City v. PBA, 37 OCB 22 (BCB 1986) [Decision No. B-22-86 (Arb)]

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

-between- DECISION NO. B-22-86

THE CITY OF NEW YORK, DOCKET NO. BCB-816-85 (A-2211-85)

Petitioner,

-and-

THE PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.
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DETERMINATION AND ORDER

On October 11, 1985, the City of New York ("City"), appearing by its office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance initiated by the Patrolmen's Benevolent Association ("PBA" or "the Union"). The Union filed an answer to the petition on October 29, 1985, and the City filed a reply on November 21, 1985.

Background

On April 22, 1985, the PBA submitted an informal grievance alleging that, on April 1, 1985, nineteen members of the Bronx Task Force were improperly rescheduled in order to avoid payment of overtime compensation in violation of the 1982-84 collective bargaining agreement between the parties ("Agreement"). On August 1, 1985, the grievance was denied by the New York City

Police Department's Office of Labor Policy, On August 6, 1985, the Union submitted the matter at Step IV of the grievance procedure.[1] The Step IV grievance was denied by the Police Commissioner on August 16, 1985. On September 3, 1985, the PBA filed the request for arbitration which underlies the City's petition in this matter.

The PBA seeks arbitration in accordance with Article XXIII, Section la(l) and (2) of the Agreement, wherein the term "grievance" is defined as follows:

> 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 it "grievance" shall not include disciplinary matters.

It is alleged that Article III, Sections l(a) and (b) of the Agreement have been violated by the rescheduling of tours on April 1. Article III (Hours and Overtime), Section 1 provides as follows:

> a. all ordered and/or authorized overtime in excess of the hours required of an employee by reason of the employee's regular duty chart, whether of an emergency nature or of a non-emergency nature, shall be compensated for either by cash payment or

[1] Article XXIII, Section 4.

> compensatory time off, at the rate of time and one-half, at the sole option of the employee. Such cash payments or compensatory time off shall be computed on the basis of completed fifteen (15) minute segments.
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> b. In order to preserve the intent and spirit of this Section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. Notwithstanding anything to the contrary contained herein, tours rescheduled for court appearances may begin at 8:00 A.M. and shall continue for eight (8) hours thirty-five (35) minutes. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory reassignment of personnel to different days off and/or tours of duty. In interpreting this Section, T.O.P. 336, promulgated on October 13, 1969, shall be applicable. Notwithstanding anything to the contrary herein, the Department shall not have the right to reschedule employees' tours of duty, except that on the following occasions the Department may reschedule employees' tours of duty by not more than three hours before or after normal starting for such tours, without payment of pre-tour or post-tour overtime provided that the Department gives at least seven days' advance notice to the employee whose tours are to be so rescheduled: New Year's Eve, St. Patrick's Day, Thanksgiving Day, Puerto Rican Day, West Indies Day, and Christopher Street Liberation Day.

As a remedy for the alleged violations, the Union seeks overtime payment at the contract rate for all time worked outside of the grievants' regularly scheduled tours.

Positions of the Parties

City's Position

The City contends that arbitration of the grievance herein

should be barred under the doctrines of "res judicata, collateral estoppel and issue preclusion"[2] because the PBA has previously submitted to arbitration and had a determination on the merits of the same grievance it seeks to have arbitrated in the present case. OMLR asserts that the aforementioned doctrines have been embraced by the Board of Collective Bargaining ("Board") in prior decisions which govern the present case.[3]

The City notes that, in Matter of the City of New York and Patrolmen's Benevolent Association, Case No. A-728-78, Arbitrator Eva Robins considered whether the rescheduling of tours of duty for members assigned to the Brooklyn North Task Force violated Article III, Section l(b) of the 1976-78 agreement between the parties. Arbitrator Robins denied the grievance, according to OMLR, based upon her determination that police officers assigned to task forces were not to be granted overtime pay for rescheduled tours. The City asserts that the instant grievance, involving rescheduling of tours of officers assigned to a task force, is thus specifically covered by the Robins award and should not be permitted to be relitigated.

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[2] We note that the terms "collateral estoppel" and "issue preclusion" refer to the same legal doctrine. We shall refer to that doctrine as "collateral estoppel."

[3] The City cites our Decision Nos. B-27-82, B-28-81, and B-16-75. Also cited in support of OMLR's theory of the case are decisions of New York appellate courts.

The City maintains that there is no basis in fact or in law for the Union's position that a determination that members of one command are not entitled to overtime payments for rescheduled tours of duty is binding only on that command. According to OMLR, Arbitrator Robins accepted the City's position on this point and ruled that the City may reschedule members of task forces, wherever employed, without penalty. Moreover, the City contends, if a determination concerning one command is not binding on all other similarly situated commands, there would "never be any finality to determinations made by arbitrators."

Addressing the merits of the grievance, the City argues that task forces are part of a citywide program and must be governed by uniform policies. It is argued that different scheduling practices in different task forces would impair effective management of the citywide program.

For all of the aforementioned reasons, the City maintains that the PBA's request for arbitration should be denied.

PBA's Position

The Union asserts that arbitration of the grievance of Bronx Task Force members should not be barred under principles of res judicata or collateral estoppel. The PBA contends that the arbitration award in A-728-78 deals solely with the rescheduling of tours of the Brooklyn North Task Force and was based upon the specific circumstances prevailing at Brooklyn

North. These include a past practice with respect to the rescheduling of tours without overtime compensation and the fact that, upon joining the Brooklyn North Task Force, police officers are given to understand that the City may reschedule their tours of duty without compensating them at the overtime rate. The PBA asserts that no such past practice or understanding exists at the Bronx Task Force. Accordingly, it maintains that the instant case is not controlled by the Robins award.

The PBA also alleges that, in A-728-78, the City itself argued that Brooklyn North should be distinguished from other task forces in light of specific practices which distinguished Brooklyn North from other commands. Based upon the substance of the City's "admission", therefore, the Union argues that the merits of the instant grievance, filed on behalf of members of the Bronx Task Force, have yet to be determined.

In sum, the PBA contends that the prior arbitration award permits the City to reschedule tours of duty for Brooklyn North Task Force members without violating the Agreement because of the particular circumstances prevailing in that command. The Union argues that, were the circumstances not those of Brooklyn North, a contract violation would have been found in that case. The PBA asserts, moreover, that, if the arbitration award in A-728-78 is given citywide effect, OMLR will be able to violate the Agreement with impunity. Such a result, it maintains, would have a disastrous effect on labor relations and cannot be permitted.

Based upon the above circumstances, the Union requests that the City's petition be dismissed and that the request for arbitration be granted.

Discussion

The parties in this matter do not dispute that they have agreed and are obligated to submit to arbitration unresolved grievances, as that term is defined in their collective bargaining agreement. Nor do they dispute that a claimed violation of the provisions of the Agreement is within the scope of their obligation to arbitrate. Thus, in the present case, we conclude that the grievance asserted by the PBA, alleging that the rescheduling on April 1, 1985 of members of the Bronx Task Force without the payment of overtime violates Article III, Section 1 of the Agreement, is arbitrable under the Agreement.

However, the City objects to the submission to arbitration of this qrievance because, it alleges, the same dispute was previously resolved by the arbitration in A-728-78. The City maintains that principles of res judicata and collateral estoppel should be applied to bar relitigation of a question that has already been decided. In a recent case, we had occasion to review the various legal doctrines governing the preclusive

effect of prior arbitration awards.[4] We quoted from the Supreme Court's opinion in Parklane Hosiery Co. v. Shore, wherein the essential distinction between res judicata and collateral estoppel was explained:

> [u]nder the doctrine of res judicata, a judgment on the merits of a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.[5]

Under a third doctrine, stare decisis, a prior decision reached on the basis of similar facts may be adopted as a standard of judgment with respect to subsequent cases involving the same issues, but not necessarily the same parties. Although the issue has not been raised, it is well to state that while this Board may determine the preclusive effect of a prior award under the doctrines of res judicata and collateral estoppel,[6]

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[4] City of New York v. Local 621, S.E.I.U., Decision No. B-3-86.

[5] 339 U.S. 322, 326, n. 5 (1978).

[6] Decision No. B-27-82. See, Decision Nos. B-3-86; B-27-85; B-10-82; B-13-80; B-9-78; B-20-75; B-16-75. We are aware that some courts, including the New York Court of Appeals, have held that the Preclusive effect of a prior arbitral award is itself a question for arbitration. Board of Educ. Of Patchogue -

the question whether the outcome of a party's grievance is controlled by stare decisis is for an arbitrator to resolve.[7] We shall now consider the application of the aforementioned doctrines to the present case.

The "essential elements" of res judicata "are generally stated to be (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits".[8] Applying this formulation to the

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([6] continued):

Medford Union Free Sch. Dist., 48 N.Y. 2d 812, 424 N.Y.S. 2d 122, 399 N.E. 2d 1143 (1979); Little Six Corp. v.. United Mine Workers, 112 LRRM 2922 (4th Cir. 1983). However, there is also authority for judicial application of res judicata principles. E.g., IBEW Local 199 v. United Telephone Co., 112 LRRM 2666 (M.D. Fla. 1982). In addition section 1173-5.0a(3) of the New York City Collective Bargaining Law ("NYCCBL") grants us the power to determine, upon request, whether a dispute is a proper subject for grievance arbitration. We construe this provision to include the authority to rule upon the applicability in a given case of principles of res judicata and collateral estoppel.

[7] Machinists v. Associated Transport, Inc., 92 LRRM 2342 (M.D.N.C. 1976).

