City v. PBA, 37 OCB 23 (BCB 1986) [Decision No. B-23-86 (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-23-86
DOCKET NO. BCB-847-86
(A-2259-85)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.
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DECISION AND ORDER

On January 24, 1986, the City of New York, appearing by its Office of Municipal Labor Relations (herein "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance filed by the Patrolmen's Benevolent Association (herein "the Union" or "PBA") on November 20, 1985. The Union filed an answer on February 13, 1986, to which the City replied on March 3, 1986.

The PBA 's request for arbitration states the issue as follows:

> Members ... are being directed, if they are the arresting officers, to report to court for complaint preparation in

> civilian clothes. These directions are being given after the member has already reported for duty.[1]

It is the position of the Union that the above directions violate both Article III, Section l(a) and Article XXII of the collective bargaining agreement between the parties.

Article III is entitled "Hours and Overtime." Section 1(a) states, in pertinent part:

> 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 compensatory time off ....

Article XXII is entitled "Overtime Travel Guarantee" although it is generally referred to by the parties as "portal-to-portal pay," or "flying allowance." This article states, in pertinent part:

> Section 1. The assignment of an employee to a post not within the employee's permanent command shall in the first instance be accomplished so that the assignment originates and terminates within such employee's permanent command and within the employee's regular tour of duty.

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[1] On April 6, 1985, New York City Police Department issued a directive stating, inter alia:

> If it appears that preparation of the court complaint will extend beyond a scheduled tour of duty, the desk officer will direct the arresting officer to report for complaint preparation in civilian clothes.

> Section 2. Overtime travel guarantee compensation shall continue to be paid as follows:
>
> a. In the event that an employee is assigned to a post outside the employee's permanent command and is required to report at such post at the start of the employee's tour of duty,...
>
> b. In the event that an employee is assigned to a post outside the employee's permanent command and cannot return to the permanent command within the regular tour of duty ....
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> * * * *
>
> Section 4. In the administration of the provisions of this Article, the arbitrator's award in OCB Docket No. A-114-70 shall be applicable ....

The award in A-114-70 determined the applicability of portal-to-portal pay to certain groups of employees. The particular issue herein was not presented to arbitrator Dash, who summarized the issue before him as the PBA's contention that:

> portal-to-portal pay procedures presently applicable in mutually recognized situations, services and assignments, but from which are excluded a limited number of services and assignments (recorded and/or mutually understood) should apply [to several specific situations].

Before making his award, the arbitrator examined the premise underlying the concept of portal-to-portal pay:

> The basic concept ... is to make provision for a patrolman sufficient to compensate him for the inconvenience and loss of personal time involved in having to report to his regular reporting location in one geographical area, secure his uniform and/or equipment, and report ready for duty at some location outside of the geographical area serviced by his regular reporting location, with the total time involved in all aspects of his report time, work time, and return time exceeding a regular 8-hour tour of duty. The Arbitrator is persuaded that under these criteria the parties intended that the patrolman involved should be granted [portal-to-portal pay] to compensate him for the inconvenience and loss of personal time involved.

The City's Position

The City, in its petition, takes the position that arbitration of this grievance is inappropriate for two reasons. First, Section 1173-4.3(b) of the New York City Collective Bargaining Law ("NYCCBL") reserves to the City a broad range of management prerogatives, which, in the absence of any contractual or other limitation, encompasses the right to order police officers to report to court in civilian clothes. The City takes the position that while the conditions under which officers have a right to portal-to-portal pay are set forth in Article XXII and arbitrator Dash's award in Case No. A-114-70, there is no statutory or contractual limit on its right to direct officers to change their clothes.

Secondly, the City argues, there is no substantive relationship between the right alleged to have been violated, i.e., the right not to be ordered to change from uniform to civilian clothes in midtour, and the alleged sources of that right, i.e., Article III, Section l(a) of the contract which provides for overtime when an officer is required to work beyond his regular tour of duty, or Article XXII, which provides for portal-to-portal pay in certain circumstances. The City reasons that the directive complained of merely mandates the wearing of civilian clothes for certain work activities, and does not relate in any way to the payment of overtime pay or portal-to-portal pay. Thus, the City concludes, the necessary nexus has not been established, and this grievance is not arbitrable.

The Union's Position

The Union's answer concedes that the city "has the unabridged right under Section 1173-4.3(b) to direct a member to change into civilian clothes." The Union then attempts to restate its grievance, alleging that the Department is using its right to order a member to change into civilian clothes to deny overtime. There is, however, no allegation that officers are not being paid overtime for time actually spent in court beyond their normal tour. Although inartfully phrased, it appears that the gravamen of the grievance is actually the giving of the direction in midtour. The Union's rationale appears to be that prior

to the disputed directive the police officers would have been sent to court in uniform and, if required to stay at court beyond their regular tour of duty, the officers would have been entitled not only to overtime actually performed at court, but they would also have been entitled under Article III or XXII to payment for the time it took to return to their commands to change back to civilian clothes.

The Union asserts that the City cannot use a management right in order to deprive officers of overtime they would have received "had they been allowed to return to their commands after completion of the court proceeding." The Union cites, as the source of this right, Article III, Section l(a) of the contract which provides for the payment of overtime for ordered and/or authorized overtime beyond the regular tour. According to the PBA, the City does not have "the right to deny the members the overtime if such direction tends to reduce or eliminate it."

The Union also takes the position that Article XXII establishes the officer's right to "finish his work where it starts," and that it entitles the officer to portal-to-portal pay when he is ordered to report to or leave from a location outside his regular command. According to the Union, "an exception to that entitlement...is where the officer is told to report to court at the beginning of his tour and to leave

from there when his appearance is completed." The Union argues that prior notification allowed officers to report directly to court, and since they would be leaving directly from court, they could make appropriate transportation arrangements. The Union's rationale is that an officer notified of the change of costume and location in midtour does not have an opportunity to make transportation arrangements in advance, and this is the type of inconvenience for which portal-to-portal pay was designed to compensate.

DISCUSSION

As we have long held, the Board's function in determining arbitrability is to decide whether the parties are in any way obligated to arbitrate their controversies and if so whether the obligation is broad enough to include the particular controversy.[2] There is no dispute in this case that the parties have agreed to arbitrate unresolved grievances, as defined in their collective bargaining agreement, and that claimed violations of the provisions of Articles III and XXII are within the scope of the parties' agreement to arbitrate.

With respect to the claimed violation, however, the City argues that the Union has failed to establish a nexus between the actions of the City and the substantive provisions of the agreement. This Board has a responsibility

[2] E.g., Decisions B-4-86, B-2-69.

to inquire as to the prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration. In circumstances such as these, we have held that a grievant, where challenged to do so, has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.[3] Therefore, this Board must determine whether the provisions relied upon by the PBA, i.e., Article III, Section 1(a), and Article XXII are arguably related to the subject of the PBA's claim.

To the extent that the PBA's claim is based on the contractual overtime provision, we find that the Union has failed to establish the required nexus. The unambiguous language of Article III, Section l(a) merely provides for payment for the performance of such overtime work as is ordered and/or authorized by the Police Department: overtime must be "ordered and/or authorized" in order to be compensable. In the absence of a contractual or other limitation, the assignment of overtime is within the City's statutory right under the NYCCBL Section 1173-4.3(b) to:

> ... determine the methods, means and personnel by which government operations are to be conducted ....

We do not find that Article III, Section l(a) creates any limitation on the exercise of its prerogative regarding

[3] E.g., Decision Nos. B-4-86, B-8-82, 3-1-76.

the assignment of overtime.[4] We therefore hold that the union has failed to establish the required nexus between midtour assignment to civilian dress and the subject matter of Article III which, on its face, deals with payment for overtime worked.[5]

On the other hand, the Board finds that there is an arguable connection between the subject of the PBA 's grievance and Article XXII, covering portal-to-portal pay. Clearly, Article XXII envisions a situation in which employees are compensated for inconveniences caused when there are deviations from procedures relating to their regular tours of duty arising when employees are directed to perform work functions in places where they do not usually do so. It is not clear whether the inconveniences caused by giving directions to change clothes in midtour are of the type that would qualify the employee, under the arbitrator's formulation, to portal-to-portal pay. Moreover, the award in Case No. A-114-70, incorporated

[4] We note that subdivision (b) of this section appears to limit the City's right to reschedule days off and/or tours of duty in order to avoid the payment of overtime. However, no such rescheduling has been alleged in this case, and we do not find this limitation to be relevant to the PBA'S claim herein.

[5] We note also that the challenged directive is to be given only in circumstances where it is envisioned that an officer will be called upon to remain in court beyond his normal tour. There is no allegation that officers are not being paid for time actually spent in court beyond their regular tour.

into Article XXII of the contract, makes reference to applications of portal-to-portal pay which are "recorded and/or understood" by the parties. These applications are not spelled out in the award or in the contract. The Union refers to an exception to the contractual portal-to-portal entitlement under circumstances where a court appearance is required, presumably one of those "understood" situations to which the award refers. Under all these circumstances,.the question whether the directive herein creates a situation in which officers may be entitled to portal-to-portal pay is a matter requiring interpretation of the agreement and the award incorporated therein. This question involves the merits of the grievance, and, hence, is a matter into which this Board will not inquire.[6]

We have long held that the interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator and not for the forum dealing with the arbitrability of the dispute.[7] We therefore hold that insofar as the PBA's grievance is based upon an alleged violation of Article XXII, it should be submitted to an arbitrator for determination.[8]

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[6] E.g., Decision Nos. B-10-86, B-4-81, B-12-69.

[7] E.g., Decision Nos. B-4-81, B-15-80, B-10-77, B-25-72.

[8] We hold herein that the Union's grievance is not arbitrable insofar as it alleges a violation of Article III. However, should the arbitrator find that portal-to-portal Pay is warranted in the circumstances herein, our decision does not preclude the use of overtime rates in calculating the proper amount of portal-to-portal pay as provided in Article XXII.

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 City's petition challenging arbitrability be and the same hereby is, denied, except as to the Union's claim based upon Article III, Section 1(a) of the Agreement, and as to such claim only, it is granted; and it is further

ORDERED, that the request for arbitration of the Patrolmen's Benevolent Association be, and the same hereby is granted, only to the extent that it is based upon a claimed violation of Article XXII of the Agreement.

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

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MEMBER