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

-between-

DECISION NO. B-22-85

THE CITY OF NEW YORK,

DOCKET NO. BCB-723-84

Petitioner, (A-1940-84)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.
- - - - - - - - - - - - - - - - - - - X

DETERMINATION AND ORDER

On July 31, 1984, the City of New York, by its Office of Municipal Labor Relations ("the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is subject of a request for arbitration submitted by the Patrolmen's Benevolent Association ("PBA" or "the Union"). The PBA filed an answer to the petition on August 19, 1984 and a supplementary letter on August 19, 1984. OMLR filed a reply on August 30, 1984.

Request for Arbitration

On May 28, 1984, the PBA initiated a grievance at Step III of the grievance and arbitration procedure set forth at Article XXIII of the 1982-1984 collective bargaining agreement between the City and the Union ("the Agreement"). The

grievance alleged a violation of Chief of Personnel Memorandum No. 48, dated May 17, 1972, which provides as follows:

> Subject: CONFIDENTIAL NATURE OF UNSUBSTANTIATED COMPLAINTS INVESTIGATED BY THE CIVILIAN COMPLAINT REVIEW BOARD OF INVESTIGATING UNIT.
>
> 1. The attention of all members of the Department is directed to the Rules and Procedures, Chapter 21, paragraph 17.0, which reads as follows:
>
> > "No notation of any action taken by the Civilian Complaint Review Board or of any proceedings pursuant to Part 1 of this Chapter shall be, made in the personal records folder of any member of this department."
>
> 2. Superior officers shall not require members being interviewed, for any reason, to divulge the fact that they have been the subject of civilian complaints coming within the purview of the Civilian Complaint Review Board, except for substantiated complaints on which Charges were preferred. No interview form shall have any caption requiring whether the officer has been the subject of civilian complaints unless such complaints were substantiated and Charges were preferred.
>
> 3. The Civilian Complaint Review Board will not supply information to superior officers concerning unsubstantiated complaints investigated by the Civilian Complaint Review Board Investigating Unit.

The grievance was denied by the Police Department's office of Labor Policy, and subsequently by the Police Commissioner, on the ground that the memorandum in question had been revoked by operations Order No. 36, dated April 2, 1979. Thereafter, on July 17, 1984, the PBA filed a request for arbitration, in

which it is alleged that Chief of Personnel Memorandum No. 48 has been violated by:

> Chief Rosenthal's criteria for identification of members of the service for inclusion on the [Civilian Complaint Review Board ("C.C.R.B.")] recidivist list and the supplying of information to superior officers concerning unsubstantiated complaints investigated by the C.C.R.B. investigating unit.

The demand for arbitration is made in accordance with Article XXIII, Sections l(a)(1) and l(a)(2 which provides:

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 seeks an order prohibiting the reporting of unsubstantiated complaints to superior officers and making whole all officers "transferred, reassigned, denied overtime or any discretionary benefits, etc." as a result of

the alleged violation.

A written waiver, pursuant to Section 1173-8.Od of the New York City Collective Bargaining Law ("NYCCBL"), accompanied the request for arbitration filed on July 17, 1984.

Background of the Controversy

The C.C.R.B. was created in 1966, pursuant to Section 440 of the New York City Charter, which authorized the Police Commissioner to establish a review board "to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the police department...." [1] Once the C.C.R.B. Investigating Unit completes its investigation of a complaint, a recommendation is made to the C.C.R.B. and, subsequently, to the Police Commissioner. A C.C.R.B. investigation may result in one of the following dispositions: "substantiated" "partially substantiated," "unsubstantiated," exonerated'' "unfounded" and/or "misconduct noted." A complaint is defined as "unsubstantiated" when "the investigation discloses insufficient evidence to clearly prove or disprove the allegations, made.[2]

[1] N.Y. City Charter §440(c) (1976).

[2] Interim Order No. 53 (1974).

