City, DOP v. UPOA, 43 OCB 55 (BCB 1989) [Decision No. B-55-89 (Arb)]

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

THE CITY OF NEW YORK and THE DEPARTMENT OF PROBATION,

Petitioners,

-and-

UNITED PROBATION OFFICERS ASSOCIATION,

Respondent.

----------X

DECISION NO. B-55-89

DOCKET NO. BCB-1171-89 (A-3088-89)

DECISION AND ORDER

On June 2, 1989, the City of New York (the "City") appearing by its Office of Municipal Labor Relations, and the New York City Department of Probation (the "Department"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the United Probation Officers Association ("UPOA" or the "Union"). On June 14, 1989, UPOA filed a verified answer, to which the City filed a verified reply on July 10, 1989.

Background

A dispute between these parties concerning an alleged a violation of Article XIV, Section 2(a) of the 1980-82 Citywide Agreement ("Agreement") was initiated in September 1984. This

section of the Agreement provides:

> Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees.

Specifically, the Union complained that the Department's offices on the tenth and fourteenth floors at 100 Centre Street, New York City, were overcrowded, poorly lighted, poorly ventilated, subject to flooding, without privacy and infested with roaches and mice.

In his Opinion and Award in Case No. A-2399-86, issued December 12, 1986, Arbitrator Nathan Cohen found that the City violated Article XIV, Section 2(a) of the Agreement and as a remedy, ordered the City to take unilateral corrective action without delay. Arbitrator Cohen stated, however, that he "was not prepared to provide a remedy beyond that which is called for by Section 2(f) of that Article." Article XIV, Section 2(f) provides:

> In construing this Section, an arbitrator shall initially have the power only to decide whether the subject facilities meet the standards of subsection a of this Section 2 but may not affirmatively direct how the Employer should comply with this Section. If the arbitrator determines that the Employer is in violation of this Section, the Employer shall take appropriate steps to remedy the violation. If in the opinion of the Union the Employer does not achieve compliance within a reasonable period of time, the Union may reassert its claim to the arbitrator. Upon such second submission, if the arbitrator finds that the Employer has had a reasonable time to comply with the terms of this Section and has failed to do so, then and only then, the arbitrator may order the Employer to follow a particular course of action which will effectuate compliance with the terms of this Section. However, such remedy shall not exceed appropriations available in the current budget allocation for the involved agency for such purposes.

Thereafter, on January 30, 1987, the Union complained that no action had been taken to comply with the Award. On March 24, 1987, a further hearing was held before the arbitrator for the purpose of fashioning an appropriate remedy in accordance with Article XIV, Section 2(f). In his Supplemental Award dated April 22, 1987, Arbitrator Cohen ordered:

SUPPLEMENTAL AWARD

> Until such time as space and facilities equivalent to State recommended guidelines are made available to Probation Officers at 100 Centre Street and all office space utilized by Probation Officers is maintained in a relatively safe and sanitary condition, the following steps shall be taken:
>
> 1. Employees adversely affected by working conditions at 100 Centre Street who request transfers to other locations shall be given preferential consideration for temporary transfers to other Probation Department work locations.
>
> 2. The existence of poor working conditions at 100 Centre Street shall be recognized as a significant factor when case assignments are made, work loads are established or when employee work performance is evaluated.
>
> 3. A security guard shall be assigned to the tenth floor public waiting room area to deter asocial conduct by visitors in the waiting area and in the toilets.
>
> 4. A porter shall be assigned to make frequent inspections of the functioning and cleanliness of the toilets on the tenth floor and a date and time record shall be kept of such inspections.
>
> 5. The responsible Department administrators shall meet with a committee designated by the Union to review the adequacy of the present exterminator services. Union recommendations for the modification of the current level of such services shall be given favorable consideration whenever feasible to do so.

Approximately two years later, on or about March 29, 1989,

UPOA submitted a Step III "Group Grievance" on behalf of Probation Officers assigned to the same two floors at 100 Centre Street, complaining:

> The NYC Department of Probation has failed to comply with two Arbitration Awards issued by Nathan Cohen as follows: ... Case No. A-2399-86 and ... Case No. A-2399-86 Supplementary Award.

On April 5, 1989, the Union also filed a verified improper practice petition alleging that the City violated §12-306a(4) of the New York City Collective Bargaining Law ("NYCCBL")[1] by refusing to comply with the two awards. Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining, the Executive Secretary determined that the petition did not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of NYCCBL §12-306a(4). In reaching this conclusion, the Executive Secretary stated "[t]he enforcement of an arbitrator's award must be sought in a court of law in accordance with Section 75 of the CPLR." Additionally, the Executive Secretary noted that the petition appeared to be untimely on its face. For all these reasons, the Union's improper practice petition was dismissed.[2]

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[1] NYCCBL §12-306a(4) provides:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents: . . .
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining.

[2] Decision No. B-23-89(ES).

No response having issued from the City to its Step III grievance, on May 9, 1989, UPOA filed the instant request for arbitration, restating the grievance as set forth in the Step III request, further citing an alleged violation of Article XIV, Section 2(a) of the Agreement, and seeking:

> To immediately remedy the working conditions of Probation Officers titles at 100 Centre Street and to immediately comply with all five directives issued in the Supplementary award along with injunctive and financial remedies as deemed appropriate by the arbitrator.

Positions of the Parties

City's Position

The City challenges the arbitrability of the Union's claim based, in part, on the nature of the relief requested. The City argues that because Article XIV, Section 2(f) clearly defines the powers of the arbitrator and limits the type of remedial relief available, the Union cannot demonstrate that the parties are in any way obligated to arbitrate the instant dispute. In this respect, the City contends that since an arbitrator may neither enforce another arbitrator's award nor grant the financial or injunctive relief sought by the Union, the dispute is not arbitrable.

Moreover, the City argues, as a matter of law, the enforcement of an arbitration award must be sought in a court of law. The City further states that the Board should not permit the Union's failure to assert its claim in the proper forum or in

a timely manner to be circumvented by the submission to arbitration of a claim which has no nexus to the contract.

Union's Position

UPOA rejects the City's contention that there is no nexus, arguing that a complaint concerning "current" working conditions at 100 Centre Street is "incontestably arbitrable" under Article XIV, Section 2 of the Agreement. The Union submits that "an arbitrator appointed now can assess current conditions at [that work site] taking into account Arbitrator Cohen's prior findings and awards." UPOA also denies that the remedial powers of the arbitrator are limited to the extent the City claims, so as to remove the controversy from the sphere of arbitral resolution.

In any event, the Union asks the Board to consider its request for arbitration in view of the fact that it waited "in good faith" for the City to comply with the arbitrator's award. UPOA states that because a court enforcement proceeding is probably time-barred and the improper practice petition it filed concerning this matter was dismissed, an arbitral remedy is the sole recourse available to UPOA and its members.

Finally, the Union alleges for the first time in its answer to the petition challenging arbitrability that "the City's failure to comply with Arbitrator Cohen's awards is a breach of the recognition clause (Article I) of the UPOA [unit] contract as

it tends to undermine the Union."[3]

Discussion

It is well established that in an arbitrability proceeding, consideration by the Board is limited to questions of substantive arbitrability, i.e., is there an agreement between the parties to submit their disputes to arbitration and, if so, is the scope of the obligation broad enough to cover the particular grievance presented.[4] In determining arbitrability, we will, without going into the merits of the dispute, inquire as to the prima facie relationship between the act complained of and the source of the alleged right.[5] Thus, the grievant, when challenged to do so, has the burden of showing that the provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.

The question before us is whether UPOA's grievance is submissible to an arbitrator. The City challenges the Union's attempt to arbitrate a dispute which it characterizes as a grievance seeking enforcement of an arbitrator's award. The City argues that such a matter is beyond the scope of the parties'

[3] In its reply, the City objected to the Union's attempt to raise a novel claim at this step of the grievance and arbitration procedure.

[4] E.g., Decision No. B-3-83.

[5] E.g., Decision No. B-14-87.

agreement to arbitrate and properly should have been raised in another forum through an Article 75 proceeding. In contrast, the Union contends that this is a grievance concerning working conditions which is, without question, arbitrable.

To the extent that the Union alleges that existing working conditions of Probation Officers at 100 Centre Street constitute a violation of Article XIV, Section 2(a) of the Agreement, we shall order that this dispute be submitted to arbitration, subject to the two-stage procedure set forth in Article XIV, Section 2(f). We are not persuaded by the City's contention that UPOA intended solely to arbitrate the City's non-compliance with a prior award. Although we recognize that the Union's statement of its grievance, on its face, complains of an alleged failure by the City to comply with Arbitrator Cohen's awards, a dispute which clearly is not arbitrable,[6] this does not negate the fact that an otherwise arbitrable claim has been stated.

We find that implicit in the Union's statement of the nature of the controversy is an allegation that the current working conditions at the Department's 100 Centre Street location constitute a violation of a substantive provision of the Agreement. Moreover, the Union explicitly states, at Step III

[6] The enforcement of an arbitrator's award is not within the power of the Board to grant but rather must be sought in a court of law in accordance with Section 75 of the CPLR. See also, the Determination of the Executive Secretary in Decision No. B-23-89(ES), set forth supra, at 4-5.

and in its request for arbitration, that it seeks, inter alia, action taken which will "immediately remedy the working conditions" complained of.[7] We conclude, therefore, that the Department had notice of the UPOA's complaint concerning current conditions which, if found by an arbitrator to fall short of the standards set forth in Article XIV, Section 2(a), would constitute a violation of that provision of the Agreement.

We will not foreclose arbitral resolution of this claim simply because the Union chose to illustrate the existence of these conditions by reference to circumstances found to exist some two years earlier. The weight to be accorded Arbitrator Cohen's awards is, like the merits of this controversy, a determination left to the judgment of the arbitrator.[8] Furthermore, to interpret the framing of the Union's grievance as literally as the City suggests would be tantamount to our adoption of a strict pleading rule which would, in effect, defeat arbitrability although the nature of the underlying claim is clear. Accordingly, our finding herein is not to be construed as permitting a party to belatedly broaden the scope of its

[7] In Decision No. B-14-87, we found no merit in the City's objection to consideration of additional claims on the ground that they were set forth in the remedy section of the grievance form and not in the statement of the grievance section appearing on the same page of the form. In that case, we stated that this argument was an attempt to elevate form over substance.

[8] Decision Nos. B-22-86; B-3-86.

grievance.[9] Rather, it is an acknowledgement that, in appropriate cases, we may find that the City was or should have been on notice of the nature of a claim, based upon the totality of the grievance as expressed by the Union.[10] This conclusion is consistent with the clear mandate of Section 12-302 of the NYCCBL[11] and with our own well-established policy of favoring the resolution of disputes through impartial arbitration.[12]

Next we consider the City's assertion that legal and contractual limitations on the power of the arbitrator renders this grievance nonarbitrable. While we agree that a newly appointed arbitrator is without authority to enforce a prior award, and may not exercise remedial power in excess of that prescribed by the Article XIV, Section 2(f) of the Agreement, it is well-settled that arguments addressed to remedy are not

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[9] We have consistently denied requests for the arbitration of claims that have not been raised at the lower steps of the grievance procedure. See e.g., Decision Nos. B-29-89; B-40-88; B-31-86; B-6-80; B-22-74.

[10] Decision No. B-14-87.

[11] Section 12-302 of the NYCCBL provides:

> **Statement of policy.** It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

[12] Decision Nos. B-29-89; B-20-79; B-9-79.

relevant to the arbitrability of a grievance, even if the remedy sought is alleged to be illegal.[13] For this reason, we also reject the City's argument that the grievance is barred from arbitration by a contract provision which, it claims, precludes an arbitrator from granting financial or injunctive relief.

Finally, with respect to the allegation concerning Article I of the UPOA unit contract which the Union raised for the first time in its answer to the City's petition challenging arbitrability, we decline to consider whether UPOA has stated an arguable violation of the recognition clause. We have long held that an attempt to amend a grievance "at the penultimate moment, i.e., the arbitration step [or thereafter], is improper" since this would deny the parties an opportunity to fully consider and attempt to resolve the issue at the lower steps of the contractual grievance procedure.[14]

Accordingly, we shall grant the City's petition to the extent that it challenges the arbitrability of a claim seeking a remedy for the City's alleged failure to comply with a prior arbitrator's award; and decline to consider whether the Union has alleged an arguable violation of Article I of the UPOA unit contract. We shall, however, permit arbitration of the Union's claim only to the extent UPOA alleges that current working

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[13] Decision Nos. B-35-88; B-2-71.

[14] Decision Nos. B-1-86; B-20-74.

conditions at 100 Centre Street violate Article XIV, Section 2(a) of the Agreement.

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 be, and the same hereby is, granted insofar as it contests the arbitrability of an alleged failure to comply with a prior arbitrator's award and a claimed violation of the Recognition Clause set forth in Article I of the UPOA unit contract; and it is further

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is, denied in all other respects, and it is further

ORDERED, that the United Probation Officers Association's request for arbitration be, and the same hereby is, granted insofar as it asserts an alleged violation of Article XIV, Section 2(a) of the Citywide Agreement concerning current working conditions; and it is further

ORDERED, that the United Probation Officers Association's request for arbitration be, and the same hereby is, dismissed in all other respects.

DATED: New York, New York

October 2, 1989

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER