

City v. PBA, 43 OCB 60 (BCB 1989) [Decision No. B-60-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

-----X

In the Matter of

THE CITY OF NEW YORK,
Petitioner,

DECISION NO. B-60-89

DOCKET NO. BCB-1144-89
(A-2969-

88)

-and-

THE PATROLMEN'S BENEVOLENT
ASSOCIATION,

Respondent.

-----X

DECISION AND ORDER

On February 24, 1989, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), 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") on December 13, 1988. The Union filed an answer to the petition on March 9, 1989. The City filed a reply on March 20, 1989.

BACKGROUND

On or about July 1, 1987, the PBA filed an informal grievance on behalf of its members, claiming that the June 11, 1987 memorandum from the Commanding Officer, Court Division to the Chief of Department regarding Implementation of the Supreme

Court Special Summer Session Program¹ violates Patrol Guide

¹ The memorandum from the Commanding Officer, Court Division to the Chief of Department, dated June 11, 1987, states in relevant part as follows:

SUBJECT: IMPLEMENTATION OF SUPREME COURT
SPECIAL SUMMER SESSION PROGRAM

1. The Police Commissioner has stated at a high level criminal justice meeting that the Police Department would guarantee the presence of all police officers at court during the special summer session of Supreme Court which is designed to set firm trial dates for special jail cases.
2. The responsibility to produce police officers at this special summer session rests with the Court Division's Appearance Control Units. Patrol Services Bureau, Narcotics Division and Detective Bureau have all assigned high ranking officers to represent their Bureaus.
3. Acceptable reasons for non-appearance on a scheduled day off or vacation (PG 114-7) is suspended. Members of the service will be brought in on their days off. Attempts will be made to produce police officers who are on vacation. Appearance Control supervisors will use discretion when ordering personnel to court while on vacation. Documented travel plans, i.e., airline tickets, confirmed reservations, etc. will generally be acceptable reasons for not cancelling vacations.
4. Appearance Control Units in each borough will treat these cases separate and distinct from normal court appearances. The designation SS will precede the Borough abbreviation and serial number to indicate it is a "Summer Session" case. Separate logs will be kept and a special overtime code will be assigned to this project. (Emphasis in original)

Section 114-7² and past practice which accepts vacation as a valid reason for non-appearance in court, without the necessity of providing documented travel plans. The informal grievance was denied on September 29, 1988 and, on October 3, 1988, the Union filed a grievance at Step IV of the grievance procedure. On December 5, 1988, the Step IV grievance also was denied.

No satisfactory resolution of the dispute having been reached, on December 13, 1988, the PBA filed a request for arbitration, alleging that the "Issuance of [the] June 11, 1987

² Patrol Guide Section 114-7, effective June 27, 1980, states in pertinent part as follows:

PURPOSE - To prevent unnecessary appearance in court on the scheduled day off of a uniformed member of the service.

DEFINITION - Acceptable reasons for non-appearance on a scheduled day off:

* * *

(2) Vacation

* * *

ADDITIONAL DATA - A uniformed member of the service who must appear in court on a scheduled day off, for an adjourned (sic) case, will be assigned to a 0900 to 1700 hour tour or as otherwise appropriate for attendance at court. A uniformed member who must appear in court on a scheduled day off for an arraignment will be assigned to the second platoon.

Member returning from court may be excused upon request, if the exigencies of the service permit. If excused, member shall enter "Requested Excusal" on OVERTIME REPORT (PD138-064) submitted.

* * *

order suspending that portion of Section 114-7 of the Patrol Guide which allows vacation as an acceptable reason for non-appearance in court" violates Patrol Guide Section 114-7. As a remedy, the Union requested a "Determination that the June 11, 1987 memorandum is invalid and unenforceable with compensation as determined by the arbitrator to be paid to members adversely affected by the order."

POSITIONS OF THE PARTIES

CITY'S POSITION

The City asserts that the request for arbitration must be denied because the waiver filed by the PBA pursuant to Section 12-312d of the New York City Collective Bargaining Law ("NYCCBL") is invalid.³ In support of its position, the City notes that on July 10, 1987, the PBA filed a verified improper practice petition in which it charged that the Police Department "by memorandum dated June 11, 1987 ... suspended Patrol Guide Section

³ Section 12-312d of the NYCCBL states as follows:

As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the award.

114-7 to the extent of ordering members of [the PBA] to be present for Court appearances on their vacations." The remedy sought by the PBA in that proceeding was an order directing the Police Department to "vacate, withdraw and annul the memorandum of June 11, 1987 ... and restore and place into full effect Patrol Guide 114-7." In Decision No. B-42-88, the Board of Collective Bargaining ("the Board") dismissed the Union's improper practice charge, finding that the Police Department's decision to suspend Patrol Guide Section 114-7 was an exercise of its managerial prerogative.

The City maintains that the instant request for arbitration concerns the same underlying dispute as previously presented by the PBA in the improper practice petition; namely, the suspension of Patrol Guide Section 114-7. Therefore, the City argues, the waiver filed by the PBA with its request for arbitration is invalid. "Any contrary ruling would clearly upset the policy underlying the [statutory] waiver [provision, which] as set forth by the Board, [is] to prevent multiple and repetitive litigation."

With regard to the PBA's claim that the request for arbitration requires the interpretation of Patrol Guide Section 114-7, the City, in its reply, contends that "[t]his assertion is plainly disingenuous." The City points out that the request for arbitration challenges the issuance of the June 11, 1987 order suspending that portion of Section 114-7 of the Patrol Guide

which allows vacation as an acceptable reason for non-appearance in court. Thus, it maintains that contrary to the Union's assertion, "no issue of contract interpretation has been raised in the Request [for Arbitration]. Clearly, the issue presented is whether Petitioner has the managerial right to suspend Patrol Guide 114-7, and this question has already been answered in the affirmative by the Board." Inasmuch as the PBA has been unable to distinguish the underlying dispute at issue in the instant proceeding from the underlying dispute at issue in the prior improper practice proceeding, the City maintains that the Union has failed to comply with Section 12-312d of the NYCCBL, and the request for arbitration must be denied.

In any event, the City asserts that even as "clarified" by the Union in its answer to the petition challenging arbitrability, the PBA's claim that the instant grievance is arbitrable because it requires the interpretation of Patrol Guide Section 114-7 must fail for the reason that there exists no nexus between the request for arbitration and the provision cited as the basis for its claim. According to the City, "As Patrol Guide [Section] 114-7 has already been suspended pursuant to the June 11, 1987 order, and as the suspension has already received the imprimatur of the Board in ... Decision No. B-42-88, there can be no nexus between [the Union's] Request [for Arbitration] and a nonexistent provision of the Patrol Guide."

UNION'S POSITION

The PBA denies the City's assertion that the waiver filed with its request for arbitration is invalid. It claims that Section 12-312d "does not prohibit separate proceedings being commenced on a distinguishable issue."

The Union contends that in the improper practice proceeding it alleged that the Police Department did not have the right to suspend Section 114-7 of the Patrol Guide. In the instant matter, however, the question to be decided by the arbitrator is "whether or not the actions of the [Police] [D]epartment violated the [P]atrol [G]uide." Thus, the Union argues, "the question to be determined in the arbitration is ... totally distinguishable ... [from the question previously decided by the Board in the improper practice proceeding]." Accordingly, the two proceedings do not involve the same underlying dispute.

The Union also contends that contrary to the City's assertion, the instant dispute has not been submitted previously to another forum, as evidenced by the fact that the remedy requested in the improper practice proceeding differs from the remedy requested in the proceeding herein. The PBA claims that in the improper practice proceeding it sought "to restore Patrol Guide Section 114-7 into full effect while the remedy sought in the instant grievance is to declare the memorandum invalid and unenforceable as in violation of Section 114-7, two clearly distinguishable remedies." Therefore, for the reasons stated

above, the Union maintains that its request for arbitration should be granted in its entirety.

DISCUSSION

The City claims that the request for arbitration must be denied because the Union violated the waiver provision set forth in Section 12-312d of the NYCCBL. The City argues that the action complained of by the PBA, "Issuance of the June 11, 1987 order suspending that portion of Section 114-7 of the Patrol Guide which allows vacation as an acceptable reason for non-appearance in court," concerns a matter that has already been addressed by this Board in an improper practice proceeding. Having exercised its rights pursuant to Section 12-306a of the NYCCBL,⁴ the City maintains that the PBA may not seek a remedy in arbitration for the same underlying dispute.

⁴ Section 12-306a of the NYCCBL provides, in relevant part, as follows:

Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

The Union, on the other hand, disputes the City's assertion that it violated the waiver provision. In support of its position, the PBA notes that in the improper practice proceeding it claimed that the Police Department did not have the right to suspend Section 114-7 of the Patrol Guide; whereas in the request for arbitration it alleges that "... the actions of the [Police] [D]epartment violated the [P]atrol [G]uide." Furthermore, the PBA maintains that it could not have submitted the same underlying dispute to two forums inasmuch as the remedy requested in the improper practice proceeding is "clearly distinguishable" from the remedy it is seeking in the request for arbitration.

In prior decisions, this Board has stated that the purpose of the waiver provision set forth in Section 12-312d of the NYCCBL is to prevent multiple litigation of the same dispute, and to ensure that a grievant who elects to seek redress through the arbitration process will not attempt to relitigate the matter in another forum. A union is deemed to have submitted the same underlying dispute to two forums, and thus to have rendered itself incapable of executing an effective waiver, where the proceedings in both forums arise out of the same factual circumstances, involve the same parties, and seek a determination of common issues of law.⁵

The Board may find the same underlying dispute has been submitted to two forums even where the union has neither cited

⁵ See e.g., Decision Nos. B-50-89; B-28-87; B-8-79; B-8-71.

the same statute, rule, regulation or contract provision⁶ nor requested the same remedy.⁷ Furthermore, the Board has denied the request for arbitration even where the party raised additional matters in the other forum beyond those asserted in the request for arbitration.

Applying these principles to the instant matter, we find that the PBA violated the statutory waiver requirement and, therefore, its request for arbitration should be denied. In so ruling, we note that contrary to the Union's assertion, the underlying dispute at issue in the instant matter is the same as that previously presented to this Board in Decision No. B-42-88, an improper practice proceeding. The actions complained of by the PBA in both proceedings arise out of a memorandum issued by the Police Department on June 11, 1987, which suspended the portion of Patrol Guide Section 114-7 that recognized "vacation" as an acceptable reason for non-appearance in court.⁸

In Decision No. B-42-88, we determined that Patrol Guide

⁶ See e.g., Decision Nos. B-50-89; B-10-82; B-10-74.

⁷ See e.g., Decision Nos. B-50-89; B-8-71.

⁸ Inasmuch as we find that the Union's prior improper practice proceeding and the instant request for arbitration concern the same underlying dispute, it is unnecessary to address the PBA's assertion that it requested "two clearly distinguishable remedies" in those proceedings.

We note, however, that in Decision No. B-6-78, we held that the "[s]ubstitution of a different demand for relief is no basis for allowing a renewal, with arbitration, of the same underlying dispute."

Section 114-7 does not involve a mandatory subject of bargaining and, therefore, the City did not violate Section 12-306a of the NYCCBL by unilaterally suspending that section of the Patrol Guide. In denying the PBA's claim, we noted that:

Unless the substance of a rule involves a mandatory subject of bargaining, so that the employer is precluded by law from taking unilateral action thereon, or the promulgation, revision, modification or revocation of a rule has a practical impact on employees, as defined by the NYCCBL, the employer is not required either to negotiate or to arbitrate concerning its decision [to change the rule]. (citations omitted)⁹

Furthermore, we pointed out that in 1979, the PBA grieved the promulgation and implementation of Patrol Guide Section 114-7, claiming that it violated Section 304-2 of the Administrative Guide. In Decision No. B-9-79, we denied the PBA's request for arbitration, finding that it failed to present an arbitrable grievance because it did not allege that the contract limits the general right of the employer to promulgate amendments of existing rules, regulations and procedures. We stated that:

If [the PBA] does not have a right to the preservation of such a rule, regulation or procedure, as such, it cannot justify its request to arbitrate a claim that amendment or revocation of the regulation is a violation of the regulation. If it is the Union's claim that conditions provided for in the regulation are also prescribed by the terms of the contract, then its right to continuation of those conditions, if any, derive from the contract and not from the regulation.

⁹ Decision No. B-22A-85. See also, Decision No. B-42-86.

Thus, since the PBA in the instant request for arbitration alleged only a violation of Patrol Guide Section 114-7, and did not allege the violation of any contractual provision which arguably limits the City's managerial right to revoke that portion of the Patrol Guide, we would in any event find that the request for arbitration should be denied because the Union failed to state a grievance which falls within the scope of the parties agreement to arbitrate.

Accordingly, for all of the reasons stated above, we shall deny the Union's request for arbitration, and grant the City's petition challenging arbitrability.

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 request for arbitration filed by the Patrolmen's Benevolent Association be, and the same hereby is, denied; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted.

DATED: New York, N.Y.
October 23, 1989

CHAIRMAN

MEMBER

MEMBER

MEMBER

MEMBER

MEMBER

MEMBER