On May 3, 1984, Police Commissioner Benjamin Ward met with the PBA's president and counsel to advise them of a change of procedure for reporting the disposition of complaints investigated by the C.C.R.B.. Pursuant to the new procedure, implemented in March 1984, commanding officers are afforded the opportunity to review the case file of any police officer identified as requiring special attention, in accordance with the following criteria:

3 or more complaints since 1/1/83
4 or more complaints since 1/1/82
5 or more complaints since 1/1/81
6 or more complaints since 1/1/80
3 or more substantiated complaints ever.

Except for officers in the last category, all civilian complaints that are not disposed of as exonerated or unfounded, are counted toward the determination of whether an officer falls within the above criteria. Believing the failure to distinguish between substantiated and unsubstantiated complaints to be a violation of Chief of Personnel Memorandum No. 48, the PBA reminded the Commissioner of the existence of the Memorandum, to which the Commissioner replied that he had authority to revoke a prior Department order.

On or about May 29, 1984, the Union filed an Article 78 petition in, the Supreme Court, New York County, seeking an

order (1) enjoining the implementation of the new Department policy "until grievance procedures directly related to this matter and involving the parties herein have been resolved", and (2) directing the Department to comply with Chief of Personnel Memorandum No. 48. By decision dated August 7, 1984, Supreme Court Justice Louis Grossman granted the PBA's application for a preliminary injunction [3] On June 27, 1985, however, the Appellate Division, First Department reversed the lower court's order and denied the injunction. [4]

Positions of the Parties

City's Position

The City advances three arguments in support of its petition challenging arbitrability. First, OMLR asserts that the written waiver submitted by the PBA is invalid since the Union commenced an Article 78 proceeding based upon the same allegations as underlie the request for arbitration. OMLR points to the fact that the PBA's demand for relief in the Article 78 proceeding includes a request for an order directing compliance with Chief of Personnel Memorandum No. 48 as evidence that the Union has submitted the same dispute to two forums, thus

[3] Caruso v. Ward, Index No. 12720, Sup. Ct., N.Y. Cty., Spec.
Term, Pt. 1 (Aug. 7, 1984).

[4] Caruso v. Ward, N.Y.L.J., June 27, 1985, at 6 (App. Div., 1st Dept.) (Sullivan, J., dissenting).

violating a condition precedent to arbitration established by Section 1173-8.Od of the NYCCBL.

Second, the City asserts that, insofar as the request for arbitration cites Article XXIII, Section 1(a)(1) as the section of the Agreement under which the demand for arbitration is made, without identifying another provision of the contract as having been violated, it fails to state a cause of action.

The City also asserts that the PBA has failed to state a cause of action under Article XXIII, Section-l(a)(2) of the Agreement because Chief of Personnel Memorandum No. 48, the rule, regulation or procedure claimed to have been violated, has been revoked by Operations Order No. 36.

Copies of the City's verified answer to the Article 78 petition, several affidavits in support of the answer and the City's memorandum of law are annexed to and incorporated into the petition challenging arbitrability herein. These documents describe, in some detail, procedures that have been followed since 1979 for the reporting to commanding officers of recommended dispositions of civilian complaints, as well as procedures for publication of operations and other departmental orders. In brief, it is asserted:

> Since 1979, it has been the practice

> of the CCRB to send to precinct commanding officers notices of dispositions of investigated civilian complaints against police officers. The dispositions sent to the commanding officers indicated the CCRB's recommendations and included "unsubstantiated" complaints. This continues to be the CCRB's practice
>
> In March 1984, the CCRB implemented an amended procedure .... The amended procedure merely takes the information that commanding officers have been receiving in the disposition notices since 1979 and organizes that information.
>
> * * *
>
> Operations Order No. 36 was promulgated in the same manner that all operations orders are promulgated. Once published, it was sent to all commands where it was publicly posted .... Operations orders are always made public to members of the Police Department and are published sequentially, by number so that if Operations Order No. 36 has been "secretly" passed it would have been noticed by members of the Police Department. Since Operations Order No. 36 was publicly promulgated and made known to members of the Police Department it is highly unlikely that petitioners did not know of it then. [5]

Finally, the, City notes that, since there is no obligation under the cited definition of a grievance to arbitrate a

[5] Respondent's Memorandum of Law at 4-6, Caruso v. Ward, supra, n. 3.

management determination to revise rules, regulations, or procedures, the promulgation of new criteria for the reporting of civilian complaints, which represent a departure not only from the terms of the revoked Memorandum No. 48 but also a change from the procedure that has been in place since 1979, is not subject to arbitration.

