

City v. PBA, 41 OCB 5 (BCB 1988) [Decision No. B-5-88 (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

DECISION NO. B-5-88

-and-

DOCKET NO. BCB-989-87
(A-2536-87)

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent

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DECISION AND ORDER

On August 11, 1987, the City of New York, through its Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a grievance submitted by the Patrolmen's Benevolent Association ("the Union" or "PBA") on behalf of Police officers Vanessa Jacobs and Monserrate Lopez ("the grievants"). The Union filed an answer on November 4, 1987, to which the City replied on November 13, 1987.

Background

On January 28, 1986, Police officers Jacobs and Lopez of the Manhattan Traffic Area were assigned to direct traffic on Delancey Street. Grievants assert that Captain Roge encouraged them to volunteer for the assignment

because fourteen police officers were needed to direct traffic on Delancey Street due to repair work on the Williamsburg Bridge and, at that time, only three other police officers had volunteered. According to grievants, Captain Roge agreed that if they volunteered for the assignment they: (1) would be partners; and (2) could remain in the assignment for its duration. Other than one instance of lateness by Police officer Jacobs, for which she was docked a day, grievants maintain that they were on time and worked well together.

On April 25, 1986, grievants were directing traffic on Delancey and Ludlow Streets. Grievants submit that traffic was very light due to the Jewish holiday and moving freely in all directions. At 0915 hours, Police officer Lopez was involved in an altercation with Inspector Burke who was driving through the intersection at that time. Inspector Burke criticized grievants' handling of traffic in the intersection. He indicated that grievants were not paying attention to their work; instead, they were talking.

On April 28, 1986, Captain Roge informed grievants that they were no longer assigned to Delancey Street. They were split up and given "C.D.'s" (Command Discipline) for unnecessary conversation.

On or about September 15, 1986, the Union filed a grievance on behalf of Police Officers Jacobs and Lopez at Step I of the grievance procedure claiming an "unjust... change of assignment." The Step I grievance was denied on or about December 30, 1986. Thereafter, on or about January 6, 1987, the Union filed a grievance at Step IV; which also was denied. No satisfactory resolution of the dispute having been reached, on or about January 29, 1987, the Union filed a request for arbitration claiming that:

The assignment of P.O. Vanessa Jacobs and P.O. Monserrate Lopez of Manhattan Traffic Area to directing traffic on Delancy Street was improperly changed by Capt. Roge after both grievants had volunteered for assignment at request of Capt. Roge who agreed that they could remain in such assignment for its duration if they volunteered for it.

The Union claims a violation of Article III, Section 1(b)¹

¹ Article III - Hours and overtime

Section 1.

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 employees' 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 the 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.

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and Temporary Operating Procedure No. 336 (TOP #336)² and, as a remedy, requests "[o]vertime compensation at the rate of time and one half for all hours worked by both

² TOP #336 pertains to the assignment of members of the force and states, in relevant part, as follows: "Members of the force shall perform their assigned duties in accordance with their regularly assigned duty charts. No member of the force shall be rescheduled to perform any tour of duty other than the tour to which he is assigned unless otherwise specified herein."

grievants outside the Delancey Street steady day assignment."

Positions of the Parties

City's Position

The City contends that pursuant to Section 12-307.5(b) of the New York City Collective Bargaining Law ("NYCCBL"), it has the right to

"[d]etermine the standards of selection of employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted."
(Emphasis added).

The City claims that the right to assign employees is clearly within its statutory management prerogative; and that this right is "unfettered" unless limited by the collective bargaining agreement. Since the PBA has cited no provision in the collective bargaining agreement which limits management's right to assign employees, nor does any provision exist, the City argues that the request for arbitration must be denied.

The City further argues that the request for arbitration must be denied because the Union has failed to establish the required nexus between the act complained of and

the source of the alleged right sought to be remedied at arbitration. The City contends that the contractual provision and directive cited by the PBA as the basis for its claim, Article III, Section 1(b) and TOP #336, prohibit the rescheduling of tours of duty. The stated intent behind Article III, Section 1(b), according to the City, is to preserve the spirit of Article III, Section 1(a), which guarantees overtime compensation. In the instant case, the City maintains, the acts complained of relate only to changes in assignments. Even assuming arguendo that grievants' tours were changed, an assertion not made in the request for arbitration, the City asserts that the Union has failed to show or even allege that any such change resulted in the avoidance of overtime pay and, therefore, violated the rights of grievants under the collective bargaining agreement.

Union's Position

The Union argues that management's statutory right to assign its employees is not "unfettered" in that Article III, Section 1(b) and TOP #336 prohibit the rescheduling of employees without the payment of overtime compensation. Therefore, the Union asserts, management's right to assign employees is subject to and limited by the provisions cited

in the request for arbitration.

The Union further claims that the grievance does not involve grievants' assignment as the City asserts, but the switching of grievants' tours in violation of Captain Roge's agreement to the contrary. Since Article III, Section 1(b) and TOP #336 relate specifically to the payment of over-time compensation for changes in tours, the Union contends that it has established the required nexus between the act complained of and the source of the alleged right sought to be remedied at arbitration. Therefore, the Union argues, its request for arbitration must be granted.

Discussion

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.³ Additionally, this Board has held that whenever a management rights defense to a request for

³ Decision Nos. B-16-87; B-35-86; B-8-82; B-15-79; B-7-79.

arbitration is asserted, the burden will not only be on the Union ultimately to prove its allegations, but also to establish at the outset that a substantial issue under the contract is presented. This, we have held, requires close scrutiny by the Board.⁴

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 as well as the rules, regulations and procedures of the Police Department. In the present case, however, the City contends, and we agree, that the provisions upon which the PBA relies as the source of the right which it asserts do not limit the City's statutory management right to assign its employees. Article III, Section 1(b) and TOP #336 simply provide that in order to preserve the intent and spirit of Article III, Section 1(a), which guarantees overtime compensation for all "ordered and/or authorized overtime", there shall be no rescheduling of days off and/or tours of duty.

Contrary to the Union's assertion, we find that grievants' complaint concerns an alleged improper change

⁴ Decision Nos. B-16-87; B-8-81.

in assignment; not a change in tours. In reaching this conclusion, we note that the grievance filed at Step I and Step IV of the grievance procedure is identified as an "unjust... change in assignment." In addition, the statement of the grievance to be arbitrated in the request for arbitration claims that "the assignment of [grievants] ... of directing traffic on Delancey Street was improperly changed...." Moreover, even if we were persuaded that grievants' complaint concerned the switching of tours, we would still deny the Union's request for arbitration. The Union has alleged no facts which show that grievants' tours were rescheduled in order to avoid the payment of overtime compensation. In fact, the Union has alleged no facts which show that grievants were even ordered and/or authorized by the Police Department to perform overtime work. Therefore, we find that the Union has failed to establish an arguable relationship between the act complained of and the provisions cited as the source of the alleged right.

Finally, we find that Captain Roge's alleged agreement that grievants could remain in the assignment for its duration if they volunteered for it has no bearing on the arbitrability of the grievance herein. Under our prior decisions the violation of an oral agreement is not included within the contractual definition of a grievance.⁵

⁵ Decision Nos. B-31-86; B-28-84.

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Accordingly, for all of the reasons stated above, the petition challenging arbitrability shall be granted.

O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association be, and the same hereby is denied; and it is further

ORDERED, that the petition of the City of New York challenging arbitrability be, and the same hereby is, granted.

DATED: New York, N.Y.
March 29, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER