

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-52-87

-and-

DOCKET NO. BCB-991-87
(A-2648-87)

UNITED PROBATION OFFICERS
ASSOCIATION,

Respondent.

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DECISION AND ORDER

On August 14, 1987, the City of New York, appearing by its Office of Municipal Labor Relations ("City"), filed a petition challenging the arbitrability of a grievance submitted by the United Probation Officers Association ("UPOA"). The UPOA filed an answer on August 26, 1987, to which the City replied on September 4, 1987.

Background

The UPOA requests arbitration of the following grievance:

1. Whether the Department of Probation violated Article V of the contract by failing to give UPOA notice of new overtime policies and bargaining over the impact of same?

2. Whether the Department of Probation violated an agreement reached in Labor Management Committee to issue overtime policies in writing?

Article V of the parties' agreement, entitled "Productivity and Performance," reads, in its entirety:

Introduction

Delivery of municipal services in the most efficient, effective and courteous manner is of paramount importance to the Employer and the Union. Such achievement is recognized to be a mutual obligation of both parties within their respective roles and responsibilities. To achieve and maintain a high level of effectiveness, the parties hereby agree to the following terms:

Section 1. - Performance Levels

(a) The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise performance standards or norms notwithstanding the existence of prior performance levels, norms or standards. Such standards, developed by usual work measurement procedures may be used to determine acceptable performance levels, prepare work schedules and to measure the performance of each employee or group of employees. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the union prior notice of the establishment and/or revision of performance standards or norms hereunder.

(b) Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law.

Section 2. - Supervisory Responsibility

(a) The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employees for employees in supervisory positions listed in Article I, Section 1 of this Agreement. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility hereunder.

(b) Employees who fail to meet such standards may be subject to disciplinary measures in accordance with applicable law.

Article VI, Section 1, of the parties' agreement defines the term "grievance" to include, in relevant part:

(A) A dispute concerning the application or interpretation of the terms of this Agreement;

(B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer....

Positions of the Parties

City's Position

The City challenges the arbitrability of this grievance on several grounds. First, the City asserts that in the absence of any contractual or other limitation, decisions concerning the assignment and allocation of overtime have been held by this board to fall within the statutory grant of management rights contained in Section 1173-4.3(b) (new section 12-307(b)) of the New York City Collective Bargaining Law which states, in relevant part:

It is the right of the City... to determine the standards of services to be offered by its agencies; ... direct its employees;...maintain the efficiency of government operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; ... and exercise complete control and discretion over its organization and the technology of performing its work.

The City asserts that there is no limitation in the contract or elsewhere on the City's statutory right with respect to the assignment of overtime.

The City also argues that the UPOA has failed to state a provision of the collective bargaining agreement that is even arguably related to the grievance sought to be arbitrated, as the contractual provision alleged by UPOA as the

basis of its grievance makes no reference "to overtime or to any right on the part of the union to be notified of changes in overtime policy." Further, the City asserts that even if an oral agreement had been reached by the parties, "no provision of the collective bargaining agreement grants to the respondent the right to grieve an oral agreement."

The City also claims that the Board has already ruled on the claims herein in Decision No. B-29-87, wherein the Board dismissed an improper practice petition filed by the UPOA alleging that the Department of Probation had unilaterally changed the amount of overtime allowed for the preparation of pre-sentence recommendations. Thus, according to the City, the UPOA's waiver in the instant case is invalid, and the union is barred from bringing its request for arbitration by the doctrine of res judicata. Finally, the City argues that the remedy requested by UPOA - an order directing the City to bargain over impact of changes in overtime policy - is within the exclusive jurisdiction of the Board, and beyond that of an arbitrator.

The UPOA's Position

The UPOA argues that the references in Article V of the collective bargaining agreement to the employer's duty to notify and bargain concerning the practical impact of cer-

tain decisions limit the City's management prerogative "in this instance." The UPOA also claims that an oral agreement was reached, reiterated at several labor-management meetings, and may be enforced.

The UPOA denies that the underlying dispute was litigated and decided in Decision No. B-24-87, and asserts that the waiver is therefore valid and that an arbitrator can determine and remedy a violation of a contractual duty to bargain.

Discussion

The threshold issue with respect to challenges to arbitrability is whether the parties' obligation to arbitrate their controversies is broad enough to include the particular controversy.¹

With respect to the alleged violation of an agreement reached in labor management committee meetings, we conclude that it is not. Even if the management committee members did promise to issue overtime policy in writing, an oral agreement falls outside the contractual definition of a grievance, which is confined to disputes concerning the contract itself or concerning written policy or orders.

¹E.g., Decisions No. B-2-69, B-27-86.

With respect to the alleged violation of Article V of the parties' agreement, the grievance definition specifically encompasses such a dispute. The next question is whether the UPOA has established that a prima facie relationship exists between the act complained of and the source of the right alleged to have been violated.² We conclude that the UPOA has failed to meet this burden. In a number of recent cases we have found that, in the absence of contractual or other limitation, determinations with respect to overtime policy fall within the City's statutory right "to determine the methods, means and personnel by which government operations are to be conducted."³ Although Article V of the collective bargaining agreement may, as the UPOA asserts, oblige the City to provide notice of "certain management decisions" and to bargain about their practical impact, decisions concerning overtime are not among them. Article V deals specifically with the establishment of standards for performance and for supervisory responsibility, but does not address the issue of overtime. While it is theoretically possible to show a relationship between overtime and standards of performance, the Union has

²E.g., Decisions No. B-35-86, B-23-86.

³Decisions No. B-29-87, B-20-87, B-17-87, B-35-86, B-23-86.

not presented any evidence linking the two concepts. Thus, the UPOA has failed to identify a nexus between the act complained of (lack of notice and bargaining about the impact of decisions concerning overtime policy) and the source of the alleged right (contractual provision concerning standards for performance and for supervisory responsibility).

Accordingly, we find that the dispute as presented herein are not arbitrable.⁴

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 in Docket No. BCB-991-87 be, and the same hereby is, granted; and it is further

⁴Under these circumstances, we find it unnecessary to determine whether the grievance herein involves the same underlying dispute as that addressed in Decision No. B-24-87, or to address the City's additional arguments.

ORDERED, that the United Probation Officers Association's request for arbitration in Docket No. A-2648-87 be, and the same hereby is, denied.

DATED: New York, N.Y.
October 26, 198

ARVID ANDERSON
CHAIRMAN

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GEORGE NICOLAU
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