

City v. COBA, 35 OCB 5 (BCB 1985) [Decision No. B-5-85 (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-5-85
DOCKET NO. BCB-732-84
(A-1959-84)

- and -

CORRECTION OFFICERS' BENEVOLENT
ASSOCIATION,

Respondent.

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DECISION AND ORDER

On September 7, 1984, the City of New York (the City"), 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 which was filed on August 1, 1984. On September 17 1984, the Correction Officers' Benevolent Association ("COBA" or "respondent") filed its answer, to which the replied on September 20, 1984.

BACKGROUND

On September 23, 1983, Correction officer Patrick Marcune ("grievant") filed a grievance in which he charged that the Department of Correction failed to observe the "Guidelines for Interrogation of Members of the Department", to which reference is made at Article XIX of the

1980-82 Correction Officers Contract, and otherwise mishandled the disturbance at the Anna M. Kross Center on Rikers Island on May 29, 1983.

On that day, grievant was assigned to an area of the prison known as the "B" post quadrant, lower "6" and "8". Upon his arrival, for the 11:00 p.m. to 7:31 a.m. tour, he allegedly encountered "a noisy and unruly quad," and observed an Inmate Suicide Aide passing objects back and forth from cell to cell on the "8" side. Grievant alerted the aide to his responsibilities to which the aide allegedly replied - "I know what the hell I'm supposed to do and where do you get off telling me my job."

The encounter was overheard by the inmates of the lower "8" side who thereupon began to act "even more threateningly." Disturbances spread through lower 8 where one inmate threatened to set his cell on fire. Grievant got a fire extinguisher from station A and returned to the cell where the inmate already had begun to light matches. Grievant alleges that he extinguished the matches and then returned to station A to report the incident. On his way there, he was struck in the head by a bar of soap. The blow caused him great pain and loss of balance. This area of his head had been previously injured on a tour of duty performed on May 13, 1983.

Captain Trapp, the designated area Captain, arrived some time after 11:35 p.m. and proceeded to the lower 8 side where he allegedly conferred with the inmates and obtained their version of the incident before, it is alleged, he consulted with either of the assigned post officers. When the Captain arrived at Station A, he loudly charged that "this has been a good house with good inmates and it was your [officer Marcune] fault that this happened." It is further alleged that

he [Captain Trapp] began demanding a report ignoring my statement that I was just hit in the head with a bar of soap. He then regained composure and called C-95 Control Room requesting that I be relieved for the purpose of report writing, never once considering my appeal for medical attention.

At approximately 12:10 a.m. grievant alleges that he was ordered to assume the main corridor post, from which he was not relieved until 12:50. Only then was he allowed to go to the Medical Management Unit where he received medical attention and a doctor's release from duty.

At 2:00 a.m. grievant signed out of the Center and proceeded to the Control Building where, he alleges, he was refused exit by a Rikers Island Security Captain. He returned to the Control Room where he was commanded to write a report before leaving the Island. Grievant alleges that his request to make a phone call was denied, and his medical condition ignored. The officers present proceeded

to interrogate him and, it is alleged, became "accusative, persisting that I write a report and humiliated me without any regard for the state I was in."

They apparently became aware of the wrongfulness in keeping me there under such duress and now they saw fit to have me driven to Booth Memorial Hospital by an Institutional vehicle and driver for further medical treatment ...

Grievant claims that the injury which he sustained on May 29, 1983 was later diagnosed by his physician as a concussion.

