City v. PBA, 41 OCB 53 (BCB 1988) [Decision No. B-53-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-53-88

Petitioner,

DOCKET NO. BCB-1065-88

-and- (A-2760-88)

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK,

Respondent.
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DECISION AND ORDER

On June 20, 1988, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance filed by the Patrolmen's Benevolent Association ("PBA" or "the Union"). The Union filed an answer on July 6, 1988, to which the City filed a reply on July 18, 1988.

Background

On October 28, 1987, the PBA submitted an informal grievance on behalf of its members assigned to the Brooklyn South Neighborhood Stabilization Units 10, 11 and 12 ("NSU"). It is uncontroverted that effective October 20, 1987, the starting and finishing times of the NSU day and evening tours were changed from 0730 x 1605 and 1530 x 0005 to 0800 x 1635 and 1500 x 2335, respectively. The PBA

contends that the NSU tours of duty were changed for the purpose of avoiding the payment of overtime compensation, in violation of Article III, Section 1(b) of the contract. In contrast, the City asserts that the tour changes at issue constitute permanent reassignments and, therefore, are management decisions not limited by the overtime provisions of the contract.

The informal grievance was denied and, on December 30, 1987, the Union filed a grievance at Step IV of the grievance procedure. No satisfactory resolution of the dispute having been reached, on February 11, 1988 the Union filed a request for arbitration pursuant to Article XXIII of the collective bargaining agreement alleging a violation of Article III, Section 1(b)[1] of the contract and Temporary

[1] Article III - **Hours and overtime**

Section 1b. 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.... 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.

Operating Procedure No. 336 ("TOP #336")[2] cited therein, which prohibit the rescheduling of members of the force to perform any tour of duty other than his regularly scheduled tour of duty without the payment of overtime compensation. As a remedy, the Union requests "[o]vertime compensation ...at the rate of time and one half paid to grievants for all hours worked on either tour outside the regularly scheduled tours of duty, this overtime to be paid for each separate occasion ... the reschedul[ing] occurred."

## Positions of the Parties

### The City's Position

In challenging the arbitrability of the instant grievance, the City argues that its statutory management

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[2] TOP #336 provides, in relevant part:

Subject: **ASSIGNMENTS OF MEMBERS OF THE FORCE**

1. 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.

2. When filling details and assignments commanding officers shall be governed by the above. When the detail coverage is during hours not normally performed by the assigned member, his commanding officer shall provide coverage by having a member from the ensuing tour relieve him. If this cannot be accomplished, the member assigned to the detail shall then be directed to perform his regular tour of duty and the additional hours necessary to cover the detail will be considered as overtime....

rights, as set forth in Section 12-307 b.[3] of the New York City Collective Bargaining Law ("NYCCBL"), include "the unfettered right to exercise its managerial prerogative to 'permanently' change an employee's tour of duty." (emphasis in original) In support of its position, the City claims that in two recent decisions involving the same parties and provisions of the contract, the Board of Collective Bargaining ("Board") determined that the City had neither temporarily rescheduled the grievants as alleged by the Union nor surrendered the managerial right to reschedule tours of duty permanently, contending that such management

[3] Section 12-307 b. of the NYCCBL provides:

**Scope of collective bargaining; management rights.**

b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means, and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

decisions remain unrestricted by the contract.[4] In the instant matter, the City maintains that Article III, Section 1(b) is equally inapplicable to the violation alleged herein because of the "permanent" nature of the tour changes. Therefore, the City contends that the request for arbitration should be dismissed for failure to allege facts sufficient to demonstrate a nexus between the act complained of and the source of the alleged right.

The City also submits that in determining the threshold question of nexus, it is appropriate for the Board to resolve the issue of whether the City has either rescheduled tours of duty within the meaning of Article III, Section 1(b) or has legitimately exercised a management right to reassign the grievants to different tours of duty permanently.[5] Thus, the City rejects the Union's contention that such questions are solely for arbitral determination.

The Union's Position

The Union does not dispute that the City enjoys certain statutorily prescribed managerial prerogatives, including

[4] Decision Nos. B-32-88 and B-15-88. In both decisions, the City's petition challenging arbitrability was granted on the basis that the Union failed to demonstrate a nexus between Article III, Section 1(b) and TOP #336 and the alleged rescheduling of probationary police officers.

[5] The City cites Decision No. B-32-88.

the right to direct its employees and to maintain the efficiency of governmental operations. However, the PBA argues that the City voluntarily modified its management right to alter unilaterally the schedules of its employees when it negotiated and agreed to include the language of Article III, Section 1(b) in the collective bargaining agreement that exists between the parties. Thus, the Union contends that the City's challenge to arbitrability, based upon an "unfettered" right to determine assignments unilaterally pursuant to Section 12-307 b. of the NYCCBL, is wholly without merit.

Contrary to the City's contention that the Union has failed to demonstrate the required nexus on the ground that Article III, Section 1(b) is not violated when a change in tours of duty is permanent, the Union argues that it has demonstrated a "direct relationship" between the acts complained of and the contract. The PBA asserts that the question of whether or not the tours at issue were "permanently" changed goes to the merits of the grievance and, therefore, is a matter to be determined by the arbitrator rather than the Board.

In response to the City's argument that it has permanently reassigned the grievants, the PBA maintains that the "chart change [at issue] was instituted in conjunction

with the implementation of Operation Pressure Point within the confines of the 71st Precinct." The Union contends that "Operation Pressure Point is not a permanent venture" and, points to the fact that "tour changes were not imposed in other boroughs working this operation," as an indication of the "temporary" nature of the change. Therefore, the PBA asserts that the City's argument raises an issue which relates not to the arbitrability of the grievance but rather to its merits and, as such, is a matter for resolution by the arbitrator.

## 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 pursuant to the grievance and arbitration procedures of the contract. However, in determining questions of arbitrability, this Board sometimes is required to inquire further as to the prima facie relationship between the acts complained of and the source of the alleged right, redress of which is sought through arbitration.[6] While it is the policy of the NYCCBL and

[6] Where challenged to do so, the proponent of arbitration has a duty to show that the contract provisions invoked are arguably related to the grievance to be arbitrated. See Decision Nos. B-32-88; B-15-88; B-16-87; B-23-86; B-4-83; B-8-82; B-15-79.

this Board to favor arbitrability of grievances,[7] the Board cannot create a duty to arbitrate where none exists, nor can it enlarge a duty to arbitrate beyond the scope established by the parties.[8]

The City has challenged the arbitrability of the PBA's claim by asserting that the facts alleged provide no basis for a grievance under the provisions of the agreement relied upon by the PBA. Contending that the grievants were reassigned to new tours of duty, the City argues that it has properly exercised a managerial prerogative unrestricted by Article III, Section 1(b). In contrast, the Union alleges that Article III, Section 1(b) does provide the requisite nexus to the contract, claiming that the grievants' tours were rescheduled to avoid incurring overtime liability for an operation of limited duration.

For the reasons outlined below, we find that the grievance alleged by the PBA is within the scope of disputes that the parties have agreed to submit to arbitration. Furthermore, we are unpersuaded by the City's argument that it would be appropriate for this Board to determine the real issue in dispute; that is, whether the challenged scheduling changes are temporary or permanent.

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[7] See, NYCCBL 12-302.

[8] Decision Nos. B-24-86; B-25-83; B-28-82; B-36-80.

In support of its position, the City erroneously relies upon Decision Nos. B-32-88 and B-15-88, in which we refused to find a nexus between Article III, Section 1(b) and the acts complained of in those cases. In both disputes, the Union grieved the assignment of probationary police officers directly from the Police Academy to a duty chart which was different from the chart worked by non-probationary officers in the same unit, claiming that the grievants were temporarily rescheduled from their "regular" tours of duty. In finding Article III, Section 1(b) inapplicable to the circumstances of those disputes, we noted that the Union failed to allege facts to demonstrate that any "rescheduling" occurred in order to invoke the provisions of Article III. We found, to the contrary, that "grievants' tours of duty could not have been rescheduled because they were not previously assigned to any duty chart."[9]

The circumstances which formed the basis for our determinations in Decision Nos. B-32-88 and B-15-88 are distinguishable from the facts of the instant matter because here, the grievants were previously assigned to a duty chart and have experienced a change in their tours of duty.

[9] Decision B-15-88 at 10. See also, Decision No. B-32-88 at 9.

Inasmuch as the nature of the scheduling change (whether temporary or permanent) is in dispute, Article III, Section 1(b) may arguably have been violated. Therefore, we agree with the PBA that the contract provision relied upon is sufficiently related to the grievance sought to be arbitrated to permit arbitral consideration of its application to these circumstances. As we have long held, where we find that there exists an arguable nexus, our inquiry is at an end.[10] All questions relating to the merits of grievances are for arbitral determination.[11]

In reaching our conclusion herein, we reject the City's argument that, in order to be consistent with Decision No. B-32-88, we must first resolve the issue of whether the City rescheduled the grievants in violation of the contract as a prerequisite to our determination of the existence of a nexus. In Decision No. B-32-88, our determination that there was not a rescheduling such as would establish an arguable nexus with the cited contractual provision was based upon the undisputed fact that the grievants therein had not been assigned to any previous duty chart, and not upon any interpretation or application of the contractual

[10] Decision Nos. B-31-87; B-1-84; B-1-76; B-25-72.

[11] Decision Nos. B-10-83; B-4-83.

provision by this Board. In contrast, in the present case, it is undisputed that the grievants were assigned to a previous duty chart. The interpretation of whether the change in their charts was such as is prescribed by Article III, Section 1(b) involves the merits of the grievance, into which we may not inquire.

Finally, in view of the fact that we find that the contract arguably is controlling herein, we find it unnecessary to address the City's challenge based upon its statutory management rights. We have held that where, as here, it is claimed that a specific contract provision limits or modifies the City's managerial prerogative, the matter is one of interpretation and that is properly for an arbitrator.[12] Furthermore, as we see it, Article III, Section 1(b) imposes a limitation on a management right. Where it is alleged that management has exercised a right as though no contractual limit on that right exists, an arbitrable issue is presented.[13]

Based upon the foregoing, we find that the grievance should be submitted to arbitration.

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[12] Decision Nos. B-24-88; B-1-87.

[13] Decision Nos. B-14-84; B-4-83.

ORDER

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

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

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

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER