

City v. PBA, 37 OCB 19 (BCB 1986) [Decision No. B-19-86 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

DECISION NO. B-19-86

THE CITY OF NEW YORK,

DOCKET NO. BCB-818-85
(A-2207-85)

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On October 18, 1985, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging arbitrability of a grievance submitted by the Patrolmen's Benevolent Association ("the PBA") on behalf of police officer William F. Mullin ("grievant"). The PBA filed an answer to the petition on November 6, 1985, to which the City filed its reply on December 13, 1985.

Background

While assigned to cover a nursing home strike on August 1, 1984, grievant arrested Lorenzo King, a striking worker, for alleged picket line violence. An attorney representing the striking workers' union, Mary Jill Hanson, appeared at the police precinct to provide counsel

to Mr. King. Ms. Hanson claims, however, that grievant screamed at her to leave the premises while pushing her through the precinct doors and down the steps, allegedly causing slight injury to her right leg.

On the basis of this alleged incident, Ms. Hanson filed a complaint with the Civilian Complaint Review Board. On August 14, 1984, Captain William Friedlieb met with grievant about the matter.¹ In Captain Friedlieb's view, grievant became increasingly angry during this meeting, adamantly stating that "the attorney had attempted to take away his prisoner and that he should have hit her over the head with his nightstick." Feeling grievant "was unable to discuss the incident in a rational manner," Captain Friedlieb concluded the meeting and, because of his alleged concern over grievant's statements and conduct during the meeting, referred grievant to the Police Department's Psychological Services Program.

¹ The City and grievant dispute the nature of this meeting. According to the City, grievant appeared before Captain Friedlieb for a non-disciplinary "conciliation interview" for the purpose of discussing the complaint and the proper way to handle the underlying matter should it arise again. The grievant, however, claims that he was "ordered" to appear before Captain Friedlieb for an "interrogation" about the complaint.

Petitioner thereupon filed an Article 78 petition before the New York State Supreme Court seeking both a temporary and a permanent injunction of the psychological testing directed by Captain Friedlieb. Although it granted the temporary injunction pending a hearing on the matter, the Court denied petitioner's request for a permanent injunction on October 24, 1984, reasoning that grievant had failed to demonstrate that the Police Department had abused its discretion or violated its regulations in referring him for psychological testing.

On September 5, 1985, the PBA filed a request for arbitration on the basis that "[t]he rights of [grievant] under Section 118-9 of the Patrol Guide ² were violated

² Procedure No.118-9 of the Patrol Guide provides in pertinent part as follows:

PURPOSE

To protect the rights of the member of the service (uniformed or civilian) in an official department investigation.

PROCEDURE

Prior to questioning a member of the service (uniformed or civilian) who is the subject or a witness in an official investigation:

INTERROGATING OFFICER

1. Permit member to obtain counsel if:
 - a. A serious violation is alleged or
 - b. Sufficient justification is presented although the alleged violation is minor.

(more)

in that he was questioned and forced to respond regarding an allegation of improper conduct while on duty without PBA representation and/or counsel." As a remedy, the PBA seeks "[a)

(2 continued)

2. Notify member concerned two (2) business days prior to date of hearing to permit member to obtain and confer with counsel.
3. Inform member concerned of:
 - a. Rank, name and command of person in charge of investigation.
 - b. Rank, name and command of interrogating officer.
 - c. Identity of all persons present
 - d. Whether he is subject or witness in the investigation, if known.
 - e. Nature of accusation.
 - f. Identities of witnesses or complainants (address need not be revealed) except those of confidential source of field associate unless they are witnesses to the incident.
 - g. Information concerning all allegations.
4. Permit representative of department line organization to be present at all times during interrogation.

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determination directing the Department to cease and desist from violating member's rights under 118-9 of the Patrol Guide and a complete expungement [sic] of the records of the investigation involving [grievant) and the subsequent psychological evaluation." The City

thereupon filed a petition challenging the arbitrability of this grievance.

Positions of the Parties

The City's Position

The City argues that because grievant "has presented the same underlying dispute and has requested the same relief" in New York State Supreme Court, he is unable to comply with the requirement of NYCCBL Section 1173-8.0(d) that, as-a condition precedent to obtaining arbitration of a grievance, a waiver of any right to submit the underlying issue to any other forum must be filed. Section 117'3-8.0(d) reads as follows:

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 rights, 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 City further contends that the grievance herein is barred by laches due to the ten-month delay between the claimed violation and the filing of the grievance. This delay, according to the City, is prejudicial to its case since "the passage of time has dimmed available

witnesses' memories of events to the point of questionable reliability."

The PBA's Position

The PBA denies that grievant previously presented the same dispute underlying the grievance herein to another tribunal, thereby precluding him from satisfying the waiver provision of Section 1173-8.0(d). According to the PBA, the dispute before the Supreme Court concerned grievant's attempt to enjoin the psychological testing ordered by Captain Friedlieb, while the instant grievance seeks to resolve whether "Captain Friedlieb violated [grievant's] rights pursuant to Section 118-9 of the patrol guide in that he did not allow [grievant] an opportunity to obtain PBA representation and/or counsel."

Nor is the PBA, in its view, seeking the same remedy in arbitration that it sought in the Supreme Courts- The PBA contends that while the Article 78 proceeding requested an injunction of the psychological testing, the arbitration seeks "a determination directing the Department to cease and desist from violating the rights of the grievant and other members in the future similarly situated under Section 118-9 of the patrol guide".

Finally, the PBA disputes the City's claim that the grievance is barred by laches, pointing out that it submitted the grievance approximately two months after the Appellate Division denied its appeal from the

Supreme Court's decision. Thus, the PBA argues that the City cannot claim that it has been prejudiced by inexcusable delay on the part of the Union in asserting this grievance.

Discussion

The purpose of the waiver provision set forth in Section 1173-8.0(d) 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,³ an appeal to the Civil Service Commission,⁴ and an improper practice charge filed with the Public Employment Relations Board,⁵ each dealing with the same underlying dispute sought to be submitted to arbitration, violated the waiver requirement and precluded arbitration.

Likewise, we find that the grievance here concerns the same underlying dispute previously resolved in another forum. That being the case, grievant is unable to comply with the waiver requirement of Section 1173-8.0(d) and may not seek arbitration of his claim.

³ E.g., Decision No. B-8-79.

⁴ Decision No. B-7-76.

⁵ E.g., Decision No. B-10-74.

In so ruling, we reject the PBA's contention that the arbitration seeks to establish a violation of grievant's representation rights as set forth in the Patrol Guide, whereas the court proceeding only sought an injunction of the psychological testing. In his order to show cause before the Supreme Court, grievant requested a temporary injunction of the psychological testing on the basis that "there was a non-compliance with Patrol Guide Procedure 118-9 on August 14, 1984, in violation of the petitioner's rights regarding interrogation of police officers in respect to their official duties." Similarly, the attorney affirmation concerning the request stated in pertinent part as follows:

4. A stay of the examination is sought to prevent disciplinary proceeding being brought against the petitioner by failure to submit to such testing. There can be no prejudice to the respondents should the stay be granted pending the hearing of the motion herein.

5. At the hearing, the respondents will be afforded the opportunity to show to this Court that Rules and Procedures of the Police Department are being observed and carried out without discrimination, in good faith and not as a pretext for vengeance because the petitioner requested that the respondent comply with Patrol Guide Procedure 118-9. A review of the petition herein clearly shows an arrogance and disdain for the rights of the petitioner.

Indeed, the Court, in denying permanent relief, specifically ruled upon grievant's claim that he had been improperly denied representation. The court's decision stated as follow:

In response to the complaint the Civilian Complaint Review Board (CCRB) followed its usual procedures including interviewing the complainant and the officer. The complainant agreed that the matter should be handled through conciliation, which in effect is a counseling process that does not involve any disciplinary action against the officer, and therefore does not afford the officer a right to counsel. [emphasis added).

The matter presented by the instant case is distinguishable from that of Decision No. B-22-85, where the only remedy sought in the judicial forum was a temporary stay to preserve the status quo, pending the outcome of arbitration. In contrast, the PBA here admittedly filed for arbitration only after the court action, seeking permanent injunctive relief, had been finally adjudicated in the City's favor. See Decision No. B-21-85 (grievant was unable to comply with Section 1173-8.0(d) where he had previously been denied a permanent injunction with respect to the same underlying dispute).

Accordingly, we hold that grievant is unable to satisfy the waiver requirement of Section 1173-8.0(d) and is thereby precluded from arbitration of his claim.

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In view of our ruling, we need not address the City's argument that the grievance is barred by laches.

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 Petition of the Office of Municipal Labor Relations herein be, and the same hereby is, granted; and it is further

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

DATED: New York, N.Y.
March 31, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F. X. MULHEARN
MEMBER

CAROLYN GENTILE
MEMBER

SANDRA B. DURANT
MEMBER