

City v. PBA, 41 OCB 52 (BCB 1988) [Decision No. B-52-88 (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 NO. B-52-88

DOCKET NO. BCB-1067-88  
(A-2741-88)

DECISION AND ORDER

On July 15, 1988, the City of New York ("the City"), appearing by its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance initiated by the Patrolmen's Benevolent Association ("the PBA" or "the Union"). The Union filed an answer to the petition on July 24, 1988. The City filed a reply on August 5, 1988.

Background

On October 27, 1987, the PBA submitted an informal grievance on behalf of Police Officer Robert W. O'Brien ("the grievant") of the 115th Precinct, alleging "Harassment while on Sick Leave." The grievance was accompanied by a three-page statement detailing the circumstances thereof. A summary follows:

On July 23, 1987, grievant was admitted to Horton Hospital in Middletown, New York with a diagnosis of viral meningitis, a non-line of duty illness. Upon discharge from

the hospital on July 31, 1987, he was advised by his personal physician to rest for two to six weeks, "until all symptoms gradually reverse themselves." Grievant was scheduled for an examination on August 14, 1987 by Dr. Roth, a District Surgeon of the Health Services Division, District #3 ("HSD") of the New York City Police Department ("the Department"). On that day, while driving himself from his residence in Middletown to HSD in the Bronx, grievant experienced a recurrence of symptoms necessitating that he return home. Upon returning to his home, he called Dr. Roth to advise him of what happened. Dr. Roth instructed him to contact Lt. Stevens of HSD who, in turn, informed grievant that if he did not keep his appointment that day, he would be subject to command discipline for failure to report to the District Surgeon while on sick leave. In response to grievant's explanation that he had no alternative means of getting to HSD that day, Lt. Stevens allegedly ordered grievant to report to "weekend sick" located in Lefrak City the following day. The grievant states that after making special travel arrangements to get to Lefrak City, he was sent home without being examined by the weekend Surgeon. The Surgeon declined to examine the grievant explaining that since he had been hospitalized, "he had to be examined by his own District Surgeon, who is responsible for keeping [the grievant] out on sick leave or returning him to work."

The grievant alleges that Lt. Stevens' order that he report to weekend sick was unreasonable, unnecessary and

without regard for grievant's health and safety, and therefore constitutes harassment.

The informal grievance was denied. On November 25, 1987, the Union filed a grievance at Step IV of the grievance procedure. No satisfactory resolution of the dispute having been reached, on December 30, 1987, the Union filed a request for arbitration in which the grievance is stated as follows:

Denial of sick leave benefit by unreasonable enforcement of the sick leave program including harassment by Lt. Stevens of P.O. Robert W. O'Brien of the 115th Pct., and unreasonably requiring him to respond to Health Services.

The PBA alleges violations of Article X, Section 2 and Article III, Section 1(a) of the 1984-87 collective bargaining agreement between the parties ("the Agreement"):

Article X, Section 2 - **Sick Leave**

a. Each employee shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service connected.

b. The Chief Surgeon shall consult with representatives of the PBA regarding the enforcement of the sick leave program in order to insure that undue restrictions will not be placed upon employees. Departmental orders in connection therewith shall be issued after consultation with the PBA. (emphasis added)

Article III, Section 1(a) - **Hours and Overtime**

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 or compensatory time off shall be

computed on the basis of completed fifteen (15) minute segments.

As a remedy, the Union seeks:

Overtime compensation for any time spent in traveling to and from and time at Health Services on August 15, 1987 and any other unnecessary times together with a directive to the Department to cease and desist from violating Article X, Section 2 of the contract.

#### Positions of the Parties

##### The City's Position

The City, in its petition challenging arbitrability, submits that the PBA has failed to identify a provision of the collective bargaining agreement which is arguably related to the grievance sought to be arbitrated. In the City's estimation, the PBA has not demonstrated the requisite nexus between its allegations of harassment and either Article X, Section 2 or Article III, Section 1(a) of the Agreement.

The City does not deny that police officers are entitled to unlimited sick leave under Article X, Section 2(a). Rather, the City maintains that the Union does not allege a denial of the benefit of this provision. To support its contention, the City notes that the PBA does not seek compensation for any denied sick leave day in the remedy requested.

The City contends that Article X, Section 2(b) provides, in substance, that the Chief Surgeon shall consult with the PBA prior to issuing departmental orders regarding enforcement of the sick leave program. The City asserts

that the Union has failed to demonstrate a nexus between the grievance and this section because the PBA does not allege that the City failed to consult with it prior to issuing any departmental order.

In response to the Union's attempt to establish a nexus by characterizing Lt. Stevens' verbal command to the grievant as a "departmental order" constituting an "undue restriction," the City contends that the Union has taken these phrases from Article X, Section 2(b) entirely out of context in an attempt to "forge a nexus" between the grievance and the terms of the Agreement.

Finally, the City argues that the PBA's attempt to establish a nexus between Article III, Section 1(a) and the grievant's claim is also without merit because Article III, Section 1(a) requires that overtime be "ordered and/or authorized" by the Department in order to be compensable. The City contends that there is no basis for considering the grievant's obligation to visit the District Surgeon as 'ordered overtime' within the meaning of this provision.

#### The Union's Position

The PBA maintains that Article X, Section 2(a) of the collective bargaining agreement entitles police officers to unlimited sick leave while Article X, Section 2(b) guarantees that the Department will not place undue restrictions on employees in connection with their use of sick leave. Accordingly, the Union claims that when one of

its members has been subjected to "unreasonable enforcement of the sick leave program," an arbitrable grievance has been stated. In response to the City's nexus argument, the Union asserts that

[s]ince Section 2(b) prohibits undue restrictions which would, in effect, destroy the ability to enjoy the benefit of Section 2(a), there is an allegation of a denial of a benefit. Consequently the nexus exists, and the challenge to arbitrability is inappropriate.

With respect to the alleged violation of Article III, Section 1(a) of the Agreement, the Union asserts that the grievant was ordered to report to the department on his off duty time. Since the grievant was following the direction of a supervisory officer, the PBA maintains, it is reasonable to conclude that he was performing ordered and authorized overtime within the meaning of the Agreement when he reported to weekend sick on August 15, 1987.

#### DISCUSSION

At the outset, we note that it is undisputed that the City and the PBA are obligated by contract to arbitrate their controversies. Nor is it disputed that an alleged violation of a substantive provision of the contract is a proper subject for arbitration. However, in determining questions of arbitrability, the Board is sometimes required to inquire further as to the prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration. Where challenged to do so, the proponent of arbitration has

a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.<sup>1</sup> Such is the focus of our inquiry in the instant case.

The PBA's request for arbitration alleges a violation of both Article X, Section 2 and Article III, Section 1(a) of the collective bargaining agreement. Article XXIII of the Agreement defines a grievance to include

"[a] claimed violation, misinterpretation or inequitable application of the provisions of this Agreement. [Section 1.a.1]."

Thus, on its face, the request appears to allege claims which would fall within the contractual definition of a grievance. However, in light of the City's contention that there is no arguable basis for the PBA's reliance upon these two provisions, we must examine the terms of the agreement more closely than we might otherwise do to ascertain whether the provisions relied upon provide a colorable basis for the grievant's claim.<sup>2</sup>

It is uncontroverted that Article X, Section 2(a) provides the PBA's members with unlimited sick leave. The City asserts, and we agree, that the Union does not allege a violation of this provision. Rather, the PBA contends that the City, in ordering grievant to report to "weekend sick," imposed an "undue restriction" in violation of Article X,

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<sup>1</sup>See, e.g., Decision Nos. B-14-88; B-8-88; B-4-86; B-4-83; B-8-82; B-11-81; B-7-81; B-15-80.

<sup>2</sup>See, e.g., Decision Nos. B-9-83; B-21-80.

Section 2(b) which, in effect, destroyed grievant's ability to enjoy the benefit of Article X, Section 2(a). Thus, the Union's burden in light of the contentions raised by the City herein is to establish a nexus between the acts of an agent of the City and the provisions of Article X, Section 2(b).

Clearly, Article X, Section 2(b) contemplates that the PBA be consulted regarding enforcement of the sick leave program in order to insure that no Department policy decisions issue that place undue restrictions on its members' enjoyment of the unlimited sick leave benefit. In Decision No. B-7-81, we held arbitrable the question of whether a restriction placed on the opportunity to work overtime due to placement on the chronic sick list constituted an undue restriction within the meaning of Article X, Section 2(b). This question, however, arose within the context of the Department's promulgation of a chronic absence control program. In the instant matter, we are unpersuaded that Lt. Stevens' verbal command to this police officer constitutes a "departmental order" requiring consultation with the PBA. Moreover, it is clear on its face that Article X, Section 2(b) deals only with the Department's duty to consult with the PBA in certain prescribed circumstances. There is, thus, no nexus established by the Union between the requirements imposed on Police Officer O'Brien of which he complains and the Department's duty under Article X, Section 2(b) to consult



with the PBA. While it is the policy of the New York City Collective Bargaining Law ("NYCCBL") and of the Board to favor impartial arbitration of grievances, we cannot create a duty to arbitrate where none exists, nor enlarge a duty to arbitrate beyond the scope established by the parties in their agreement.<sup>3</sup>

With regard to the alleged violation of Article III, Section 1(a), we find that the Union has failed to establish that there is an arguable relationship between this provision - which affords a right to be compensated for ordered and/or authorized overtime worked - and the allegation that the grievant was unreasonably required to report to the weekend Surgeon on his off duty time.

In Decision No. B-9-83, we held:

The nexus which the proponent of the arbitration must establish is not the "causal relationship" as the Union has attempted to demonstrate.... but a substantive relationship between the right claimed to have been violated and a contract provision or agency rule which is deemed to afford such a right.<sup>4</sup>

In that case, the grievant argued that the denial of his request to work overtime resulted in a lack of supervisory personnel, constituting a violation of an agency rule requiring that certain supervisory levels be maintained. We held the grievance not arbitrable because the Union could not demonstrate that the rule it claimed to be violated was

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<sup>3</sup>Decision Nos. B-30-84; B-21-80; B-15-79; B-7-79.

<sup>4</sup>See also, Decision No. B-4-86.

arguably the source of the grievant's right to work overtime.

Similarly, in the instant matter, even if we were to find an arbitrable claim under Article X, Section 2, we would still reject the PBA's request for arbitration under Article III, Section 1(a) because Article X, Section 2, on its face, is not arguably the source of a right to work overtime. As the PBA has not otherwise fulfilled the condition precedent to assertion of a claim for compensation under Article III, Section 1(a), it has failed to establish any basis for arbitration thereunder.

Accordingly, we grant the City's petition challenging arbitrability in its entirety.

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

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

DATED: New York, N.Y.  
October 25, 1988

MALCOLM D. MacDONALD  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

GEORGE NICOLAU  
MEMBER

CAROLYN GENTILE  
MEMBER

EDWARD F. GRAY  
MEMBER

DEAN L. SILVERBERG  
MEMBER