City v. COBA, 35 OCB 13 (BCB 1985) [Decision No. B-13-85 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-13-85

Petitioner, DOCKET NO. BCB-758-85
-and- (A-2033-84)

CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

Respondent.
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DECISION AND ORDER

On January 14, 1985, 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 Correction Officers Benevolent Association (hereinafter "the Union" or "COBA"). COBA filed an answer on January 23, 1985, to which the City replied on January 31, 1985.

Request for Arbitration

The Union alleges that Directive #2258, recently promulgated by the New York City Department of Correction ("the Department")

punishes the exercise of contractual rights and privileges and violates the intent and spirit of the contract.

The Directive, a comprehensive, single spaced thirteen-page document which became effective on October 1, 1984, establishes an Absence Control Program "to reduce chronic absenteeism among members of the uniformed force" and purports to do so by "identifying and monitoring members who may require special attention and counseling concerning their use of sick leave." Essentially, the Directive categorizes employees based upon the frequency of their use of sick leave. An employee who reports sick for any reason (except hospitalization) on five or more occasions within a twelve-month period is classified as being in Category A; if the same takes place on six or more occasions, the employee is placed in Category B. Appeals of one's classification are made to the employee's Commanding officer, who makes a recommendation for approval or denial to the Absence Control Coordinator. The Absence Control Coordinator's denial of an appeal may be forwarded to the Chief of operations for a final determination.

The Directive establishes certain "discretionary benefits and privileges" which include: assignment to a steady tour, assignment to a specified post or duties, access tovoluntary overtime, promotions, secondary employment, transfers, and authorization to leave one's residence while on sick leave. A Category A

employee who does not respond to counseling and who remains in that classification may have one or more of the aforementioned discretionary benefits and privileges revoked by the Commanding Officer. The same holds true for Category B employees once the appeal period has expired. Furthermore, Category B members are directed to report to the Department's Medical Management Unit and are not permitted to leave their residences while on sick leave except for certain reasons, such as doctor's visits, of which they must notify the Department. Category B members are given the highest priority for home visits by the Department's representatives.

The Union states that the Directive violates the provisions of the 1982-1984 collective bargaining agreement ("the Agreement") entered into between the parties, to wit: a) Article X (Leaves), Section 2 (Sick Leave) which states:

> Each Correction Officer shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service-connected in accordance with existing procedures;

and b) that portion of the "whereas" clause of the Agreement which reads as follows:

> the Union and City desire to cooperate in establishing conditions which will tend to secure standards and conditions of employment consistent with the dignity of Correction Officers ...

As a remedy, COBA seeks to have Directive #2258 rescinded.

Positions of the Parties

The City's Position

The City contends that COBA has failed to state a grievable matter pursuant to the contractual definition of a "grievance". Article XXI, Section 1(b) of the Agreement defines a grievance as, inter alia:

> a. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
>
> b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Agency affecting terms and conditions of employment ...

OMLR argues that the allegation that the Directive "chills" and "punishes" the exercise of contractual rights: a) does not fall within the ambit of the above definition of a grievance; b) admits that employees are, in fact, able to exercise their contractual rights; and c) is so vague,

general and illusory as to prevent the City from preparing a full and proper defense. OMLR also claims that the Union has not shown that any individual has actually been denied unlimited sick leave, the subject of Article X, Section 2, and that COBA has not specified or identified the "numerous benefits", nor their source, which the Directive allegedly denies.

The City additionally maintains that in promulgating Directive #2258, it was exercising its managerial prerogatives as stated in Section 1173-4.3(b) of the New York City Collective Bargaining Law ("NYCCBL").[1] Absent evidence that the Department has waived, limited or modified its "statutory right to promulgate and implement policy regarding absence control," states OMLR, the

[1] NYCCBL Section 1173-4.3(b) states, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty becausa of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work

City's exercise of its management rights, and/or the resulting impact thereof, are not subject to challenge in the arbitral forum.

A Step III of the grievance procedure, the Union alleged that the Directive "adversely and improperly alters long standing practices and impacts upon the working conditions of all officers." The City presently urges that neither an alleged violation of past practice nor a change in written policy give rise to arbitral claims under the parties' definition of a grievance. We note, as to this last mentioned contention of the petition, that the Union makes no claim of right deriving from past practice in its Request for Arbitration and has thus apparently abandoned any such claim as may have formed a part of its grievance at an earlier step.

The Union's Position

COBA maintains that Article X, Section 2 of the Agreement grants Correction officers full pay for any incapacity due to illness, injury or mental or phyiscal defect. Directive #2258, asserts the Union, "chill(s) the exercise of this contractual right by denying numerous benefits to officers who make legitimate use of this contractual right."

COBA also argues that the changes instituted by Directive #2558, and the retroactive effect thereof, amount to a violation of due process.

Furthermore, the Union asserts that the City's actions are in contravention of the "spirit" of the Agreement, as embodied in the "Whereas" clause, cited above. Rather than further cooperation, contends the Union, the Directive punishes Officers even though there is no proof of feigned sickness and denies employees the right to a statutory hearing before discipline is imposed.

Discussion

This Board has repeatedly held that in determining disputes concerning arbitrability, we must decide whether the parties are in any way obligated to arbitrate their controversies and if so, whether the dispute presented falls within the category of issues the parties have agreed to submit for arbitral resolution.[2] It is clear that the parties in the instant matter have agreed to arbitrate grievances, as defined in Article XXI, Section 1(b) of their Agreement. The question remaining is whether or not the Department's actions fall within

[2] Decision Nos. B-2-69, B-18-74, B-1-76, B-15-79, B-11-81, B-3-82, B-28-82, B-22-83, B-5-84, B-27-84.

the categories defined above so as to present an arbitrable claim.

The Department submits that its actions are beyond the scope of the grievance procedure by virtue of the statutory management rights provision contained in NYCCBL Section 1173-4.3(b). However, this right to manage, and the reservation of an area in which management is free to act unilaterally in order to manage effectively and efficiently, not a delegation of unlimited power. As we stated in discussing Section 1173-4.3(b) in Decision No. B-8-81,

> the protected area is not intended to be so insulated as to preclude any examination of actions claimed to have been taken within its limits. In short, it is intended as a means to enable management to do that which it should do but not as a license to do that which it should not. Section 1173-4-3b does not authorize management to abrogate the statutory or contractual rights of employees directly nor does it warrant the indirect accomplishment of such ends through acts which, in a general way, may be said to fall within the area of management prerogative.

Furthermore, in cases analogous to this one, [3] 11 we have attempted to accommodate the competing interests of the parties by fashioning a test in which the grieving

[3]Decision Nos. B-5-84, B-9-81, B-8-81, B-27-84.

party is required to allege sufficient facts to establish a nexus between the act complained of and the source of the alleged right.

Article X, Section 2 of the Agreement accords Correction officers sick leave benefits and does so "in accordance with existing procedures." Clearly, Directive #2258, which the Union claims violates Article X, Section 2, deals with sick leave. COBA has thus met its burden by presenting a claim that promulgation of the Directive with regard to sick leave violates the rights of unit employees to sick leave under the contract. It must therefore be concluded that the request for arbitration alleges a breach of contract and is arbitrable. This finding, however, is in no way a determination of the merits of the underlying dispute.

Having so found, we need not consider grievant's claims with regard to the relevancy or significance of the "Whereas" clause of the Agreement, a matter more appropriate for resolution in arbitration.

Having determined that the claim alleged by COBA falls within the definition of a grievance contained in the collective bargaining agreement between the parties, we shall deny the petition contesting arbitra-ability and grant the request for arbitration.

0 R D E R

Pursuant to the powers vested in the Board of CoilectiveBargaining 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.
April 24, 1985

ARVID ANDERSON
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MEMBER

MILTON FRIEDMAN
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