On September 23, 1983, Patrick Marcune filed a grievance in which he alleged that he was denied medical attention in connection with his injury in violation of Departmental Rule and Regulation No. 3.10.090. Officer Marcune further alleged that the Department failed to¹

¹ Rule and Regulation No. 3.10.090 provides, at paragraph "g" as follows:

Whenever an employee reports sick on duty, he shall immediately be examined by an institutional physician who shall submit to the head of institution or division concerned a report of medical findings and recommendations. The head of institution or division shall be guided in all instances by the physician's recommendations. If the employee is excused from duty, he shall be required to return to his home for the purpose of obtaining private medical care or treatment. If the employee so excused is unable to return to duty on his next regularly scheduled working day, he shall communicate with his institution or division as if reporting sick for the first time.

observe Rule and Regulation No. 3.15.250² by the manner in which it handled the disorder, and that it disregarded General Order 49 of the office of the Commissioner - "Guidelines for members of the Department When Interrogation in Connection with an Official Investigation,"³ in violation of Article XIX of the 1982-84

(Footnote 1/ continued)

Whenever an employee reports sick while on duty and there is no physician on duty at the institution or division, if required, he may be excused from duty for the purpose of obtaining private medical care or treatment. If the employee is unable to return to duty on his next regularly scheduled working day, he shall communicate with his institution or division as if reporting sick for the first time.

² Rule and Regulation No. 3.15.250 provides as follows:

Though not specifically mentioned in these rules and regulations, all disorders and neglects to the prejudice of good order and discipline and all conduct of a nature to bring discredit upon the Department shall be taken cognizance of by the Department according to the nature and degree of the offense and punished at the discretion of the Commissioner.

³ General Order 49 provides, at paragraph "i", as follows:

The Department shall afford an opportunity for a member of the Department, if he so requests, to consult with counsel before being

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Correction

questioned concerning an allegation of violation of law or serious violation of the Rules and Regulations, provided the interrogation is not unduly delayed. However, in such cases, the interrogation may not be postponed for purpose of counsel past 10:00 a.m. of the day following the notification of interrogation. Counsel, if available, and a representative of a Line Organization may be present during the interrogation.

Officers' Contract.⁴

On September 28, 1983, respondent was advised that the incident involving Officer Marcune was under investigation by the Department and that the grievance could not therefore be addressed at that time.

This position was subsequently restated at Steps II and III, with the further clarification that "Article XXI of the ... [Agreement states the term 'grievant' shall not include disciplinary matters" and that "[t]he incident which gave rise to the allegations raised by grievant are inextricably encompassed in the investigation that preceded disciplinary charges being served against him."

⁴ Article XIX of the Correction officers' Contract provides:

The Guidelines for Interrogation of members of the Department in force at the execution date of this Agreement will not be altered during the term of this Agreement, except to reflect subsequent changes in the law or final decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York regarding the procedures and conditions to be followed in the interrogation of a member of the Department. No less than two (2) weeks' written notice of such proposed alteration of the said Guidelines shall be given to the Union.

On or about February 29, 1984, the grievant was served with disciplinary charges. The first charge stated that

[slaid Officer Marcune assigned to the "B" post quadrant lower 8, at Ann M. Kross Center on May 29, 1983 tour 11:00 p.m. to 7:31 a.m. did wrongfully and without just cause prepare and submit a false report.

A request for arbitration was filed with the Office of Collective Bargaining ("OCB") on August 1, 1984, alleging the same facts and citing the same violations as those stated in the Step I grievance filed on September 23, 1983, and seeking, as a remedy, the suppression of statements and a cease and desist order.

Positions of the Parties

City's Position

The City maintains that (1) on September 28, 1983, grievant was informed that the incidents and documents which were the basis for his grievance were part of an investigation; and that (2) this investigation led to the filing of disciplinary charges against him on February 29, 1984. Since, it is argued, the contract expressly excludes disciplinary matters from its definition

of the term "grievance"⁵, and since "the very essence of his claim and allegations is the subject of the disciplinary matter," the alleged violations, it is maintained, are not arbitrable under the collective bargaining agreement. The City further argues that "[t]he grievant is clearly seeking to utilize the grievance procedure to attempt to suppress any statements or reports which may be used against him at a disciplinary hearing," and, further that "it would be illegal for an arbitrator to frame any remedy... which would attempt to interfere with or influence the Section 75 proceeding."⁶

COBA's Position

Respondent, in its answer, persistently maintains that it is not grieving a disciplinary matter per se but rather improper conduct by the Department in its

⁵ Article XXI provides that, inter alia the term "grievance" shall mean:

- b. a claimed violation, misinterpretation misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matter. [Emphasis added]

⁶ Disciplinary matters are heard pursuant to Section 75 of the Civil Service Law.

interrogation of a member, and that in bringing the grievance, it was concerned with - "not the conduct of the member but rather the conduct of the Department." Indeed, it is noted, it filed the grievance several months before disciplinary charges were even preferred against officer Marcune by the Department of Correction.

Since, it is alleged, Article XXI, Section 1C of the Correction Officers' Contract expressly provides, inter alia, that the term "grievance" shall mean "a claimed violation ... of the Guidelines for Interrogation of Members of the Department referred to in Article XIX of this Agreement," the fundamental premise underpinning the City's position is completely untenable since it "seems to suggest that any grievance by the Union could be thwarted by the filing of disciplinary charges against the member involved." Respondent, therefore, requests that the Board issue an order denying the City's petition challenging arbitrability.

Discussion

The parties to this proceeding do not disagree that the term "grievance", as it is defined in their argument, excludes disciplinary matters from the grievance arbitration procedure. Nor, however, has an out-

right assertion been made by either of the parties that a claimed violation of the "Guidelines for Interrogation of Members of the Department" is similarly excluded from the contractual definition of a grievance. Instead, the City has maintained throughout that "the allegations raised by grievant are inextricably encompassed in the investigation that preceded disciplinary charges being served ..." and are, therefore, excluded by virtue of that portion of the definitional clause of the contract which renders the grievance procedures unavailable in matters of discipline.

We have carefully considered the parties' respective arguments and in particular the overlap claimed by the City to exist between the facts which underlie the grievance and those which are encompassed in the pending disciplinary matter. We are convinced, nevertheless, that a prima facie claim has been stated under Section 1C of Article XXI of the contract which clearly and unambiguously defines a grievance as a "claimed violation, misinterpretation or misapplication of the Guidelines for Interrogation of Members of the Department referred to in Article XIX of this Agreement."

In an extensive statement filed by him at Step I, Officer Marcune charged that the manner in which he was

interrogated on May 30, 1983 violated General Order 49 and therefore Article XIX of the contract, and further that the Department's delay in responding to his request for medical attention violated Departmental Rule and Regulation No. 3.10.090.

It seems clear to this Board that the Department cannot shield itself from an inquiry into its conduct any more than the grievant can avoid an investigation examining his conduct albeit in connection with the same incident. We fail, therefore, to the provision see a conflict between barring disciplinary matters from arbitral consideration and the language of the contract which recognizes as arbitrable a claim that an interrogation was improperly conducted by the Department.

In so finding, we wish to note that the City's challenge to arbitrability based on its objection to any of the remedies sought by petitioner cannot, as we have repeatedly held,⁷ serve as the basis for a denial by this Board of a request for arbitration which in all other

⁷ In Decision No. B-12-83 this Board stressed that the mere possibility that an arbitrator might render a proscribed remedy will not defeat an otherwise valid request for arbitration.

respects satisfies the limited test of arbitrability.⁸

For the foregoing reasons, we find no basis for denying the request for arbitration herein.

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 Correction Officers' Benevolent Association's request for arbitration be, and the same hereby is, granted; and it is further

⁸ In Decision No. B-6-84, we stated that

[w]here as in this case the union has cited a contract provision which, on its face deals with the subject matters at issue, it has presented all of the elements appropriate to the limited scope of the Board's inquiry in matters of substantive arbitrability.

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ORDERED, that the petition challenging arbitrability be, and the same hereby is denied.

Dated: New York, N.Y.
February 19, 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