City v. COBA, 35 OCB 40 (BCB 1985) [Decision No. B-40-85 (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-40-85

Employer, DOCKET NO. BCB-771-85
(A-2090-85)

-and-

CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

Respondent.
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DECISION AND ORDER

The City of New York (hereinafter "the Employer") has filed a petition challenging the arbitrability of four consolidated grievances submitted by the Correction Officers Benevolent Association (hereinafter "the Union") concerning alleged violations of the Employer's Institutional Order No. 16/84. The Union filed an answer to the petition, alleging that the consolidated grievance is arbitrable. Thereafter, the Employer filed a reply reiterating its contention that the consolidated grievance is not arbitrable.

Background

The facts in this matter are as follows. On April 3, 1984, the Deputy Warden in charge of the King's County Hospital Prison Ward, a facility within the Employer's Department of Correction, issued Institutional order

No. 16/84 entitled "'G' BUILDING 6TH FLOOR LOCK-IN/LOCKOUT SCHEDULE" (hereinafter "the Order"). The Order contains the statement that it was issued "to ensure that all inmates are allowed to lock-in/lock-out at the times indicated to ensure compliance with both Minimum Standards and Federal Court order." Briefly stated, the Order sets forth a schedule for the lock-out and lock-in of inmates at the facility, and relevant procedures to be followed by supervisory personnel as well as Officers within the bargaining unit. The procedures entail such matters as granting certain options to inmates, keeping time sheets and logs, and making certain that inmates are observed at all times.

On or about August 25, 1984, the Union filed a grievance alleging a violation of the Order in that during the optional lock-in/lock-out on that date a Captain removed the G63 Officer from the scene despite the fact that the Order requires the presence of five Officers. The result of this alleged understaffing, according to the Union, was that the security and safety of all concerned was jeopardized.

On or about August 26, 1984, the Union filed a second grievance alleging that paragraph 9 of the Order

was violated on that date when Officers were ordered to "cross relieve one another for meal." Further, according to the Union, the requirement that Officers go "to meal" impermissibly decreases the number on duty below the requisite five.

On or about September 5, 1984, the Union filed a third grievance, alleging that the Order was violated on that date when a Captain "stripped the G63, 64 center officer for the purpose of driving the institutional vehicle, returning an inmate back to his respective institution...." This, according to the Union, violated the requirement of the Order "for the presence of five officers ... in order to fully comply with the minimum standards pertaining to optional lock-out/lock-in."

On or about November 6, 1984, the Union filed the last of the four grievances involved herein, alleging that the Order was violated when, on November 5, the Captain removed an Officer from his post to drive the institutional vehicle thereby "stripping the ward of a required post ...."

On or about December 8, 1984, the four grievances were consolidated by the Union for purposes of further

processing, with the allegation that

> the Department's failure to follow "Institutional Procedure" (see Institutional Order #16 attached), continues to create unsafe working conditions which, in addition to breaches of security, have an adverse impact on members' ability to perform the duties for which they are held accountable.

On or about March 5, 1985, after the consolidated grievance was denied at Step III, the Union filed its request for arbitration, defining the grievance as a "violation of Institutional Order #16...." Thereafter, the instant petition was filed with the Board.

Positions of the Parties

Both parties rely upon the definition of a grievance set forth in Article XXI, Section 1(b) of their agreement. A grievance is defined therein as

> a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment ....

In this regard, the Employer contends that the level of staffing at the Kings County Hospital Prison Ward is not a term and condition of employment, but rather is a management right pursuant to §1173-4.3(b) of

the New York City Collective Bargaining Law which it has not waived in the Order and which is not subject to the agreement's grievance machinery. The Employer also claims that the Union cannot challenge the alleged adverse impact of the exercise of a management right in the arbitral forum. Finally, the Employer argues that the Union has not established any nexus between the actions it has grieved and provisions of the Order.

The Union, on the other hand, in support of its contention in the four grievances that a requirement for minimum staffing levels has been violated by the Employer, maintains that the Order has the same force and effect as a rule or regulation and that the instant dispute as to alleged violation of the order therefore falls within the agreement's definition of a grievance. The Union adds that the Employer, by its actions herein, has made it impossible for officers to perform duties required by the Order and thereby has created a substantial risk of injury and breach of security as well subjecting affected employees to sanctions for nonperformance of mandated duties.

Discussion

The dispute proposed for arbitration herein consists of two elements - the alleged adverse impact of the management action complained of upon employee safety and security and the contention that management's action could put employees at risk of disciplinary action by making impossible the performance of duties expressly mandated by written Institutional Order.

The Union does not cite nor does our own examination of the contract between the parties disclose any provision of the contract which can be said even arguably to constitute agreement by the parties to arbitrate issues relating to employee safety and security. Nor does the Union allege that employee rights with regard to that subject matter or to arbitration thereof are dealt with in any side agreement between the parties or in any unilateral management order, rule or regulation.

The nearest the Union comes to any such identification of a source of its alleged right is the contention central to each of the four grievances with which we are concerned here that the Institutional Order creates a minimum standard of manning. The only portion of the Order potentially relevant to this claim is paragraph 9 which was expressly cited by the Union in

the second grievance - that of August 26, 1984 - which reads as follows:

> 9. The officer assigned to the G 61-B, G 63-B and G 64-B, post shall position themselves so that any inmate who is locked-in is in visual sight at all times. Whenever there are inmates locked-in the main ward the officer will make a tour of inspection at least every half hour. Whenever the "B" officer is making a tour of inspection he/she shall prior to the start of the tour of inspection notify the G 61, G 63 or G 64 officer, so that the gate will be locked while the inspection is being made. An entry will be made in the post log book every time he/she makes a tour of inspection.

Beyond its conclusory allegations, the Union makes no showing as to how this language may be said to create a minimum standard of manning, nor is it apparent to us. Management's intention, it appears to us, was to issue a discretionary directive designed to achieve a desired level of performance. In every exercise of its management prerogative, the public employer does not incur the duty of disproving that the purpose of the action was to vest new rights in the Union or in unit employees. Rather it is for the Union to show that such a right has been created;

and it is in part in expression of this that we have held that it is the duty of the party seeking arbitration to identify the source of the asserted right and to establish a nexus between the source of the right and the act complained of.[1] We find that the Union has failed to prove or to offer any support for its claim that Institutional Order No.16 created a minimum standard of manning and that no such purpose or effect is apparent on the face of the Order itself. We find, furthermore, that even if the alleged standard could be read into the language of the Order there is no basis in the record before us for the Union's further conclusion that the Order creates a benefit for unit employees and grants a vested interest in such benefit.

With regard to the Union's contention that the actions complained of in the four grievances could prevent employee compliance with mandates set forth in Institutional order N0.16 thus putting them at risk of being disciplined, there is no showing in any of the Union's submissions that any employee has been reprimanded, disciplined or in any way stigmatized

[1] See, e.g., Decision No. B-8-81.

as a result of the actions complained of and in connection with performance of duties set forth in the Institutional Order. It has not been shown by the Union that the public employer has taken any action even suggesting an intention of disciplining unit employees in the manner projected by the Union. We are thus brought to the conclusion that this aspect of the Union's contentions is both conclusory and anticipatory and, at least on the basis of the record before us, that the Union's allegations do not present an issue ripe for submission to arbitration.

For all of the reasons stated, we find that the Union has not established any basis herein for the grant of its request for arbitration and we will accordingly order that the request be 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 Employer's petition challenging the arbitrability of the Union's claims that Institutional Order No. 16/84 has been violated be, and the same hereby

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

DATED: New York, N.Y.
December 6, 1985

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