City v. PBA, 41 OCB 67 (BCB 1988) [Decision No. B-67-88 (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-67-88
DOCKET NO. BCB-1075-88
(A-2804-88)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION

Respondents.

---------- X

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-67-88
DOCKET NO. BCB-1076-88
(A-2805-88)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On August 10, 1988, the City of New York appearing by its Office of Municipal Labor Relations ("the City") filed two petitions challenging the arbitrability of two grievances that are the subjects of requests for arbitration filed by the Patrolmen's Benevolent Association ("the Union") on April 15, 1988. The Union filed its answers on September 1, 1988. After receiving several time extensions, the City filed its replies on November 21, 1988.

BACKGROUND

On or about May 18, 1987, the Union filed an informal grievance requesting overtime compensation for the alleged rescheduling of members of the Bronx Community Affairs

Team's tours of duty in violation of the Collective Bargaining Agreement ("Agreement"). It contended that in response to rumors of potential racial trouble during the summer, the Police Department ("Department") was planning to commence a new scheduling program on Memorial Day, 1987. This program would involve assigning team members who traditionally worked Monday through Friday with the weekend off, to work either Tuesday through Saturday, or Sunday through Thursday without overtime compensation.

The Department denied this grievance on or about July 7, 1987 because it allegedly involved the institution of a duty chart which provided for weekend coverage, "without rescheduling the members' regular days off." On or about July 13, 1987 the Union filed a Step IV grievance, which was denied on or about August 3, 1987 on the ground that the assignment of officers into a permanent duty chart did not violate the Agreement's rescheduling clause.

Subsequently, on or about January 18, 1988, the Union filed another informal grievance alleging that its members' tours of duty had been rescheduled again. It contended that on December 8, 1987, Community Affairs officers assigned to odd numbered precincts, previously scheduled to take Sunday and Monday off, were rescheduled to take Friday and Saturday as their regular days off, while officers assigned to even numbered precincts, previously scheduled to take Friday and Saturday off, were rescheduled to take Sunday and Monday as their regular days off.

This grievance was denied on or about March 4, 1988. Thereafter, on or about March 8, 1988 the Union filed a Step IV grievance which was denied on or about April 11, 1988.

No satisfactory resolution of these disputes having been reached, the Union filed two separate requests for arbitration as to each of the above-described grievances, alleging that in each instance the change in the team members' tours of duty constituted an improper rescheduling in violation of Article III, Section 1(b) of the Agreement[1] and Temporary operating Procedure ("T.O.P.") #336/69.[2] As a remedy, it seeks overtime compensation for all hours that grievants worked outside their regularly scheduled tours.

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[1]Article III, Section 1(b) provides in relevant part as follows:

> 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 ...

[2]T.O.P. #336/69 provides in relevant part that:

> 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 ...

Since both of these requests for arbitration involve the same grievants, and arise from a series of related actions by the Department, they are consolidated for determination herein.

POSITIONS OF THE PARTIES

City's Position

The City maintains that the grievants never had their tours of duty "rescheduled" but were permanently "reassigned" to new tours of duty each time their schedules were changed. It argues that there are no contractual limitations on its authority to permanently reassign its employees and that the Union has therefore failed to demonstrate a nexus between its grievances and the sources of the right it is invoking.

The City asserts that Section 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL") specifically authorizes it to "direct its employees" and to "determine the methods, means and personnel by which government operations are to be conducted", as it has done in the instant case. It also cites Decision Nos. B-16-81, B-15-88 and B-32-88, as authority for its power unilaterally to determine personnel assignments. Furthermore, the City contends that the Board, in Decision Nos. B-15-88 and B-32-88 considered the instant Agreement and concluded that the City has the "unfettered right to exercise its managerial prerogative to permanently change an employee's tour of duty" (emphasis in original).

Union's Position

The Union argues that the grievants had their regular tours of duty rescheduled and were not as the City contends, permanently reassigned to new duty charts. In support of its position, the Union points out that within months of the first alleged rescheduling, grievants' tours were rescheduled again. Therefore, it asserts that the first change in the grievants' schedule was not permanent.

The Union does not contest the City's right to permanently assign its employees, but rather, maintains that the authority it cites is inapplicable to the instant situation which does not involve permanent assignments. Since it alleges that grievants' tours were rescheduled each time they were changed, the Union argues that it has demonstrated a nexus between the alleged grievance and the contractual and procedural provisions it is invoking.

DISCUSSION

In considering challenges to arbitrability, this Board must determine whether a prima facie relationship exists between the act complained of, and the source of the right being invoked, and whether the parties have agreed to arbitrate disputes of that nature. Therefore, where challenged to do so, a party must demonstrate that a contractual arbitration clause applies to the dispute in question, and that the right being invoked is arguably related to the grievance.[3] However, in determining the

[3]Decision Nos. B-5-88, B-16-87, B-35-86, B-22-86.

arbitrability of a grievance, this Board will not consider its merits.[4]

In the instant case, it is clear that the parties have agreed to arbitrate alleged contractual and procedural violations in Article XXIII of their Agreement. However, the City contends that there is no nexus between the Union's grievances and the provisions it cites. We disagree and find that the instant facts arguably state violations of Article III, Section 1(b) of the Agreement, and T.O.P. #336/69.

Initially, we note that although the City's authority to determine personnel assignments involves the exercise of its statutory managerial prerogative, this authority can be limited in a collective bargaining agreement.[5] The City incorrectly cites Decision Nos. B-32-88, B-15-88 and B-16-81 in support of its right to assign personnel unilaterally in the instant situation. Decision No. B-16-81 involved a scope of bargaining case in which we determined that several of a Union's demands regarding personnel assignments were not mandatory bargaining subjects because they interfered with the City's managerial prerogative. In that decision, we in no way implied that the City could not of its own volition enter into an agreement regarding these subjects and thereby voluntarily restrict its managerial authority. Moreover, in Decision Nos. B-32-88 and B-15-88 we merely

[4]Decision Nos. B-36-88, B-30-86, B-27-86, B-31-85.

[5]Decision Nos. B-33-88, B-24-88, B-1-87.

reconciled specific contractual provisions with managerial actions alleged to violate them.

Article III, Section 1(b) and T.O.P. #336/69 clearly limit the City's managerial prerogative to reschedule officers' tours of duty and days off. By its own terms, Article III, Section 1(b) is intended to preserve the spirit of Article III, Section 1(a) of the Agreement which guarantees overtime compensation for overtime work. Therefore, the primary question we must resolve in order to determine whether a nexus between the instant grievance and the contractual and procedural provisions cited exists, is whether the City, in altering grievants' tours of duty, arguably rescheduled them.

We do not disagree with the City's contention that in Decision Nos. B-15-88 and B-32-88 we held the institution of certain changes in employees' tours of duty to be a valid exercise of its managerial authority. Those cases involved the assignment of probationary officers from the Bronx Neighborhood Stabilization Unit to work with the Manhattan Peddler's Detail on a schedule that differed from the one regularly worked by Neighborhood Stabilization Unit officers. Our determination in each of those instances was based on the fact that the grievants had been assigned to the Manhattan Peddler's Detail directly from the Police Academy and were not previously assigned to other duty charts. Therefore, we held that their tours of duty could not have been "rescheduled".

The factual situations presented in Decision Nos. B-15-88 and B-32-88 differ significantly from the facts presented in the instant case. Those decisions involved grievants, initial "assignment" to tours of duty. In this case, the grievants' regular tours were changed in May 1987, and then changed again in December 1987.

Although the City contends that each of these schedule changes was a permissible permanent "reassignment", the Union argues with equal force that the changes were impermissible "reschedulings" as contemplated by Article III, Section 1(b) of the Agreement and T.O.P. #336/69. In support of its contention that the schedule changes were temporary reschedulings, the Union shows that the first such change was replaced by another several months later.

Neither the Agreement nor T.O.P. #336/69 are expressly limited in their application to reschedulings which are other than permanent. The City's argument that such, a limitation must be read into the cited provisions is a matter of contract interpretation. These several questions as to the meaning and application of Article III, Section 1(b) of the Agreement and T.O.P. #336/69 are clearly matters to be addressed by an arbitrator and not this Board. We find only that the Union has demonstrated a nexus between its grievances and the provisions which it cites.[6]

[6]See also Decision No. B-53-88 where we held that the PBA demonstrated a nexus between Article III, Section 1(b) and T.O.P. #336/69 because the grievants had a duty chart before the disputed change in their schedule.

Accordingly, for all the aforementioned reasons, the City's petition challenging arbitrability shall be denied.

O R D E R

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 request for arbitration of the Patrolmen's Benevolent Association be, and the same is hereby granted; and it is further

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

Dated: December 20, 1988
New York, N.Y.

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Dean L. Silverberg
MEMBER

Carolyn Gentile
MEMBER

Edward F. Gray
MEMBER

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MEMBER