

City v. PBA, 33 OCB 28 (BCB 1984) [Decision No. B-28-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration  
-between-

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-28-84

-and-

DOCKET NO. BCB-705-84

PATROLMEN'S BENEVOLENT ASSOCIATION

(A-1846-84)

Respondent.

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### **DECISION AND ORDER**

Respondent Patrolmen's Benevolent Association (hereinafter "PBA" or "the Union") submitted a request for arbitration, dated February 29, 1984, but received on March 6, 1984, in which it sought to arbitrate the grievance of Police Officer Richard Biller. The City filed a verified petition challenging the arbitrability of this grievance on April 6, 1984. The Union filed its verified answer on April 19, 1984, and the City submitted a reply on May 2, 1984.

### **BACKGROUND**

The grievance alleges a violation of Article III, Section 1a of the collective bargaining agreement, and "all operation and interim orders and patrol guide provision relating to that

section." Article III, Section 1a 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 employee. Such cash payments or compensatory time off shall be computed on the basis of completed fifteen (15) minute segments.

The grievant performed certain overtime work while assigned to the 41<sup>st</sup> Precinct. The dispute underlying the grievance concerns the method and manner in which the grievant was to be compensated for his overtime. As indicated above, the contract states that overtime shall be compensated for either by cash payment or by compensatory time off, at the rate of time and one-half, at the sole option of the employee. The grievant alleges that he made an oral agreement with his superior, Capt. Lovett, that he would select compensation in the form of compensatory time off, on condition that he would be permitted to add the compensatory days to his annual vacation pick and to use those days in the same manner as vacation.

Subsequently, when the grievant requested five compensatory days together with his annual vacation in June, 1983, he was informed that the compensatory days could not be taken at that time because of manpower requirements. The Union alleges that vacation is selected and granted in the Police Department on a seniority basis, and is not subject to manpower requirements as would be the case with normal compensatory time. It is for this reason that the grievant sought and allegedly obtained his Captain's agreement to treat his compensatory time in the same manner as vacation.

His selection of days having been refused by the Department on the ground of manpower requirements, the grievant considered the agreement under which he chose compensation in time off to have been broken. Consequently, the grievant requested that his overtime be converted to its cash equivalent. When this request was denied, the grievant submitted the instant grievance. The City contends that this grievance is not arbitrable.

### **POSITIONS OF THE PARTIES**

#### **City's Position**

The City raises a number of objections to the arbitrability of this matter.

1. The City submits that pursuant to Article III, Section 1a of the agreement, the grievant elected to be compensated for his overtime by compensatory time off. In fact, his leave balance has been credited with the time off which he earned. Therefore, he has received everything to which he is entitled under the contract, and his claimed violation of the contract should be dismissed.

2. The City contends that it is its managerial prerogative, as protected under §1173-4.3(b) of the New York City Collective Bargaining Law ("NYCCBL") to regulate the use of employees' accumulated leave according to the needs of the service. The City asserts that employees do not have a right to use accumulated leave whenever they so desire. The grievant's claim is based on an alleged verbal agreement which is inconsistent with management's reserved rights. Assuming arguendo that such an agreement existed, it was without validity. The grievant's Captain lacked authority to bind the Police Department to a collective bargaining agreement, or to modify an existing agreement.

3. The City argues that under Article XXIII, Section 8 of the contract, the Union must seek arbitration of unresolved grievances within 20 days following receipt of the Police Commissioner's Step IV decision. It is alleged that the Police

Commissioner's decision in this matter was dated January 20, 1984, and that the request for arbitration was submitted on February 29, 1984, more than 20 days later. Accordingly, the City claims that this grievance is barred from arbitral review.

4. The City contends that the Union's allegation of violations of "operation and interim orders and patrol guide provisions" relating to Article III, Section 1a of the contract are vague and uncertain. The City argues that the Union has failed to identify which orders and provisions it is relying upon. For this reason, the City asks that these claims be dismissed.

#### **Union's Position**

The PBA alleges that under Article XXIII, Section 1a (1) and 1a (2) of the collective bargaining agreement, a grievance is defined to include:

- "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 Union submits that the dispute herein satisfies the contractual definition of a grievance, inasmuch as the grievant has alleged a violation of a provision of the agreement (Article III, Section 1a) and rules, regulations and procedures of the Department relating to the subject of that section of the agreement.

The PBA contends that under Article III, Section 1a, a Police Officer who has performed overtime is entitled to be compensated in either cash or compensatory time off, at the sole option of the employee. It is alleged that the grievant, who had performed overtime, initially chose compensation in time off, based on a verbal agreement with his Captain that the time off could be added to his annual vacation and could be used in the same manner as vacation, i.e., not subject to the manpower needs of the Department. When the Department failed to adhere to the terms of this alleged agreement, the basis for the grievant's choice was frustrated, and the grievant requested that he be compensated in cash rather than in time off. It is the Department's refusal to permit the grievant to exercise his contractual right to choose compensation in cash which constitutes the substance of the present grievance. The Union submits that his claim clearly is arbitrable under the contract.

The Union also argues that Capt. Lovett had ostensible authority to make an agreement with the grievant concerning the

manner in which compensatory time off could be used. The Union asserts that one of the rules, regulations and procedures of the Police Department is that verbal or written agreements with a commanding officer regarding the manner in which compensatory time is to be taken are proper subjects of a grievance, and may be brought to arbitration.

The PBA contends that, with respect to the City's claim of untimeliness, the Union had obtained an extension of time from the Police Department's Office of Labor Policy. In any event, alleges the PBA, the question of timeliness under the contract should be submitted to the arbitrator and not the Board for determination.

#### **DISCUSSION**

As this Board has often stated, in determining questions of arbitrability, we must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.<sup>1</sup>

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<sup>1</sup> Decision Nos. B-21-80; B-17-80 and Decisions cited therein at footnote 3.

In deciding these questions, we will not inquire into the merits of the dispute.<sup>2</sup> In the present case, the parties have agreed to arbitrate a broad range of grievances as defined in Article XXIII of their collective bargaining agreement. Therefore, the issue before this Board is whether the instant grievance is within the scope of the matters the parties have agreed to arbitrate.

On its face, it would appear that the PBA's request for arbitration states a grievance within the definition of that term set forth in the agreement. The PBA alleges violations of Article III, Section 1a of the agreement and of "all operation and interim orders and patrol guide provisions relating to that section." Thus, the Union's claim asserts violations of both a substantive provision of the agreement and of what may be characterized as agency rules and regulations concerning the substantive provision.<sup>3</sup> Both categories of alleged violations fall within the contractual definition of a grievance, and thus within the ambit of the grievance arbitration provisions of the contract.

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<sup>2</sup> Decision Nos. B-17-80; B-10-77; B-5-76; B-1-75; B-19-74.

<sup>3</sup> We have previously held that the Patrol Guide constitutes rules and regulations of the Police Department. Decision Nos. B-15-80; B-8-78.



However, the City argues that the allegation of violations of "operation and interim orders and patrol guide provisions" is vague and uncertain, and that the Union has failed to state a claim with respect thereto. We find that once the City asserted this objection, it was incumbent upon the PBA to elucidate its claim by specifying which operation and interim orders and patrol guide provisions were violated, with sufficient particularity so as to give the City an opportunity to make an informed response. The mere allegation of "all" orders and provisions "relating to" a particular substantive contractual provisions was not a sufficiently informative and precise response. The City should not be required to arbitrate a grievance without having adequate notice of the claimed violations with which it has been charged. Accordingly, we will grant the City's petition insofar as it involves alleged violations of "operation and interim orders and patrol guide provisions."

We are not persuaded by the City's further. argument that the grievance based on the alleged violation of Article III, Section 1a of the agreement is without merit. The City contends that the agreement permits an employee to choose the form of compensation for overtime worked, that the grievant herein chose compensation in time off, and that such time off was credited to his leave balance. Thus, the City would have us conclude

that no violation of the agreement has been alleged. But, the City's argument ignores the fact that the Union alleges that the grievant changed his selection and sought compensation in cash rather than time off. The reasons he attempted to change his selection in this case are irrelevant to the issue of arbitrability. The facts which concern us are that (a) the collective bargaining agreement provides for compensation for overtime either in cash or in time off, "at the sole option of the employee", (b) the grievant alleges that, for whatever reasons, he wanted to be compensated in cash; and (c) the City refused to compensate grievant in cash. Based on the foregoing, we can hardly accept the argument that there exists no nexus between the allegations of the grievance and the substantive provision of the contract claimed to have been violated. To the contrary, we find that a clear nexus has been established.

The City's objections to arbitrability seem to be founded upon two issues which, we believe, do not affect the arbitrability of this matter. First, the City fears that its clear management prerogative to regulate its employees' use of accrued leave, in order to meet the manpower needs of the Department, is threatened by the grievant's actions in this case. The City fears that the purported private "verbal agreement" between the grievant and his commanding officer concerning the

use of the grievant's accrued compensatory time off may be viewed as modifying or superseding the parties' collective bargaining agreement. We understand the City's concern over this matter; to render enforceable such private agreements would have grave consequences for the parties' collective bargaining relationship. We point out that pursuant to §1173-5.0 b(2) of the NYCCBL, the Union is certified as the exclusive collective bargaining representative for the employees in the bargaining unit. We do not condone individual bargaining in units for which a union has been certified; in fact, such individual bargaining can constitute an improper practice under §1173-4.2 of the NYCCBL.

However, our holding that the grievance herein is arbitrable does not infringe upon the City's management rights and is not based on the grievant's purported verbal agreement. It is based solely on the express language of the collective bargaining agreement. We reject any contention by the PBA that the arbitrator in this case can be asked to enforce affirmatively the verbal agreement. We wish to make clear that such claim may not be presented for arbitration in this case. In this

regard, we reiterate that the Union's assertion that verbal or written agreements with an employee's commanding officer are arbitrable under "one of the rules, regulations and procedures of the Police Department" is too vague and conclusory to warrant submission to arbitration. The Union has failed to specify any provision which would authorize the arbitration of such private agreements.

The City's remaining concern is founded on an issue which is implicated in the dispute which we submit for arbitration. It is implicit in the City's pleadings, although not expressly stated, that it is the City's position that once an employee chooses the manner of compensation for overtime performed, he or she can never change that selection. In other words, the contractually-provided choice is irrevocable. On this basis, the City points to the grievant's initial selection of compensatory time off, and ignores his subsequent selection of compensation in cash.

We believe that the issue of whether or not an employee's selection of the form of compensation under Article III, Section 1a is irrevocable, is a matter of contract interpretation which properly is to be determined by an arbitrator. The contract, on its face, does not appear to answer this question.

We find that the City's implicit objections on this issue involve the merits of the grievance and do not affect its arbitrability.

Finally, we note that the City's allegation that the PBA failed to comply with the contractual time limits for requesting arbitration following receipt of an adverse Step IV decision, is a matter of procedural arbitrability which is to be determined by the arbitrator, not this Board.<sup>4</sup>

**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 City's petition challenging arbitrability be, and the same hereby is, granted, only as to claimed violations of "operation and interim orders and patrol guide provisions" and any alleged verbal agreements with the grievant's commanding officer; and in all other respects it is denied; and it is further

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<sup>4</sup> Decision No. B-19-80 and decisions cited therein at footnote 1.

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted, only insofar as it alleges a violation of Article III, Section 1a of the collective bargaining agreement.

Dated: New York, N.Y.  
December 18, 1984

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

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MILTON FRIEDMAN  
MEMBER

CAROLYN GENTILE  
MEMBER

JOHN D. FEERICK  
MEMBER

DEAN L. SILVERBERG  
MEMBER