

City v. PBA, 41 OCB 40 (BCB 1988) [Decision No. B-40-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of  
THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-40-88

-and-

DOCKET NO. BCB-993-87  
(A-2538-87)

THE PATROLMEN'S BENEVOLENT AS-  
SOCIATION,

Respondent.

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DECISION AND ORDER

On January 29, 1987, the Patrolmen's Benevolent Association (hereinafter "PBA") requested arbitration of six grievances alleging that Police Officer The& Bergere (hereinafter "the grievant"), had been subjected to various forms of harassment and disparate treatment by the New York City Police Department.

The City of New York, by its representative, the Office of Municipal Labor Relations (hereinafter "the City"), filed a petition challenging the arbitrability of the above dispute on August 17, 1987. The PBA submitted its answer to the petition on November 1, 1987. The City filed a reply on December 14, 1987.<sup>1</sup>

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<sup>1</sup> Each party's time to file pleadings was extended upon consent.

Background

The grievant was assigned to the 17th Precinct on September 12, 1984 and, beginning in December 1984, held a series of fixed posts at diplomatic missions. In January 1985, grievant applied for an assignment to "steady late tours,"<sup>2</sup> but her request was denied. Thereafter, between January 29, 1985 and February 13, 1985, she filed six grievances against the City. These grievances complained of:

- 1) the denial of grievant's request for assignment to steady late tours;
- 2) "supervisory harassment" in that the district surgeon's instructions regarding grievant's assignment to limited capacity duty were disregarded;
- 3) harassment by precinct supervisory personnel in that grievant consistently was assigned to fixed posts at diplomatic missions, which assignment precluded her from attending unit training sessions;
- 4) harassment by the Administrative Lieutenant and the Integrity Control Officer of the 17th Precinct relating to grievant's alleged lateness and attendance problem;
- 5) harassment of grievant in that she was required to sign notification slips concerning emergency days taken which other officers were not required to sign; and

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<sup>2</sup> The term "steady late tour" refers to a permanent assignment to a tour of duty commencing at 11:30 P.M.

- 6) sexual harassment and verbal abuse by the precinct executive officer.

The latter two grievances were referred to the Department's Office of Equal Opportunity for review. In August 1985, the Office of Equal Opportunity determined that grievant's complaints were substantiated in part and unsubstantiated in part. Grievant's allegation that she was subjected to disparate treatment in her assignments was deemed substantiated. However, her contention that such treatment was based on her sex was found unsubstantiated.

In its request for arbitration of the six grievances summarized above, the PBA claims that the City violated Article XX and Article XXIII, Section 3, of the 1984-1987 collective bargaining agreement between the parties ("the Agreement"). Article XX, denominated "Bill of Rights," provides as follows:

The Guidelines for Interrogation of members of the Department in force at the execution date of this Agreement will not be altered during the term of this Agreement, except to reflect subsequent changes in the law or final decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York regarding the procedures and conditions to be followed in the interrogation of a member of the Department. No less than two (2) weeks' written notice of such a proposed alteration of the said Guidelines shall be given to the Union. The parties shall discuss and may mutually agree upon other amendments to these Guidelines at any time.

Article XXIII, titled "Grievance and Arbitration Procedure," provides, in relevant part, as follows:

Section 3

- a. Every grievant shall have the right to present a grievance in accord with the procedure provided herein free from coercion, interference, restraint or reprisal.
- b. The informal resolution of differences or grievances is urged and encouraged at all levels of supervision.
- c. Commanding Officers and Reviewing Officers shall promptly consider grievances presented to them and, within the scope of their authority, take such necessary action as is required herein.
- d. Commanding Officers, Reviewing Officers and members of the Personnel Grievance Board shall consider objectively the merits of grievances with due consideration to the harmonious inter-relationship that is sought to be achieved among all members of the force and for the good of the Police Department.
- e. Any employee may present the employee's own grievance through the first four steps of the grievance procedure either individually (with the aid of the employee's own counsel if the employee so chooses), or through the Union, provided however that the Union shall have the right to have a representative present at each step of the grievance procedure.

In addition, the PBA asserts, in its answer to the City's petition, that the right to be assigned to steady late tours, alleged to have been denied to the grievant here, is contained in Operations Order No. 105 of 1978 and in a letter agreement

attached to the collective bargaining agreement. The PBA further alleges that these documents are "included by reference" in Article III of the Agreement. Article III, denominated "Hours and Overtime," deals with the subject of overtime compensation and provides, in part:

Section 1.

- 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 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.
  
- 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 contained herein, the Department shall not have the right to reschedule employees' tours of duty, except that on the following occasions the Department may reschedule an employee's 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 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.

Operations Order No. 105, on the subject of "Nine Squad Police Officer Patrol Duty Schedule," is a four-page document detailing the length and make-up of tours of duty for patrol personnel. It provides, in part, that

(a)ny new steady tour established shall, in the first instance be staffed with volunteers in order of seniority. Henceforth as vacancies occur in steady tours they shall be posted in the command for a reasonable time and staffed as above.

The letter agreement referred to by the PBA appears to be one dated November 20, 1986. It provides that police officers shall have a limited right to grieve removal for cause from a steady late tour assignment granted pursuant to Operations Order No. 105.

The PBA seeks arbitration pursuant to Article XXIII, Sections 1a(1), 1a(2), and 1a(3) of the Agreement, which provides as follows:

Section 1. Definitions

- a. For the purposes of this Agreement the term, "grievance" shall mean:

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 provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters;
3. A claimed violation, misinterpretation or misapplication of The Guidelines For Interrogation of Members of the Department referred to in Article XX of this Agreement;

Positions of the Parties

City's Position

The City maintains that the PBA has failed to cite any contractual provision that is arguably related to the acts complained of by the grievant. The City argues that Article XX of the Agreement relates solely to the guidelines for interrogation of members of the Police Department, while Article XXIII, Section 3 relates solely to the presentation and resolution of grievances, and that neither relates to the gravamen of the instant grievances, i.e., various forms of harassment and a refusal to assign the grievant to steady late tours. The City also asserts that Article III, which, it notes, was not cited by the PBA in the request for arbitration, contains no reference to any right that the grievant claims has

been violated. The City concludes that, since there is no relationship between the acts complained of and the provisions cited, the request for arbitration must be denied.

PBA's Position

In response to the City's petition, the PBA alleges that it has demonstrated a relationship between the acts complained of and the provisions cited in the request for arbitration. With respect to the claimed improper denial of grievant's request for steady late tours, the PBA points to Article III, which allegedly incorporates Operations Order No. 105 and the letter agreement.<sup>3</sup> It therefore concludes that the challenge to arbitrability must be denied, and an order be issued directing that the grievance proceed to arbitration.

Discussion

It is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the resolution of grievances.<sup>4</sup> However, it is well-established that this

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<sup>3</sup> Although the PBA claims that Article III is cited in the request for arbitration, we note that there is no such reference in the request.

<sup>4</sup> NYCCBL Section 1173-2.0.



Board cannot create a duty to arbitrate where none exists, nor enlarge a duty to arbitrate beyond the scope established by the parties in their contract. A party may be required to submit to arbitration only to the extent that it has previously agreed to do so.<sup>5</sup> In circumstances where the right to arbitrate a grievance is challenged, we have held that the Union is required to show that the contract provisions invoked are arguably related to the subject matter of the grievance sought to be arbitrated.<sup>6</sup> The City has made such a challenge in the case at bar. Thus, we must determine whether the contract provisions cited by the PBA are arguably related to the acts alleged as the basis of the six grievances presented here.

We have reviewed the pleadings in this matter and find that the PBA has failed to establish a sufficient nexus between the grievant's claims and any of the cited provisions of the Agreement. Article XX, denominated "Bill of Rights," proscribes changes in the guidelines for interrogation of members of the Police Department except under specified circumstances. The PBA has not alleged that the guidelines

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<sup>5</sup> Decision Nos. B-24-86; B-15-82.

<sup>6</sup> See, e.g., Decision Nos. B-8-82.

have been changed, however. Furthermore, we note that the guidelines themselves are applicable in instances of official department investigations. Here, it is not alleged that any of the guidelines has been violated. Therefore, we find that the PBA's claim under Article XX of the Agreement is not arbitrable.

We also find that the PBA has failed to establish any arguable relationship between the allegations of harassment and Article XXIII, Section 3. Although the PBA asserts that the grievant was harassed, it has failed to plead any arguable basis for a claim that any rights created by Section 3 were denied to grievant here. The PBA has not alleged that the grievant was denied any due process under that section or that she was retaliated against for exercising her right to file grievances. Therefore, we find that this claim is not arbitrable.

Additionally, we do not find the PBA's claim of a violation of Article III of the Agreement to be arbitrable. As the City notes, the PBA asserts a violation of Article III for the first time in its answer to the City's petition. Similarly, the first reference to Operations Order No. 105 and to a letter agreement, allegedly incorporated in Article III,

is found in the PBA's answer. We consistently have denied arbitration of claims alleged for the first time after the request for arbitration step, noting that to permit arbitration of a tardily pleaded claim would frustrate the purpose of a multi-step grievance procedure, which is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to attempt to settle the matter before it reaches the arbitral stage.<sup>7</sup>

Even if Article III had been asserted as a basis for grievant's claims at an earlier stage of the grievance procedure, however, we would deny arbitration of this claim. Article III deals with the subject of overtime compensation. Here, there is no allegation that the City failed to compensate the grievant for overtime worked or that it rescheduled her days off or duty tours in violation of that article. Further, we note that, whatever rights the grievant may have under Operations Order No. 105 and the November 1986 side-letter agreement, it is clear that neither of these documents is referred to in, much less incorporated into, Article III. We therefore concur with the City's contention that the Union has

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<sup>7</sup> Decision Nos. B-1-86; B-14-84; B-11-81; B-12-77; B-22-74; B-20-74.

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failed to establish a nexus between the grievances sought to be arbitrated and the provisions of Article III.

Finally, we find no provision in the Agreement that arguably protects an employee from sexual harassment or disparate treatment of the type alleged herein. We note that there are other forums available for redressing claims of sexual harassment, and that one such forum, the Office of Equal Opportunity, has already reviewed grievant's allegations. Absent a nexus between the allegations of sexual harassment and a specified provision of the Agreement, no arbitrable issue may be found.

The PBA, having failed to establish a nexus between specific contractual rights and the management conduct which it claims is in violation of such rights cannot proceed to arbitration over the City's objection. Accordingly, we shall deny the PBA's request to arbitrate this matter.

ORDER

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

ORDERED, that the Patrolmen's Benevolent Association's request for arbitration be, and the same hereby is, denied.

DATED: New York, NY  
September 6, 1988

MALCOLM D. MacDONALD  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

GEORGE NICOLAU  
MEMBER

CAROLYN GENTILE  
MEMBER

JEROME E. JOSEPH  
MEMBER

DEAN L. SILVERBERG  
MEMBER