PBA's Position

The PBA asserts that it commenced an Article 78 proceeding solely for the purpose of staying implementation of the new C..C.R.B. policy pending the outcome of the related grievance and arbitration procedure. The Union avers that it was unaware that there was a question as to the effectiveness of Memorandum No. 48 until it received the City's answer to its petition asserting that the Memorandum had been revoked by Operations Order No. 36. Thus, contrary to the City's position, the request for an order directing compliance with Chief of Personnel Memorandum No. 48 is consistent with the request for injunctive relief, seeking to preserve what the PBA believed to be the status quo.

Moreover, in a supplementary letter, dated August 19, 1984, to the General Counsel of the office of Collective Bargaining, counsel for the PBA notes that the Supreme Court's order in the Article 78 proceeding, granting only a prelimi-

nary injunction, reinforces the Union's position that temporary relief is all that was sought in that proceeding.

Since the PBA did not seek, nor did the Court render, a determination on the merits of the controversy, it is argue , the filing of the Article 78 petition did not invalidate the written waiver submitted to this Board.

In response to the City's second challenge to arbitrability, the PBA asserts that the contract provision violated in this case is Article XXIII, Section 1(a)(2), defining a grievance to include "a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department...."

In response to the City's third challenge, relating to the status and applicability to the grievance of Chief of Personnel Memorandum No. 48, the PBA advances the following arguments:

> (1) unilateral revocation of the Memorandum would itself be a violation of rules, regulations and procedures of the Department, redressible through the grievance procedure;
>
> (2) the PBA received "no meaningful notice" of the revocation prior to receipt on June 5, 1984, of the City's answer to the related

Article 78 petition; even Police Commissioner Ward was unaware at the time of his meeting with PBA representatives on May 3, 1984 that the Memorandum had been revoked; the Memorandum must have been revoked in a "discreet and quiet manner, calculated to arouse no response;"

(3) Operations Order No. 36, on its face, gives insufficient notice of the revocation of the Memorandum. Moreover, a reasonable interpretation of the Order warrants the conclusion that only the text of the Memorandum was revoked while the substance was preserved and incorporated elsewhere.

The PBA also contends that, even if the procedures for reporting recommended dispositions of civilian complaints, as described in affidavits submitted to the Court in support of the City's answer in that matter, have been in effect, as the City claims, since 1979, the Union was never apprised of said procedures. Moreover, it is alleged, the City admitted in Court that the dispositions of civilian complaints are confidential, thus conceding that neither the individual police officer involved, nor the Union, is privy to the results of C.C.R.B. investigations under existing procedures.

Based upon the above, the PBA concludes that the subject of the grievance herein - the purported revocation of the substance of Memorandum No. 48 - is arbitrable in accor-

dance with the provisions of Article XXIII, Section 1 (a)(2) of the Agreement.

Discussion

Section 1173-8.Od of the NYCCBL provides:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration.. 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.

The purpose of this provision is to prevent multiple litigations of the same dispute and to assure that a grievant who elects to seek redress through the arbitration process will not attempt to relitigate the matter in another forum. In accordance with this provision, we have found that commencement of a court proceeding,[6] an appeal to the Civil Service Commission,[7] and an improper practice charge filed with the Public Employment Relations Board,[8] each dealing with the

[6]E.g., Decision No. B-8-79.

[7]Decision No. B-7-76.

[8]E.g., Decision No. B-10-74.

same underlying dispute as was sought to be submitted to arbitration, violated the waiver requirement and precluded arbitration.

In City of New York v. Uniformed Fire Officers Association, however, we distinguished between an Article 78 petition in which a demand is made for declaratory relief relating to a matter of alleged contract breach and a petition seeking only a temporary stay. Refusing to consider a request for arbitration while a judicial proceeding was pending, we stated:

> This 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 of [the proposed Discretionary Response Procedurel would violate the parties' collective bargaining agreement. [9]

Finding that the relief sought in the Article 78 proceeding encompassed all of the relief obtainable from an arbitrator, we held that the pendency of the court proceeding was an

[9]Decision No. B-11-75 at 11.

absolute bar to a proceeding before the Board with respect to the request for arbitration.

As suggested by the above, the waiver requirement of our statute is not breached where the only remedy sought in the judicial forum is a temporary stay pending the outcome of arbitration. In the instant case, the PBA commenced a proceeding in Supreme Court, reciting, in part, the rights it would assert in arbitration. The demand for relief is so worded that it might be argued, as the City has done, that the Union was seeking permanent relief and not me rely a stay pending arbitration of the underlying issues. However, the PBA's assertion that it believed Memorandum No. 48 to be in effect at the time of filing, and its argument that compliance with the Memorandum under the circumstances as the union believed them to be would simply preserve the status quo, is persuasive. Moreover, the Court also perceived the PBA's demand for relief as an application for a temporary stay and limited its decision accordingly. This fact carries significant weight in our decision herein. Since, in the instant case, it cannot be said.that the relief obtained in the Article 78 proceeding encompassed or, in light of the limited scope of the application, could have encompassed, all the relief obtainable from an arbitrator, we find that the

commencement of the judicial proceeding did not invalidate the waiver submitted by the PBA. We note that the New York Court of Appeals has held:

> [t]here is neither waiver nor an election of remedies where ... plaintiff moves in Court for protective relief in order to preserve the status quo while at the same time exercising its right under the contract to demand arbitration. [10]

We shall now consider the City's claim that there is no substantive basis for arbitration in this case. First, we note that the alleged violation, misinterpretation or misapplication of the definitional section of a contract does not, in and of itself, furnish the basis for a grievance.[11] Therefore, the PBA's request for arbitration under Article XXIII, Section 1(a)(1), citing Section 1(a)(2) of that Article as the contract provision alleged to have been violated, is denied.

The PBA asserts an independent basis for a grievance under Article XXIII, Section 1(a)(2), however, claiming that

[10] Preiss/Breismeister v. Westin Hotel Co., 56 N.Y. 2d 787, 45 N.Y.S. 2d 397, 437 N.E. 2d 1154 (1982); see also, Sherrill v. Grayco Builders, Inc., 64 N.Y. 2d 261, 486 N.Y.S. 2d 159 (1985).

[11] Decision Nos. B-22-80; B-7-81; B-41-82; B-22A-83.

a Chief of Personnel Memorandum has been violated by the implementation of criteria designed to effectuate a policy of reporting unsubstantiated civilian complaints to commanding officers. That Memorandum No. 48, the relevant language of which provides that the C.C.R.B. will not supply information to superior officers concerning unsubstantiated complaints against police officers, is a rule, regulation or procedure of the Department within the meaning of Article XXIII, Section 1(a)(2) is not disputed. Rather, OMLR's objection to arbitration is based upon the claim that the Memorandum has been revoked, therefore leaving no substantive basis for the assertion of a grievance.

Operations Order No. 36, promulgated by the Department on April 12, 1979 provides, in part, as follows:

> Subject: REVOCATION OF 1956 EDITION OF RULES AND PROCEDURES
>
> 1. Certain information contained in the 1956 edition of the Rules and Procedures remains active. Information or procedures which involve..more than one command have been incorporated into the Department Manual (Patrol, Administrative, Detective or Organization Guides). Information o.r.procedures which are still active and affect only one command have been classified "INTERNAL." Commanding officers of such units have been notified that the unit is responsible that these procedures continue to be performed.

