

City v. PBA, 41 OCB 44 (BCB 1988) [Decision No. B-44-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

THE PATROLMEN'S BENEVOLENT
ASSOCIATION,

Respondent.

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DECISION AND ORDER

On December 15, 1987, the City of New York appearing by the Office of Municipal Labor Relations ("the City") served and filed a petition challenging the arbitrability of a grievance commenced by the Patrolmen's Benevolent Association ("the Union").¹ The Union served and filed an answer to the petition on December 23, 1987 to which the City served and filed a reply on February 19, 1988.

Background

The grievant, Police Officer John Pignatoro ("Grievant"), was transferred to the Police Department's Office of Equal Employment Opportunity on or about December 31, 1984.

¹ The agreement under which this dispute arises is the July 1, 1984 to June 30, 1987 contract between the parties ("the Agreement").

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He was subsequently transferred to an assignment with the Chief of Detectives on February 17, 1987.

After the latter transfer, the Police Department ("Department") notified him that from December, 1984, when he was transferred to the Office of Equal Employment Opportunity, until his transfer out of that office, he had been receiving a night shift differential to which he was not entitled.² As a result, the Department alleged that he had wrongly received \$2,000.00, and it asked for its return.

On April 20, 1987, the Union filed a grievance. The matter at issue is stated by Grievant in a letter dated April 16, 1987, to the "PBA Office" which is included as part of Exhibit A to the City's "Petition Challenging

² Article XXI of the Agreement, in relevant part, provides
for the payment of a night shift differential:

There shall be a 10% night shift differential effective January 1, 1971 applicable to all employees assigned to rotating tours of duty for all work actually performed between the hours of 4:00 P.M. and 8:00 A.M. There shall be a 10% night shift differential effective January 1, 1971 applicable to all other employees for all work actually performed between the hours of 4:00 P.M. and 8:00 A.M., provided that more than one hour is actually worked after 4:00 P.M. and before 8:00 A.M.

Arbitrability." The letter reads, in relevant part, as follows:

I was recently notified by Sr. P.A.A. Joseph Fortunato that Inspections conducted an audit and discovered that the [Police Department] Office [of Equal Employment Opportunity] had me on a wrong night differential chart and I now owe the Department \$2,000.00 back money since Dec. 1984.

I feel that this error should have been caught somewhere within this department since the Office is mandated by the Police Commissioner to be opened only between the hour(s) of 7 A.M. to 6 P.M. and no other time. Therefore, I should never have been on that chart and it should have never taken two years to discover it.

The Union claims that the City violated the Agreement by unilaterally deducting from the Grievant's salary the money claimed to have been paid incorrectly. In its request for arbitration, the Union asks for the "[i]mmediate ceasing of deductions from [the] police officer's salary and reimbursement to police officer for any deductions previously made."

The Parties' Positions

The City's Position

In challenging arbitrability, the City claims that the Union cites no provision of the Agreement which would entitle it to the relief it seeks. The City, citing a plethora of decisions of this Board,³ claims that the Union fails to allege how the sole provision it relies upon, Article XXI, is "arguably related to the grievance to be arbitrated." The City characterizes the Union's grievance as one in which the Union "is grieving the City's right to recoup monies improperly paid to Grievant over an approximately two year period." The City claims that its "right to recoup this money, paid to an employee who concedes he was ineligible for it, is obviously not an issue covered by Article XXI."

Second, the City claims that an employee has no independent contractual right to retain money that was improperly paid ab initio.

The City also claims that Section 12-307(b) of the New York City Collective Bargaining Law endows the City

³ Decision Nos. B-1-76; B-3-78; B-7-79; B-21-80; B-7-81; B-8-81; B-8-82; B-41-82; B-9-83; B-35-86; B-16-87.

with an "unfettered right to direct its employees and to determine the methods, means, and personnel by which governmental operations are to be conducted." The Union has failed, according to the City, to articulate any limitation upon its managerial rights, which would allegedly include, at least in this instance, the right to reclaim improperly paid money.

Finally, the City alleges that the Union has disingenuously attempted "to redefine its grievance" in its answer to the City's petition by asserting that the grievance to be placed before the arbitrator is whether the Grievant had an "affirmative duty" to notify the City that he was continuing to receive a night shift differential. Moreover, to the extent that the Union's answer relies upon an alleged "past practice" in support of a claimed entitlement to the continued payment of the night shift differential, the City argues that such "past practice" cannot serve as the basis for a grievance. The City cites Decision No. B-25-83, in which this Board found, inter alia, that the alleged violation of a "past practice" did not fall within the definition of "grievance" as set forth in the Agreement. The City submits that if the parties had intended to include (or not exclude) past practice from the definition

of grievance, they could have done so.

The Union's Position

The Union, in opposing the City's petition, asserts that the issue presented by its grievance is whether the City should be permitted to retain money which it paid as night shift differential but subsequently recouped through salary deductions. The City allegedly would be in breach of Article XXI if it acted to recapture a properly paid night shift differential.

The Union argues that, contrary to the City's contention, it may not have been improper for the Grievant to receive the money. Thus, the Union states the grievance

as:

whether or not a member, who is transferred from one assignment to another and continues to receive night shift differential compensation which he had previously been receiving, is under any affirmative duty to notify the department that he is receiving compensation in the same manner he was receiving it in his previous assignment.

The Union in its answer, further develops and clarifies the issue which it seeks to submit to arbitration:

There is much authority, which would be cited during the arbitration, for a

member to receive night shift differential compensation when temporarily assigned to another responsibility even where that other assignment involves hours during the day which would ordinarily not be compensated by night shift differential. There are other instances where a member, according to past practice, is paid night shift differential compensation for several years while on sick leave although he has not worked any night hours during that period of time. In other words, there is much authority for a member to continue to be paid night shift differential compensation although he does not work, for that period of time, those specific hours which he was working in his previous assignment. [emphasis added]

Finally, the Union claims that:

[e]ither there is past practice to justify the continued payment of the night shift differential compensation or there is not, but, in either case, that is a question properly addressed to the arbitrator, and the respondent should have the right to go to arbitration since the payment of night shift differential compensation was continued by the City, and the question would then be answered by the arbitrator as to whether or not it was properly continued or whether or not it was a mistake, as

the City now alleges.⁴

Discussion

In determining whether a grievance is arbitrable, this Board must initially determine, if a party raises the issue, whether there is an agreement to arbitrate grievances. Second, we must decide whether the claim is arguably covered by the contractual grievance procedure.⁵

Moreover, when a Union is so challenged by an employer, it must establish a nexus between the acts of

⁴ Article XXIII of the Agreement defines a "grievance", in relevant part, as follows:

1. A claimed violation, misinterpretation or inequitable application of the provisions of [the Agreement];
2. A claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment,...

⁵See Decision Nos. B-13-85; B-6-85; B-15-79.

the employer complained of and the source of the alleged right.⁶ In the instant case, the City not only challenges the existence of a nexus but alleges that the Union has tried improperly to redefine the grievance in the course of answering the City's petition.

In the informal grievance filed below, as evidenced by the letter dated April 16, 1987, referred to supra, the Grievant complains that the Department's "error" in in paying night shift differential should have been noticed and corrected by the City well-before it made \$2000 in overpayments. In its answer to the City's petition, the Union rephrases the grievance and states that it will present the issue of whether the Grievant was under a duty to notify the City upon his receipt of the overpayments. The City has labeled this as a "disingenuous attempt to redefine" the Union's grievance. We find that, to the contrary, the Union has merely restated in a somewhat different form the very same issues that were alleged and apparently processed below.

⁶ See Decision Nos. B-22-86; B-27-84; B-10-83.

We also find, however, that there is no nexus between the Union's grievance and Article XXI of the agreement. As discussed supra, Article XXI provides, among other things, for the payment of a 10% night shift differential "to all employees assigned to rotating tours of duty for all work actually performed between the hours of 4:00 P.M. and 8:00 A.M." Furthermore, it provides for the payment of a 10% night shift differential to all other employees for work performed between 4:00 P.M. and 8:00 A.M. "provided that more than one tour is actually worked" during those hours. The unambiguous language of this provision does no more than to create an entitlement to compensation. It clearly does not deal with the City's right to recoup alleged overpayments nor does it, by its express terms, deal with any reciprocal duty on the part of employees to notify the City of the receipt of erroneously paid night shift differential payments. The Union's grievance concerns the rights and obligations of the parties when an employee has been paid a night shift differential in error; those rights and obligations are not addressed by Article XXI.

We may not consider the further question of whether past practices have "attached" to Article XXI which would otherwise entitle the Grievant to receive night shift differential compensation in circumstances not expressly set forth in the Agreement. This claim, asserted in the Union's answer herein, was not alleged in the original grievance. We have long held that a party may not interpose at the point of going to arbitration, a claim based on a hitherto unpleaded grievance.⁷ To do so would deprive the parties of the benefit of a multi-level grievance procedure and foreclose the possibility of voluntary settlement. Where, as here, the Union raises a basis for arbitration other than that pleaded in its original grievance and its request for arbitration, the claim cannot be submitted to arbitration.

Thus, since we find that there is no nexus between the grievance before us, and Article XXI of the Agreement, we shall grant the City's petition challenging arbitrability.

⁷ Decision Nos. B-31-86; B-14-84; B-11-81; B-6-80; B-12-77.

ORDER

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 of New York's petition challenging arbitrability be, and the same hereby is, granted; and it is further

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

DATED: New York, New York
September 20, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
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EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER