

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-5-89

DOCKET NO. BCB-1017-87  
(A-2647-87)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On December 16, 1987, the City of New York ("the City"), appearing by its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Patrolmen's Benevolent Association ("the PBA" or "the Union"). The PBA filed its answer to the petition on December 28, 1987, to which the City replied on April 18, 1988<sup>1</sup>.

BACKGROUND

On April 15, 1987, the PBA submitted an informal grievance on behalf of Police Officer Eric Bishop ("the grievant") of the 43rd Precinct, protesting his being placed on "sick report" on his regular day off. According to a memorandum written by Police

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<sup>1</sup>The City requested and, with the consent of the Union, was granted several extensions of time in which to file its reply.

Officer Bishop detailing the circumstances of his grievance, on February 19, 1987, grievant was scheduled to work a court tour on his first regular day off of a two day swing. He woke up early that morning feeling very sick. Grievant notified the 43rd Precinct Desk Officer that he could not make it into court; and asked him to so notify the Assistant District Attorney. The Desk Officer informed grievant that he must report sick, which he did for February 19th and 20th. Grievant thereafter reported back to work on his first regularly scheduled 4-12 tour.

Grievant claimed that since he did not miss any of his regularly scheduled tours, his "administrative sick" on February 19th and 20th should not count as sick time toward the "chronic limit". However, if it must count as sick time, grievant asserted that he should be paid for the scheduled court tour at the rate of time and one half.

The informal grievance was denied on June 29, 1987. Thereafter, on July 2, 1987, the Union filed a grievance at Step IV of the grievance procedure, which also was denied. No satisfactory resolution of the dispute having been reached, on July 30, 1987, the PBA filed a request for arbitration in which the grievance is stated as follows:

Charging of P.O. Bishop 43rd Pct. against Chronic Absent Control Program for sick days taken on February 19th and 20th, 1987, which were his regularly scheduled days off.

The Union alleges violations of Article X, Section 2<sup>2</sup> of the 1984-1987 collective bargaining agreement between the parties and Interim Order No. 6.<sup>3</sup> As a remedy, the Union seeks

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Article X, Section 2 of the Agreement, entitled Sick Leave, states as follows:

- 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.

<sup>3</sup> Interim Order No. 6, the Chronic Absence Control Program, was promulgated, effective January 15, 1979, to "protect the unlimited sick leave benefit, as well as to ease the burdens imposed upon those members who consistently report for duty as scheduled...." It establishes a listing of uniformed members of the Police Department who are designated "chronic absent" in two categories:

CATEGORY A

A member who reports sick for any reason, except an initial line of duty absence or for hospitalization at any time, four (4) times or more within a twelve (12) month period.

CATEGORY B

A member who reports sick for any reason, except an initial line of duty absence or for hospitalization at any time, six (6) or more times within a twelve (12) month period; OR

For any reason, except an initial line of duty absence or for hospitalization at any time, four (4) times or more within a twelve (12) month period AND loses forty (40) or more WORKDAYS (not calendar days).

Key elements of the program include:

- . an appeals procedure to review requests for removal from the  
(continued...)

Cancellation of charges against chronic sick leave for P.O. Eric Bishop for February 19th and 20th, 1987 or, the alternative, time and one half overtime for scheduled court tours for both days.

POSITIONS OF THE PARTIES

City's Position

The City challenges the arbitrability of the PBA's grievance on two grounds. First, the City contends that the Union "has not and cannot demonstrate the necessary nexus" between its grievance and the contractual provision cited as the basis for its claim. The City notes that Article X, Section 2 of the Agreement provides an unlimited sick leave benefit to the PBA's members. It argues, however, that "there is no allegation in the Request for Arbitration that this benefit has been denied to the

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(...continued)  
chronic absent classification  
. revocation and denial of discretionary benefits where appropriate  
. creation of a Special Medical District to monitor and service the chronic absent  
. home visits by Reserve Surgeons and Supervisory Officers  
. particular emphasis on attendance as factor in annual evaluations  
. denial of promotion or extra compensation for those designated chronic absent  
. intensified supervision of those in chronic absent category  
. charges and specifications for chronic absent members who violated sick leave constraints.