2. Therefore, EFFECTIVE 2400 HOURS, APRIL 2, 1979, THE RULES AND PROCEDURES ARE REVOKED.

3. In addition to the revocation of the Rules and Procedures, the following directives, which have been incorporated into the Department Manual or published in another type of departmental directive, are also REVOKED:

STANDARD OPERATING PROCEDURE

S.O.P. No. 23, series 1962

TEMPORARY OPERATING PROCEDURES

T.O.P. 12, series 1966
T.O.P. 12-1, series 1966
T.O.P. 12-2, series 1966
T.O.P. 429-2, series 1971
T.O.P. 399, series 1971
T.O.P. 451, series 1971
T.O.P. 451-1, series 1971
T.O.P. 38, series 1972
T.O.P. 298, series 1972
T.O.P. 343, series 1972

CHIEF OF PERSONNEL MEMOS

Chief of Personnel Memo No. 48, series 1972

Chief of Personnel Memo No. 89, series 1972
Chief of Personnel Memo No. 91, series 1972

* * *

(Emphasis added)

The City argues that Operations Order No. 36 effectively revoked Chief of Personnel Memorandum No. 48. However, the PBA argues that, even though the Operations Order revoked the text of the Memorandum, it did not revoke the substance of the Memorandum which, the Order provides, is incorporated

elsewhere. Thus, while the City correctly states that management has the right unilaterally to revise or, for that matter, to revoke, a rule or regulation, and is under no obligation to arbitrate concerning this decision,[12] the focus of the instant dispute lies elsewhere.

The PBA and the City have expressly agreed to arbitrate "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department." Operations Order No. 36 constitutes such a rule, regulation or procedure. Thus, when the PBA asserts that Operations Order No. 36 preserves the substance of Memorandum No. 48, and that the City's action in reporting unsubstantiated civilian complaints to superior officers contravenes the substance of the Memorandum! we believe it has stated all the elements of a claimed violation, misinterpretation or misapplication of a rule, regulation or procedure of the Department. Moreover, as we are persuaded.that the language of the Operations Order itself provides an arguable basis for the PBA's claim that the order incorporates by reference, and asserts the continuing effectiveness of, the substance of

[12] The PBA's contention that unilateral revocation of Memorandum No. 48 would itself constitute a violation of rules, regulations and procedures of the Department is rejected for this reason.

Memorandum No. 48, we find that the Union has satisfied its burden of demonstrating a prima facie relationship between the management action complained of and the source of the alleged right.

Furthermore, we are persuaded that the instant claim could not have been asserted at an earlier time. For, while it is not seriously disputed by the PBA that Operations Order No. 36 was promulgated in accordance with departmental regulations, or that procedures for reporting to commanding officers the dispositions of civilian complaints, as delineated by the City, have been in effect since 1979, the Union maintains that it was not apprised of the fact that, under existing procedures, dispositions of complaints were being reported to commanding officers. Our review of the relevant procedures leads us to conclude that they do not reveal the precise nature of the information provided to commanding officers. Moreover, the City has conceded that the actual dispositions of complaints remain confidential. Under these, circumstances, notice of the existence of Operations Order No-36 cannot reasonably be said to constitute notice of the facts that unsubstantiated complaints were routinely being reported to commanding officers since 1979, or that the City considered Memorandum No. 48, and/or its substantive effect, to be a nullity.

In any event, it is not the function of a union to monitor and challenge every action of management. A union appropriately interposes itself only where a management action has an immediate impact on the employees in the unit it represents or where such an action necessarily will have an impact in the foreseeable future. A corollary to this principle, of course, is that the union must have notice of the immediate or foreseeable impact of the management action before it may be charged with registering an objection. It is well-settled that:

> the time to seek redress of ... a violation (begins] to run ... when the employee organization became or should have become aware of the circumstances that might have constituted the violation. [13]

In the present case, the PBA learned, at a meeting with the Police Commissioner on May 3, 1984, that Memorandum No. 48 was to be revoked. It promptly filed a grievance on May 28, 1984. Only subsequently, on June 5, 1984, did the Union learn that, in fact, compliance with the Memorandum had

[13] City of Yonkers, 7 PERB (.13007 at 3011 (1974). See also New Berlin Central School District, 18 PERB ¶14517 (ALJ 1985); Onteora Central School District, 16 PERB 13098 (1983); Roosevelt Union Free School District, 12 PERB 13001 (1979).

ceased some five years earlier.

In light of the foregoing, we find that the dispute is arbitrable. Our determination herein is in no way a determination of the merits of the controversy.

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 petition challenging arbitrability filed by the City of New York be, and the same hereby is denied, and it is further

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

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDDIAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER