City v. PBA, 43 OCB 40 (BCB 1989) [Decision No. B-40-89 (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,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.
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DECISION NO. B-40-89
DOCKET NO. BCB-1149-89
(A-2940-88)

DECISION AND ORDER

On March 17, 1989, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration submitted by the Patrolmen's Benevolent Association (hereinafter "PBA" or "the Union") on November 10, 1988. The grievance to be arbitrated is stated as:

> Failure to correct dangerous conditions in the third floor male locker room at the 104th Precinct.

The PBA filed its answer to the City's petition on March 20, 1989. The City filed a reply on April 6, 1989.

Background

On or about July 18, 1988, the PBA submitted a grievance to the Informal Grievance Board of the New York City Police

Department (hereinafter "Department"), on behalf of Marc Wolf, PBA Delegate, 104th Precinct. The complaint alleges that a dangerous condition was created in the Precinct's male locker room when:

> The department installed rows of flourescent(sic) lighting that [are] only 86 1/4 inches from the floor and in the aisles. An average sized male cannot take off his vest near his locker because he will come in contact with the exposed and uncovered flourescent(sic) tubes (emphasis in original).

On or about August 30, 1988, the Department's Informal Grievance Board denied the claim, finding no violation, misinterpretation or misapplication of the current collective bargaining agreement, nor any violation, misinterpretation or misapplication of the rules, regulations or procedures of the Department.

On or about September 7, 1988, the PBA advanced the grievance to the Commissioner of the Department in accordance with Article XXIII, Section 4, Step IV of the 1984-87 Collective Bargaining Agreement (hereinafter "Agreement"). On or about November 2, 1988, the commissioner denied the grievance.

No satisfactory resolution of the dispute having been reached, on November 14, 1988 the PBA filed the instant request for arbitration, citing an alleged violation of Article XVII, Section 3 of the Agreement. Article XVII, Section 3 provides that:

> All commands and other Departmental places of assignment shall have adequate heating, hot water, and sanitary facilities. The Union shall give notice to the Department of any failure to maintain these conditions. If not corrected by the Department within a reasonable time, the Union may commence a grievance at Step 3 of the grievance procedure concerning that failure.

As a remedy, the Union seeks "[i]mmediate correction of conditions in the 104th precinct."

Positions of the parties

The City's Position

The City, in its petition challenging arbitrability, asserts that the PBA has failed to establish a nexus between its request for arbitration and the contractual provision on which it relies. The City argues that there is not, "nor can there be," an arguable relationship between a complaint concerning the height of ceiling lighting fixtures and Article XVII, Section 3 of the contract, which pertains only to the maintenance of adequate heating, hot water and sanitary facilities. The City concludes that since the PBA's grievance does not fall within the contractual definition of a grievance, its request for arbitration must be dismissed.

The Union's Position

The PBA asserts that, contrary to the city's contention, Article XVII, Section 3 "states provisions which relate to the grievance sought to be arbitrated." It argues that, because Article XVII, Section 3 "directly addresses" and is "directly related to" the act complained of, it has demonstrated a sufficient nexus to the contract to permit arbitral resolution of the dispute.

Discussion

The parties' pleadings present only one issue for resolution in determining the arbitrability of the instant matter: whether there is a nexus, or an arguable relationship, between the act complained of and the source of the alleged right, redress of which is sought through arbitration. The Board has long held that a union, where challenged to do so, has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.[1]

In the instant matter, we find that the Union has failed to allege facts which demonstrate the required nexus between the subject of its grievance and the contractual provision upon which it relies. Article XVII, Section 3 - the only provision cited by

[1]Decision Nos. B-4-88; B-35-86; B-10-86; B-4-83; B-8-82; B-7-81.

the PBA in its request for arbitration - provides in pertinent part that "[a]ll commands and Departmental places of assignment shall have adequate heating, hot water and sanitary facilities." In this situation, it is incumbent upon the PBA to show how Article XVII, Section 3 is related to its claim. However, the argument the PBA offers to demonstrate a relationship between this provision and its claim consists of mere conclusory assertions that the contract provision cited is "directly related to" and "directly addresses" the subject of its grievance. We do not find this relationship to be self-evident and, therefore, are not persuaded that the Union has satisfied its burden. Moreover, an examination of the Agreement between these parties does not reveal any other provision that is arguably related to the instant grievance.

It is well settled that this Board cannot create a duty to arbitrate where none exists nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[2] Inasmuch as we do not perceive an arguable relationship between a complaint concerning the height of lighting fixtures and a contract provision which expressly enumerates only the alleged failure to maintain adequate heating, hot water and sanitary facilities as grievable contract violations, we are unable to

[2]Decision Nos. B-52-88; B-41-82; B-15-82.

find a colorable basis for the PBA's claim or any ambiguity which itself would create the need for arbitral resolution.

Accordingly, we shall grant the City's petition and dismiss the PBA's request for arbitration.

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

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

DATED: July 19, 1989
New York, N.Y.

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

REVISED CONSOLIDATED RULES OF THE
OFFICE OF COLLECTIVE BARGAINING

§7.4 Improper Practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order. Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in section 1173-4.2 of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

§7.8 Answer-Service and Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10) days of the receipt of notice of finding by the Executive Secretary, pursuant to Rule 7.4, that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the Director to order respondent to serve and file its answer within less than ten (10) days.

OTHER SECTIONS OF THE LAW AND RULES MAY BE APPLICABLE.

CONSULT THE COMPLETE TEXT.