[8] Nash County Bd. of Educ. v. Biltmore Co., 1980-31 Trade Cases §63,715 at 77,816 (4th Cir. 1981).

present case, it is clear that the first and third elements have been satisfied. Arbitrator Robins' award in A-728-78 was a judgment on the merits, and the City and the PBA were parties to the prior as. well as the present proceeding. The remaining

question, therefore, is whether the cause of action is the same in each case so as to bar relitigation in a second arbitration.

We note that, in both proceedings, the claim sought to be arbitrated involved the rescheduling of tours of duty for members of a borough task force, allegedly in violation of Article III, Section 1 of the PBA contract. However, the claim in A-728-78 related to rescheduling at the Brooklyn North Task Force on enumerated dates during 1977, while the present claim relates to rescheduling at the Bronx Task Force on April 1, 1985. Also, the grievances arise under different contracts. Since the grievances clearly relate to separate and distinct incidents, the disposition of the former cannot reasonably be deemed to bar the latter on grounds of res judicata. Therefore, we shall dismiss the City's petition insofar as it is founded upon principles of res judicata.[9]

The City has also advanced the defense of collateral estoppel as a basis for barring arbitral consideration of the PBA's grievance. According to conventional doctrine, a party who asserts collaterally the estoppel of a prior judgment must establish that the issue (1) is identical with an issue in the prior action; (2) was actually litigated and determined in the prior action; and (3) was necessary to the determination of the

[9] See, Decision Nos. B-3-86; B-9-78.

prior judgment.[10] Thus, under the doctrine of collateral estoppel, a prior action is not conclusive as to matters which were not actually litigated.

In the earlier arbitration, A-728-78, the issue submitted to the arbitrator was the following:

> Did the rescheduling of tours of duty for members assigned to the Brooklyn North Task Force violate Article III, Section l(b) of the 1976-78 Agreement? If so, what shall be the remedy?

The PBA argued that the rescheduling of police officers in the Brooklyn North Task Force outside their "steady tours" [11] for extended periods of time during the 1977 blackout and during other periods between August and October 1977 was undertaken in order to avoid the payment of overtime and was violative of Article III, Section 1 of the collective bargaining agreement. The City contended that task forces were created with the under standing that police officers who volunteered for such assignments would be subject to rescheduling as tactical considerations required, and that there was a longstanding past practice of rescheduling without compliance with Article III, Section 1

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[10] "Collateral Estoppel in New York," 36 N.Y.U. L. Rev. 1158, 1171 (1961). See, Schwartz v. Public Administrator, 24 N.Y. 2d 65, 298 N.Y.S. 2d 955 (1969); Restatement, Judgments §68 (1942).

[11] A "steady tour" is a tour characterized by fixed hours, and is to be distinguished from a "rotating tour."

under such circumstances.

Arbitrator Robins perceived the issue presented in A-728-78 as involving two major questions: (1) whether members of the Brooklyn North Task Force had a contractual right to a steady tour of 1800 to 0200 hours, such that hours worked before or after the regular tour must be treated as overtime, and (2) whether Article III, Section l's prohibition against rescheduling should be applied. Upon consideration, inter alia, of the past practice established at Brooklyn North, the arbitrator ruled that there was no contractual guarantee against rescheduling and no prohibition in Article III, Section l(b) against the rescheduling of officers at Brooklyn North for the duration of an unexpected occurrence such as the 1977 blackout.[12]

It is apparent that the dispute as to rescheduling in the Bronx Task Force, which allegedly involves practices and understandings different from those prevailing at Brooklyn North was not presented to or considered by the arbitrator in A-728-78. Since that issue was neither actually litigated, nor necessary to the determination of the prior judgment, we conclude that there is no basis for the application of collateral estoppel in

[12] Matter of City of New York and Patrolmen's Benevolent Association, Case No. A-728-78, at 9.

the instant proceeding.[13] Accordingly, we shall direct that the qrievance asserted proceed to arbitration. In doing so, however, we express no opinion as to whether the facts in this case warrant a different result from that reached in A-728-78. The stare decisis or precedential effect of a prior award is a matter peculiarly appropriate for arbitral determination. As noted by the court in Machinists v. Associated Transport, Inc.:

> the weight to be accorded the previous arbitration award ... is, like the merits of the entire controversy, a determination left to the sound Judgment of the arbitrator.[14]

Similarly, the parties' other contentions with respect to the merits of the grievance, including the existence of a uniform policy on rescheduling for the various task forces, are for an arbitrator to determine.

0 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

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[13] See, Decision Nos. B-3-86; B-13-80.

[14] 92 LRRM 2342, 2344 (D.C.N.C. 1976). In that case, the district court was asked to determine the applicability of res judicata where an arbitration award dealt with the same grievance submitted on behalf of another employee of the same employer.

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the PBA's request for arbitration be, and the same hereby is, granted.

DATED: New York, N.Y.
April 22, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

IDA TORRES
MEMBER