grievant ...." Rather, the City submits that the grievance, as framed by the Union, alleges that the Police Department violated Article X, Section 2 by charging grievant's absences against the limit imposed by the Chronic Absence Control Program set forth in Interim Order No. 6. Inasmuch as Article X, Section 2 is "devoid of any reference to the Chronic Absence Control Program", the City maintains that the Union has failed to establish an arguable relationship between this provision of the Agreement and the grievance. Therefore, to the extent it relies on Article X, Section 2, the City claims that the PBA's request for arbitration must be denied.

Secondly, the City asserts that Interim Order No. 6 contains in paragraph 4 an explicit "procedural provision" which provides the means for the -grievant to appeal a chronic absent designation and petition for its revocation. The grievant, according to the City, had an obligation to exhaust these administrative remedies before attempting to use the contractual grievance procedure to resolve his dispute. Since he did not, the City also contends that the request for arbitration must be denied to the extent that it relies on Interim Order No. 6.

#### UNION'S POSITION

The Union asserts that there is an arguable relationship between Article X, Section 2 of the Agreement and the Chronic

Absence Control Program set forth in Interim Order No. 6. According to the Union, interim Order No. 6 was promulgated, after consultation with the PBA, specifically to deal with the enforcement of the unlimited sick leave benefit referred to in Article X, Section 2.

The Union claims that contrary to the City's contention, a nexus does exist between its grievance and the provisions cited as the basis for its claim. In support of its position, the PBA asserts that Article X, Section 2 grants police officers an entitlement to unlimited sick leave, and guarantees that the Police Department will not place "undue restrictions" on employees in connection with their use of sick leave. The Union argues that classifying grievant's absences on days he would ordinarily be off duty as sick leave and charging such absences against the limit imposed by the Chronic Absence Control Program violated Article X, Section 2 because it "was unreasonable and an undue restriction on the unlimited sick leave program."

Moreover, the Union maintains that Interim Order No. 6 is arguably related to the grievance to be arbitrated. The Union claims that it has demonstrated the necessary nexus in that "the Chronic Absence Control Program, as enunciated in Interim Order No. 6/79, contemplates the use of workdays (not calendar days)." Thus, it contends that "the department is violating its own directive by its charging of calendar days against [grievant's]

sick leave record for the purpose of determining whether or not he falls under one of the categories of chronic absence control."

Finally, the Union does not deny that paragraph 4 of Interim Order No. 6 establishes an administrative procedure by which police officers may appeal a "chronic absent" designation and petition for its revocation. Instead, it contends that this "procedural provision" is inapplicable to the instant matter because "the charging of these off duty days did not place grievant in a chronic absent designation which would have allowed for a petition to be made for its revocation." The Union submits, however, that "[t]here is no reason to compel a member to first be sick on other occasions, be designated chronic absent, and jeopardize his chance for other assignments and positions of preference just so he could question the propriety of a charge against him toward a chronic sick leave designation." Accordingly, since the issue presented in the request for arbitration does not concern whether grievant was properly designated "chronic absent" pursuant to the Chronic Absent Control Program, the Union maintains that the grievant does not have an obligation to exhaust the administrative remedies set forth in Interim order No. 6 before attempting to use the contractual grievance procedure to resolve his dispute.

Discussion

It is well-settled that in determining disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.<sup>4</sup> Where challenged to do so, a party requesting arbitration must establish a prima facie relationship between the act complained of and the source of the right, redress of which is sought through arbitration.<sup>5</sup>

The PBA's request for arbitration alleges violations of Article X, Section 2 of the Agreement and Interim Order No. 6. Article XXIII of the Agreement defines a grievance as, inter alia,

1. A claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;

2. A claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment. (Emphasis added)

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<sup>4</sup> See, e.g., Decision Nos. B-54-87; B-33-87; B-6-86; B-9-83; B-2-69.

<sup>5</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.



Thus, on its face, the request for arbitration appears to allege a claim which would fall within the contractual definition of a grievance. However, where, as in the instant case, the City challenges the arbitrability of the grievance on the ground that the Union failed to establish the required nexus, we must examine the terms of the Agreement more closely than we might otherwise to ascertain whether the provisions relied upon provide a colorable basis for the grievant's claim.<sup>6</sup>

The City contends that the Union failed to allege a violation of the provisions cited as the basis for its grievance in that no claim has been made that the grievant was denied the right to use sick leave. Moreover, the City argues, Article X, Section 2 is devoid of any reference to the Chronic Absence Control Program, about which this grievance is concerned. The PBA, on the other hand, claims that Article X, Section 2 guarantees that the Police Department will not impose "undue restrictions" upon the use of sick leave. It argues that charging the grievant's absences on days he would ordinarily be off duty against the limit imposed by the Chronic Absence Control Program set forth in Interim Order No. 6 constitutes an "undue restriction" in violation of Article X, Section 2. It further argues that since the Chronic Absence Control Program set forth in Interim Order No. 6 contemplates the use of workdays, not

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<sup>6</sup>See, e.g., Decision Nos. B-52-88; B-9-83; B-21-80.

calendar days, in determining whether a police officer falls under one of the categories of "chronic absent", the Police Department is violating Interim Order No. 6 by its charging of calendar days against a member's sick leave record. Therefore, the Union contends that contrary to the City's claim, it has established a nexus between the alleged wrongful action and the provisions cited as the basis for its claim.

We find that the PBA has established the required nexus between its grievance and Interim Order No. 6 in that it claims that the Police Department misapplied the Order by charging grievant's absences on his regularly scheduled days off (and thus calendar days, not workdays) against the limit imposed by the Chronic Absence Control Program. We have long held that the interpretation of contract terms and the determination of their applicability in a given case goes to the merits of the grievance and, therefore, is a function for the arbitrator, and not the forum dealing with the arbitrability of the dispute.<sup>7</sup> Thus, we find that the question whether the charging of the grievant's absences against the limit imposed by the Chronic Absence Control Program constitutes a misapplication of the terms of Interim Order No, 6 should be submitted to an arbitrator for

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<sup>7</sup>See, e.g., Decision Nos. B-4-85; B-4-81; B-15-80.

determination.<sup>8</sup>

We next consider the City's claim that the request for arbitration must be denied because the grievant failed to exhaust the administrative remedies provided in paragraph 4 of Interim Order No. 6 before attempting to use the contractual grievance procedure to resolve his dispute. We note that paragraph 4 of Interim Order No. 6 states that "A member is free to appeal a chronic absent designation and petition for its revocation..." (Emphasis added). It sets forth the procedural steps necessary to appeal a chronic absent designation, culminating in a "final determination" by the Chief of Personnel. In the instant case, however, no evidence was presented to show that the grievant was designated "chronic absent". Therefore, we find that grievant was not obligated to exhaust the administrative remedies set forth in paragraph 4. To the contrary, we find that the procedural provisions set forth therein are not applicable to the grievant's claim.

Accordingly, we shall deny the City's petition challenging arbitrability in its entirety, and grant the PBA's request for arbitration only insofar as it relates to Interim Order No. 6.

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<sup>8</sup>In view of our finding that the PBA has established the required nexus between its grievance and Interim order No. 6, we find it unnecessary to reach the question whether Article X, Section 2 of the Agreement also provides a basis upon which the grievance may be arbitrated.

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 petition challenging arbitrability filed by the City of New York be, and the same hereby is, denied with respect to the alleged misapplication of Interim Order No. 6; and it is further

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

granted to the extent it alleges a misapplication of Interim Order No. 6.

DATED: New York, N.Y.  
March 13, 1989

MALCOLM D. MacDONALD  
CHARIMAN

DANIEL G. COLLINS  
MEMBER

DEAN L. SILVERBERG  
MEMBER

CAROLYN GENTILE  
MEMBER

JEROME JOSEPH  
MEMBER