assign employees and to schedule their time off.[4]

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[3] Where challenged to do so, the proponent of arbitration has a duty to show that the contract provision invoked is Arguably related to the grievance to be arbitrated. See, e.g., Decision Nos. B-1-76; B-3-78; B-7-79; B-15-80; B-4-81; B-11-81; B-8-82.

[4] We note that this Board has not determined one way or the other the extent of a management prerogative, if any, to schedule compensatory time off.

The Board finds that there is at least an arguable relationship between the subject of the PBA's grievance and Article III, Section 1(a) of the contract. The PBA` contends, in essence, that the unreasonable denial (unreasonable because Ford was assigned to non-patrol, non-emergency duty on the day in question) of the request for leave deprived Officer Ford of the benefit of the exclusive option which Article III, Section 1 (a) allegedly affords. A determination of whether the benefit of that option was, in fact, denied the grievant requires interpretation of the agreement as to whether, for example, the "option" is merely a choice between time or money or whether the employee is entitled, pursuant to the option, to have some input into when time off, if selected as the form of compensation, shall be taken. Such questions involve the merits of the grievance which, as we have often said, are matters for resolution by an arbitrator.[5]

Similarly, in City of New York v. Patrolmen's Benevolent Association (Decision No. B-15-80), we granted arbitration of a grievance alleging that individual police officers injured while performing police duty, were improperly denied "line of duty designations" which would have entitled them to certain benefits. The City had objected that sections of the Police Department Patrol Guide relied upon by the PBA were not intended to create any rights on the part of the

[5] Decision Nos. B-12-69; B-80-74; B-19-74; B-1-75; B-5-76; B-10-77; 3-17-80; B-4-81; B-7-81.

grievants since those sections dealt merely with the reporting of line of duty injuries and not with the designation of duties as being "in the line of duty". The Board rejected the City's argument that there was no prima facie relationship between the cited sections and the grievance presented, directing that the matter be submitted to an arbitrator for interpretation of the intent and application of the relevant Patrol Guide provisions.[6]

In reaching the above-described decision, the Board briefly reviewed the current state of the law in the area of arbitrability of public sector disputes. We examined, particularly, decisions of, the New York Court of Appeals, noting however that the Board is not directly bound by those decisions which involve arbitrability disputes between parties subject to the jurisdiction of the Taylor Law.[7] We note here that the trend reflected in decisions of the court of appeals subsequent to the famous Liverpool case[8] toward the application of less

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[6] Decision No. B-15-80, at 6.

[7] See Decision No. B-15-80, at pp. 7-10.

[8] Acting Superintendent of Liverpool Cent. School Dist. V. United Liverpool Faculty Ass'n., 42 N.Y. 2d 509, 399 N.Y.S. 2d 189, 369 N.E. 2d 746 (1977). In that case, the court of, appeals held that, in arbitrations under the Taylor Law,

> "... the agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration; anything less will lead to a denial of arbitration.

399 N.Y.S. 2d at 190.

stringent standards in evaluating arbitrability issues continues. In Board of Education of Lakeland Central School District v. Barni,[9] for example, the court of appeals stated:

> It begs the question to contend ... that the grievance is not arbitrable because it involves a dispute that is not unambiguously encompassed by an express substantive provision of the contract. The question of the scope of the substantive provisions of the contract is itself a matter for resolution by the arbitrator. [Citations omitted][10]

Where a collective bargaining agreement contains a broad and unambiguous arbitration provision, the court of appeals has recently held that

> "a stay [of arbitration] is proper only where the disputed issue falls outside the contract's arbitration provisions or where arbitration would violate Public policy."[11]

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[9] 49 N.Y. 2d 311, 425, N.Y.S. 2d 554, 401 N.E. 2d 912 (1980).

[10] 425 N.Y.S. 2d at 555.

[11] Board of Educ., West Babylon Union Free School Dist. v. West Babylon Teachers Ass'n., 52 N.Y. 2d 10003, 438 N.Y.S. 2d 291, 292, 420 N.E. 2d 89 (1981). See also, Nyack Bd. of Educ. v. Nyack Teachers Ass'n., 55 N.Y. 2d 959, 449 N.Y.S. 2d 194, 434 N.E. 2d 264 (1982), aff'g, 443 N.Y.S. 2d 425, 84 A.D. 2d 580 (2d Dept. 1981).

The agreement to arbitrate in the instant case is a broad one, including in its definition of the term grievance

> "a claimed violation, misinterpretation or inequitable application of the provisions of the Agreement" (Article XXIII, Section l(a)(1)).

Inasmuch as the PBA claims a violation, misinterpretation or inequitable application of a substantive provision of the contract, which, we believe it does when it claims that the benefit prescribed by Article III, Section l(a) was unreasonably and arbitrarily denied, we find the grievance presented arbitrable under the standards previously established by this Board and increasingly accepted by the highest court in this State.

In so ruling, we are mindful of the City's argument and we acknowledge the fact that the assignment of employees is a managerial prerogative under Section 1173-4.3b of the New York City Collective Bargaining Law (NYCCBL) and thus a matter concerning which the City may take unilateral action unless it has limited its right to do so pursuant to contract or otherwise.[12] The allegations advanced herein by the PBA raise an issue on that precise point, however. It must be

[12] The Board has held that where the City voluntarily negotiates and reaches agreement on a subject that is a management right, controversies concerning that subject are arbitrable under an agreement to arbitrate "claimed violations, misinterpretations or inequitable applications of the collective bargaining agreement." Decision Nos. B-7-69; B-2-71.

concluded that questions are presented as to the nature and effect of the option created by Article III, Section l(a) ofthe contract between the parties and the extent to which this provision may constitute a qualification of or a limitation upon the Police Department's right to act unilaterally. A subsidiary question concerns the extent to which, if at all, substantive rights afforded by Article III, Section l(a) have been unreasonably withheld. It is the function of this Board, in adjudicating a question of arbitrability, to determine only that such issues as we have described above are presented in a given case. A finding in favor of arbitrability in no way expresses a view as to the merits of the issues presented, but is only a determination that those issues are within a category which the parties themselves have agreed they will submit to arbitration.

Our ruling does not ignore the retained management rights of the Police Department to assign police officers and otherwise to deploy its forces with maximum effectiveness, nor can we assume that an arbitrator will ignore these essential powers of an agency such as the Police Department. Rather, it recognizes that since some limitation of-that right has arguably been imposed by contract, management must exercise the right with due regard for any contractual undertaking it may have made; and that where it is alleged that

management has failed to do so, that it has unreasonably withhold a contractual right and has exercised its management prerogative as though no contractual limitation on the prerogative existed, an arbitrable issue has been presented.

Therefore, having determined that the parties in the instant matter have agreed by contract to arbitrate a broad range of controversies and that the particular controversy presented is within the scope of that obligation, we shall grant the Union's request for arbitration.

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; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted.

DATED: New York, N.Y.
February 28, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY MEMBER

CAROLYN GENTILE
MEMBER

PATRICK F.X. MULHEARN
MEMBER

EDWARD SILVER
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