

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - X
In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

DECISION NO. B-21-85

Petitioner,

DOCKET NO. BCB-783-84
(A-1994-84)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DETERMINATION AND ORDER

On October 29, 1984, the City of New York ("the City"), appearing by its office of Municipal Labor Relations ("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 ("the PBA" or "the Union"). On November 10, 1984, the PBA submitted its answer. The City filed a reply on November 26, 1984.

Background

On April 9, 1984, by order to show cause, Phil Caruso, president of the PBA, commenced a proceeding in Supreme Court, New York County, on behalf of himself and all members of the 23rd Precinct of the New York City Police Department ("Department") seeking a temporary restraining order as well as an order enjoining and prohibiting the Police Commissioner of

the City of New York ("Police Commissioner") from requiring police officers to submit to interrogations concerning allegations of financial dealings with one John Chin. Mr. Chin had been arrested on criminal charges and was implicated in the investigation of former Schools Chancellor Anthony Alvarado. The Department opposed the petition, asserting mootness, since the interrogations were then concluded; lack of standing to sue; and that the claim lacked merit. On September 11, 1984, Supreme Court Justice Edward J. Greenfield issued a memorandum decision in which he denied the Union's motion for a preliminary injunction as moot and granted the City's cross-motion to dismiss the petition. ¹

On April 17, 1984, the PBA initiated an informal grievance pursuant to the grievance and arbitration procedure set forth at Article XXIII of the 1982-1984 collective bargaining agreement with the City. The grievance was rejected by the Department's Office of Labor Policy and was subsequently denied by the Police Commissioner at Step IV of the grievance procedure. On October 17, 1984, the Union submitted a request for arbitration, stating the grievance to be arbitrated as

¹ New York City Police Department v. Ward, Index No. 08417/84, Sup. Ct., N.Y. Cty., Spec. Term, Pt. 1 (Sept. 11, 1984).

follows:

Violation of the rights of over 150 members of the 23rd Pct., who were being questioned pursuant to Section 118-9 of the Patrol Guide without being informed of the complainant. Furthermore, the questioning was not specifically directed and narrowly related to the performance of police duties.

The request identifies Article XX of the agreement, entitled "Bill of Rights", and Section 118-9 of the Patrol Guide, entitled "Interrogation of Members of the Service," as the basis for the grievance, and seeks arbitration in accordance with Article XXIII, Section 1(a)(3) of the agreement, which provides as follows:

ARTICLE XXIII - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Definitions

a. For the purposes of this Agreement the term, "grievance" shall mean:

A claimed violation, misinterpretation or misapplication of the Guidelines for interrogation of Members of the Department referred to in Article XX of this Agreement;²

²In view of the allegation that a provision of the Patrol Guide has been violated, it appears that Section 1(a)(2) also should be cited in connection with the request for arbitration. Article XXIII, Section 1(a)(2) defines the term "grievance" to mean:

(More)

As a remedy for the alleged violations, the PBA seeks an order directing the Department:

to cease and desist from violating Section 118-9 of the Patrol Guide by specifically directing that the identities of complainants be divulged and that questioning [be] specifically directed and narrowly related to the performance of police duties.

A written waiver of the right "to submit the underlying dispute to any other administrative or judicial tribunal" accompanied the request for arbitration submitted on October 17, 1984.

Positions of the Parties

City's Position

The City does not challenge the substantive arbitrability of the grievance presented in this case. Its objection to arbitration is founded solely upon Section 1173-8.0d of our

(Footnote 2/ continued):

A claimed violation, misinterpretation or misapplication of the rule is, 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.

statute which, it is alleged, has been violated by the PBA's submission to the Supreme Court of the same underlying dispute as it seeks to litigate in the arbitral forum. Thus, OMLR contends, the request for arbitration and the court petition both complain about the Department's failure to identify the source of the allegations against the questioned police officers or to assert that the source was confidential, and both complain that the questions asked by the Department were not specifically related to the performance of the police officer's job, as required by Section 118-9 of the Patrol Guide. The City also notes that its response to the PBA's court petition addresses the substantive issues raised therein, including the issue of compliance with the Patrol Guide. In addition, OMLR contends, the remedy sought in the two proceedings is the same.

Denying the Union's assertion that its court petition sought only preliminary relief pending resolution of the dispute in arbitration, OMLR maintains that the court proceeding clearly involved a request for a permanent injunction and declaratory judgment, i.e., a final determination on the merits of the controversy. Accordingly, it is submitted, the waiver supplied by the PBA is invalid and precludes arbitration of this matter.

PBA's Position

In its answer to the petition challenging arbitrability, the PBA maintains that the court petition sought only a temporary restraining order and injunction pending the outcome of arbitration. Noting that the court has denied injunctive relief, the Union argues further that the court proceeding is no longer relevant to the present dispute and that the sole remaining mechanism for adjudication of the controversy is arbitration.

The PBA asserts that its argument in the court proceeding relating to Section 118-9 of the Patrol Guide had as its necessary, but limited purpose, justification of a request for temporary relief, i.e., by demonstrating to the court that there was reason to believe that the Union could succeed in arbitration. Argument relating to the merits of a controversy for the purpose of obtaining a preliminary injunction does not constitute submission of the dispute to the court for a final determination on the merits, according to the PBA.

Moreover, the Union argues, the remedies sought in the two proceedings are distinctly different:

in the court action, the PBA is seeking to enjoin the Department from implementing a policy and questioning the members who face immediate sus-

pension if they fail to respond to the inquiry while, in the arbitration petition, the PBA is seeking a final and binding determination that the Police Department cannot commit an improper inquiry again and must strictly comply with the guidelines contained in §118-9. The arbitration petition is not seeking injunctive relief since such a remedy is not available before the Board of Collective Bargaining. We are merely seeking a directive to the Police Department that they cease and desist from future improper conduct relating to §118-9 of the Patrol Guide. (Answer ¶17)

Based upon the above, the PBA contends that the request for arbitration should be granted.

Discussion

This case is similar to another matter which we decide today in that, like Docket No. BCB-723-84 (Decision No. B-22-85), it involves a challenge to arbitration based upon the Union's commencement of a court proceeding more or less simultaneously with, and relating to the same subject matter as, a grievance initiated under the collective bargaining agreement, giving rise to an argument by the City that Section 1173-8.0d of the New York City Collective Bargaining Law ("NYCCBL") has been violated.³ In Decision No. B-22-85,

³Section 117/3-8.0d of the NYCCBL provides:

(More)

we rejected the waiver argument because we found that the union's court petition sought only a temporary stay of implementation pending the outcome of the grievance and arbitration procedure. Since the PBA did not seek, nor did the court render, a final determination on the merits of the underlying dispute in that case, we concluded that the waiver submitted by the union was valid and that arbitration should not be barred on this basis.

In the instant matter, a different result is warranted. Here, the Union asserted in its petition to the court:

(p]etitioner has no adequate remedy
against the respondents except by a
Judgment as applied for herein, to-
gether with a restraining order
pending the hearing and determination
of this Petition. (emphasis added)

(Footnote 3/ continued)

d. As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

By way of relief, the petition sought:

an Order enjoining and restraining the Respondents from harassing the Petitioner by any such unwarranted and unlawful interrogations and ordering the Respondent or his agent to conduct their departmental duties with a proper and due observation of all concepts of due process of law.

Not only the petition, but the affidavits and attorney's affirmation submitted in support of the petition, addressed, inter alia, the issue of the alleged violation of police officers' rights under Section 118-9 of the Patrol Guide. In its cross-motion to dismiss the petition and memorandum of law, the City also addressed the substantive issue, asserting that the questioning of members of the 23rd Precinct was conducted in complete conformity with the Patrol Guide. Although Justice Greenfield did not write an opinion in which his express intention might be discovered, it seems reasonable for us to conclude that, having been presented with arguments concerning the merits of the dispute by both parties, and never having been apprised by the PBA that it sought only a temporary stay and desired to have the underlying issues ultimately resolved in arbitration, the court's decision to grant the City's cross-motion constituted a finding that the underlying complaint was without merit and

should be dismissed.

As we stated in City of New York v. Uniformed Fire Officers Association:

[t]his is not a case in which the Union instituted a judicial proceeding solely to seek a stay of implementation of a City action pending the outcome of an arbitrability proceeding or an arbitration hearing. In the instant matter, the Union instituted a court action in which it seeks not only a temporary injunction but a substantive finding that the implementation ... would violate the parties' collective bargaining agreement.⁴

In a second decision in Uniformed Fire officers Association, supra, rendered after the court denied the union's application for relief and dismissed its petition, we determined that the request for arbitration should be denied. On that occasion, we reasoned:

The Union's pursuit of its judicial proceeding and the Court's judgment therein constitute an election of

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Decision No. B-11-75 at 11. In this decision, we did not deny The union's request for arbitration, but determined not to process further the request or the petition challenging arbitrability while the Judicial proceeding was pending.

remedies. The Union has elected to submit the underlying dispute to the Court, and the Court's decision constitutes a complete adjudication of all issues submitted to the judicial process Therefore we will not now allow the Union to use the contractual arbitration machinery to reargue the same underlying dispute. ⁵

In the instant matter, the grievants elected, in the judicial proceeding, to plead, in part, a violation of a Department rule⁶ as a basis for obtaining an order enjoining the interrogation of members of the 23rd Precinct. In its request for arbitration, the PBA asserts a violation of the same Department rule and seeks an order directing the Department to cease and desist from such alleged violation. As in *Uniformed Fire Officers Association*, supra, we find that the relief sought by the Union in the judicial proceeding encompassed all of the relief obtainable from an arbitrator, a fact which, alone, would constitute a basis for denial of arbitration under NYCCBL Section 1173-8.0d, as that Section precludes the submission, for adjudication, of the same underlying dispute to another tribunal. Additionally, however, the

⁵Decision No. B-15-75 at 3.

⁶ In our Decision No. B-8-78, we held that the Police Department's Patrol Guide is a rule, regulation or procedure of the Department.

PBA has obtained a judgment of a court on the issue which it seeks to submit to arbitration, and therefore not only lacks the capacity to make a waiver satisfactory to the statutory requirement, but has made a conclusive and irreversible election of remedies which acts as an absolute bar to arbitration of the violations alleged herein.⁷

Finally, we reject the PBA's argument in its answer in this matter, attempting to distinguish between the injunctive remedy sought in court and the prospective "cease and desist" remedy allegedly sought in arbitration, i.e., "a final and binding determination that the Police Department cannot commit an improper inquiry again a directive to the Police Department that they cease and desist from future improper conduct...." Since the PBA obtained the judgment of a court which found allegations relating to the implementation of the Section 118-9 of the Patrol Guide to be without merit, there is clearly no predicate for the purely prospective relief now sought to be achieved in arbitration. Moreover, for reasons stated above, any attempt to litigate in the arbitral forum the issues submitted to the court in this case is barred.

⁷ See, Decision Nos. B-8-71; B-11-75; B-15-75; B-8-79.

For all of the foregoing reasons, the request for arbitration is therefore denied.

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, granted; and it is further

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

DATED: New York, N.Y.
July 29, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER