City v. COBA, 37 OCB 24 (BCB 1986) [Decision No. B-24-86 (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,

-and-

DECISION NO. B-24-86
DOCKET NO. BCB-857-86
(A-2325-86)

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Respondent.
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DECISION AND ORDER

On March 10, 1986, the City of New York (City), through its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Correction Officers Benevolent Association ("COBA"). On March 20, 1986, COBA filed its answer to the petition, and the City filed a reply on March 31, 1986.

Union's Position

The gravamen of COBA's grievance is that the City is improperly confining officers to their residences in cases where they have reported absent for a finite period due to line of duty injuries. According to COBA, this practice violates the following "letter of understanding" ("letter") between then Corrections Commissioner Benjamin Ward and COBA's President Philip Seelig:

May 5, 1983

Dear Mr. Seelig:

> When the Departmental Doctor determines that a Correction Officer is injured in the line of duty and is incapacitated and unable to return to work for a finite period of time, then the Department will not confine such-officer to his residence for that period. If the administrative determination by the Commissioner or his designee is different from that of the Department Doctor, then the change will be communicated to the Officer by telephone or in writing. It is expressly understood that the determination by the Commissioner or his designee is final and not subject to the grievance procedure. This procedure does not affect any other rule or regulation of the Department.

very truly yours,

BENJAMIN WARD
Commissioner

In COBA's view, this letter, which has been incorporated into the parties' agreement, establishes that an officer will not be confined to his residence provided the Departmental Doctor determines that he (1) received an injury in the line of duty and (2) will be unable to return to work for a finite period of time. This determination, according to COBA, may be reviewed by the Commissioner, but only for the limited purpose of ascertaining whether the two criteria detailed in the

letter have been met; that is, whether the injury occurred in the line of duty and resulted in an absence of finite duration. Instead, COBA claims, the Commissioner is confining officers to their residences for such reasons as prior sick leave violations or excessive absenteeism.

COBA thus argues that the dispute is arbitrable since it is not challenging the Commissioner's findings with respect to the two criteria; rather, COBA objects "to the Department's confinement of officers despite findings which satisfy the understood criteria for non-confinement to residence." According to COBA, a contrary interpretation of the letter would "provide no redress for members whose request for unrestricted time out of residence was unreasonably denied despite having satisfied the contractual criteria."

As a remedy, COBA seeks a cease and desist order in addition to overtime pay for officers who have been wrongly confined to their homes.

City's Position

The City argues that COBA is seeking to impose a duty to arbitrate beyond the scope established by the parties' agreement. Since the letter "explicitly states that a determination by the Commissioner or a designee is final and not subject to the grievance procedure," the City urges the Board to dismiss the request for arbitration.

The City also contends that COBA has failed to establish a prima facie relationship between its complaint regarding confinement to residence and its citation in the request for arbitration to Article III ("Hours and overtime") and Article IV ("Recall After Tour") of the parties' agreement. The City thus submits that, at least with respect to Articles III and IV, the request for arbitration should be denied.

Finally, the City asserts that the dispute is "hypothetical" since COBA has failed to plead specific facts or file individual waivers under 1173-8.0(d) of the New York City Collective Bargaining Law for officers who allegedly have been wrongly confined to their residences. Accordingly, the City requests that the petition be dismissed.

Discussion

It is well established that this Board can neither create a duty to arbitrate where none exists nor enlarge a duty to arbitrate beyond the scope established by the parties in their contract or otherwise. A party may be required to submit to arbitration only to the extent it has agreed to do so. E.g., Decision No. B-12-77 (dispute regarding alleged assignment of unit work to non-unit employees is not arbitrable since the City did not consent, by contract, executive order, or

otherwise, to submit such disputes to arbitration); Decision No. B-15-82 (dispute concerning alleged wrongful disciplinary action is not arbitrable since neither the collective bargaining contract nor the relevant executive order provides for arbitration of such disputes); Decision No. B-41-82 (City cannot be forced to arbitrate a dispute regarding job staffing requirements where it has not agreed to do so, by contract or otherwise).

COBA cites the letter by Commissioner Ward as the source of its right to proceed to arbitration on the dispute herein. We find, however, that the letter establishes no such right under the circumstances of this case. The letter could not be clearer in stating that "[i]t is expressly understood that the determination by the Commissioner or his designee is final and not subject to the grievance procedure." Under the terms of the letter, the Commissioner is in no way restricted to consideration of simply the two criteria applicable to the departmental doctor's determination.

We recognize COBA's concern the under this holding, the letter endows the Commissioner with broad power to deny a request for non-confinement to residence. However, the letter clearly and unmistakably establishes that the commissioner's determination is final and outside the purview of the grievance procedure. Under circumstances such as these, we have refused

to disturb a voluntarily created and unambiguous exception to the parties' otherwise broad agreement to arbitrate.[1] Accordingly, we shall dismiss the request for arbitration.

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 filed by the office of Municipal Labor Relations, on behalf of the City of New York herein be, and the same hereby is, granted; and it is further

[1] Decision Nos. B-10-79; B-25-82.

ORDERED, that the request for arbitration filed by the Correction officers Benevolent Association be, and the same hereby is, dismissed.

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
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IDA TORRES
MEMBER