

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

-between-

THE CITY OF NEW YORK,  
Petitioner,

DECISION NO. B-16-87

-and-

DOCKET NO. BCB-915-86  
(A-2446-86)

PATROLMEN'S BENEVOLENT  
ASSOCIATION,  
Respondent.

- - - - - x  
In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,  
Petitioner,

DOCKET NO. BCB-916-86  
(A-2445-86)

-and-

PATROLMEN'S BENEVOLENT  
ASSOCIATION,  
Respondent.

- - - - - x  
In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,  
Petitioner,

DOCKET NO. BCB-919-86  
(A-2424-86)

-and-

PATROLMEN'S BENEVOLENT  
ASSOCIATION,  
Respondent.

- - - - - x

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DECISION AND ORDER

On October 30, 1986, the City of New York ("petitioner" or the "City") filed a petition, Docket No. BCB-915-86, challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Patrolmen's Benevolent Association ("respondent" or the "PBA") on or about September 3, 1986. On October 3, 1986, the City filed a second petition, Docket No. BCB-916-86, challenging the arbitrability of a grievance that is the subject of another request for arbitration filed by the PBA on September 3, 1986. On November 6, 1986, the City filed a third petition, Docket No. BCB-919-86, challenging the arbitrability of a grievance that underlies a request for arbitration filed by the PBA on July 24, 1986. The PBA's answers to these three petitions were filed on January 15, 1987. The City filed its respective replies on February 23, 1987.

Background

In each of the three proceedings, the PBA claims that the City has violated the overtime provision of the Agreement, which states, at Article III, Section 1a that:

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, 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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In Docket No. BCB-915-86, the request for arbitration demands that

Street Crime Memo #32 issued April 27, 1986 be rescinded and that all officers who were denied discretionary benefits due to their earning of overtime be... [made] "whole",

and seeks, as a remedy,

[i]mmediate rescission of Street Crime Unit Memo #32; retroactively making "whole" all members who were adversely affected by it; and a direction to the department prohibiting them from denying members discretionary benefits or otherwise discriminating against them because of their overtime earnings.

Street Crime Unit Memo #32 ("SCU Memo #32"), addressed to "All Supervisors, Street Crime Unit", on the subject of "RDO [Regular Days Off] Court Appearances, provides as follows:

1. Attached is a listing of those members with five or more RDO Court appearances from the beginning of the year to mid-April. In perhaps very few cases does the arrest activity level appear to justify these numbers. In fact, some of the least active members in SCU are on the list. Similarly, it should be a rarity for a supervisor to be required in court, especially on an RDO.
2. Squad supervisors shall be alert to any patterns of overtime abuse that might develop. These may be manifested by frequent appearances where an officer does not testify, a constant ratio between

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arrests and RDO appearances, and disproportionance number of RDO vs Work Day appearances. Scrutinize the Court Appearance section of the Lost Time form and interview the officer if it involved an RDO appearance. Don't merely sign it!  
[Emphasis supplied]

3. Recently an officer's name was deleted from a list of recommendations because of excessive overtime; a significant part of which was caused by an unusual number of RDO appearances.

The PBA charges that SCU Memo #32,

by denying certain members continued overtime or recommendations for positions of preference is improperly inhibiting members from availing themselves of their contractually guaranteed benefit of overtime compensation.

The PBA maintains that while the employer may distribute overtime as it sees fit under ordinary circumstances, it may not make recommendations for overtime on the basis of prior utilization. To do so, it claims constitutes an abuse of the employer's discretion and an improper exercise of its managerial prerogatives.

The dispute underlying the PBA's request for arbitration which is challenged in Docket No. BCB-916-86, is whether

Police officer Howard Naylor of the Identification Unit was [wrongfully] denied the right to work overtime on a number of occasions including specifically July 4, and July 5, 1986.

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The PDA seeks, as a remedy,

[o]vertime compensation at the rate of time and one half for one full overtime tour of duty on July 4th and again on July 5th 1986, together with a cease and desist order to the department to prohibit them from discriminating against P.O. Naylor regarding the assignment of overtime.

The PBA alleges that despite assurances to the grievant that he would be assigned overtime tours on July 4th and 5th, he was ultimately denied the right to work either of the tours. Police officer Naylor claims that

[t]o my knowledge, my office had three overtime tours assigned for July 4, 1986. One was forced on Police Officer... [name], even though he requested that I take his overtime tour. One was given to another section of support services, and the last returned to where it came from as being unable to fill slot.

Police officer Naylor further claims that

July 5, 1986 had numerous overtime tours. These was distributed to officers of my command with less time on the job than myself.

The PBA maintains that Article III, Section 1(a), when reasonably interpreted, requires that overtime be made available to all members of the bargaining unit on a fair and equitable basis. The grievant, it is charged, was arbitrarily denied

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the opportunity to participate in overtime work regardless of its availability, in clear violation of both the intent and spirit of Article III.

In Docket No. BCB-919-86, the claim underlying the request for arbitration is that

Police Officer Irving Oberweis of the 103rd Pct. was denied the right to work overtime to continue his arrest made on May 5, 1986, causing the case to be dismissed.

The remedy sought is

[o]vertime compensation at the rate of time and one half for the amount of time it would have taken P.O. Oberivies to finish processing the arrest had he not been relieved.

The PBA charges that the grievant was wrongfully taken off an arrest involving a family offense (1) resulting in a dismissal of the charges; (2) jeopardizing the safety of the civilian complainant and her child; and (3) subjecting the grievant to potential liability in a possible false arrest lawsuit by the defendant in that action. The PBA maintains that

the Department's actions were clearly erroneous and caused a dismissal of the charges against the defendant. If the Police Department had not taken such erroneous action, the grievant would

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have performed the overtime work, the charges would not have been dismissed against the defendant, and the grievant would have been appropriately compensated for the overtime work performed pursuant to Article III, Section 1(a) of the contract. The City cannot escape from the natural consequences of its erroneous action and must be deemed responsible for making the grievant "whole" by providing the overtime compensation to the grievant which he would have received had the Police Department not improperly and erroneously compelled him to terminate his processing of the arrest.

#### Positions of the Parties

##### City's Position

In challenging arbitrability, the City relies principally on

[t]he right of the City, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons, maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its

organization and the technology of performing its work. (emphasis added)<sup>1</sup>

It is petitioner's position, based on earlier Board rulings, that "... in the absence of a contractual limitation, the assignment of overtime is within the City's statutory right under Section 1173-4.3(b) of the New York City Collective Bargaining Law ("NYCCBL")", and, that Article III does not constitute such a limitation.<sup>2</sup>

The City maintains, in defense to all three claims, that determinations regarding overtime assignments fall well within the area in which it may exercise complete control and discretion. The City further maintains, in Docket No. BCB-915-86, that in issuing SCU Memo #32, it had hoped to alert Squad Supervisors to excessive scheduling of court appearances by police officers on their regular days off. The City contends that the issuance of the Memo was a proper exercise of (1) its general statutory right to make decisions regarding assignments; and (2) its discretion to use reasonable means to curb overtime abuse patterns in connection with

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<sup>1</sup>Section 1173-4.3(b) of the New York City Collective Bargaining Law.

<sup>2</sup>Decision Nos. B-23-86; B-35-86.



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arrests and Court appearances.

As a further challenge to arbitrability, the City maintains that in establishing nexus, the party requesting arbitration must demonstrate a substantive nexus, rather than a causal relationship, between the alleged wrong and the provision of the agreement upon which it relies. Article III, it is claimed, deals solely with the appropriate compensation for overtime work and the means of computing such overtime where it has been ordered and/or authorized. The City contends that Article III does not control the assignment of overtime, nor does it create any entitlement to specific assignments of overtime.

#### Union's Position

In its answers to these petitions, the PBA maintains that implicit in Article III, is the presumption that members will not be unreasonably deprived of the opportunity to work overtime tours when such assignments are available. Thus, while the PBA concedes that no member is guaranteed a fixed amount of overtime, each member is assured that he or she, along with all others, will be genuinely and fairly considered for these assignments. Contracts, it is urged, must be

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interpreted according to the rule of reason and each clause must be read together with its natural and reasonably anticipated implications. Thus, the PBA maintains, the employer herein violated, at the very least, the intent and spirit of Article III.

Lastly, the PBA argues that whether or not the City modified or limited its managerial prerogatives regarding overtime, and whether or not Article III is a mere computational clause, as asserted by the City, are questions of contract interpretation to be decided in the arbitral forum.

#### Discussion

Inasmuch as the petitions in BCB-915-86, BCB-916-86, and BCB-919-86 all represent challenges to arbitrability which involve the overtime provision of the parties collective bargaining agreement and thus raise common questions of law, the three proceedings are hereby consolidated for determination by this Board.

In considering challenges to arbitrability, this Board has a responsibility to ascertain whether a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought

through arbitration. Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.<sup>3</sup> Additionally, this Board has held that whenever a management rights defense to a request for arbitration is asserted, the burden will not only be on the Union ultimately to prove its allegations, but the Union will be required initially to establish that a substantial issue under the contract is presented. This, we have held, requires close scrutiny by the Board.<sup>4</sup>

It is clear that the City and the PBA have agreed to arbitrate grievances, as defined in Article XXIII of their Agreement, and that the obligation encompasses claimed violations of the provisions of that Agreement. In the instant proceedings, however, the City contends, and we agree, that the provision upon which the PBA relies as the source of the right which it asserts simply provides that an employee is entitled to overtime compensation for "[a]ll ordered and/or

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<sup>3</sup>Decision Nos. B-4-81; B-21-80; B-15-79; B-7-79.

<sup>4</sup>Decision No. B-8-81.

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authorized overtime." As we stated in a recent Board decision, B-35-86,

[t]his section in no way establishes that an employee is guaranteed the right to perform overtime work in any particular circumstances. To the contrary, Section 1a expressly recognizes that overtime must be "ordered and/or authorized by the Police Department in order to be compensable."<sup>5</sup>

We further stated, in that decision, that in the absence of a limitation in the contract or otherwise, the assignment of overtime is within the City's statutory management right "to determine the methods, means and personnel by which government operations are to be conducted." We do not find that Section 1a creates any such limitation here on the City's reasonable exercise of its prerogative regarding the assignment of overtime.

In BCB-919-86, the City claims that it exercised its right to determine whether, and under what circumstances, an arresting officer may process his arrest. Nothing in the pleadings persuades us that Section 1a, Article III even arguably limits the employer's rights in this regard. Accordingly, we find that the dispute presented therein is not arbitrable.

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<sup>5</sup>See also, B-9-83; B-7-81.

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In BCB-915-86, the City maintains that it took those measures which it deemed necessary and appropriate to prevent overtime abuse patterns. Although the PBA claims that the City discriminated against employees on the basis of prior utilization of overtime, it seeks to establish a contract violation on the basis of the disparate impact engendered by SCU Memo #32. Nothing, however, in Article III, Section 1a creates an entitlement to specific assignments of overtime, nor does this provision of the Agreement entitle an employee to be considered for such assignments in any particular manner.

In Docket No. BCB-916-86, the grievant again charges the Department with discrimination in the assignment of overtime. We must stress, as we did in B-35-86, that Article III, Section 1a

in no way establishes that an employee is guaranteed the right to perform overtime work in any particular circumstances. To the contrary, Section 1a expressly recognizes that overtime must be "ordered and/or authorized by the Police Department in order to be compensable."

We find, therefore, that the dispute herein is not arbitrable.

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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 challenging arbitrability in Docket No. BCB-915-86 be, and the same hereby is, granted; and it is further

ORDERED that the petition challenging arbitrability in Docket No. BCB-916-86 be, and the same hereby is, granted; and it is further

ORDERED that the petition challenging arbitrability in Docket No. BCB-919-86 be, and the same hereby is, granted;

DATED: New York, N.Y.  
April 30, 1987

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

DEAN L. SILVERBERG  
MEMBER

CAROLYN GENTILE  
MEMBER

WILBUR DANIELS  
MEMBER

EDWARD SILVER  
MEMBER