

City v. COBA, 43 OCB 63 (BCB 1989) [Decision No. B-63-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
THE CITY OF NEW YORK,

Petitioner,

-and-

Decision No. B-63-89
Docket BCB-1162-89
(A-3031-89)

THE CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

Respondent.

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DECISION AND ORDER

On May 5, 1989, the City of New York ("the City") filed a petition challenging the request for arbitration served by the Correction Officers Benevolent Association ("the Union") on or about March 7, 1989. The Union filed its answer on June 23, 1989. The City filed its reply on September 11, 1989.

Background

The City and Union are parties to a collective bargaining agreement for the period July 1, 1984, through June 30, 1987 ("the Agreement"). On July 15, 1988, Alex James ("the grievant"), who was an alternate Union delegate, was transferred from the Adolescent Remand Detention Center ("ARDC") to the Bellevue Hospital Prison Ward ("Bellevue").

On or about August 1, 1988, the Union submitted a Step I grievance to the ARDC command on behalf of the grievant alleging that he was transferred from ARDC, apparently for the second time, because he participated in union activity. It did not cite

a specific provision of the Agreement which the City had violated but averred that the Agreement provides "that there shall be no discrimination by the city against any correction officer because of union activity."¹ For relief, the Union sought the transfer of the grievant back to ARDC.

The City forwarded the grievance to the Bellevue command, the command to which the grievant was assigned. By memorandum dated August 8, 1988, the executive officer at Bellevue waived any action with respect to the grievance, and forwarded it to the Director of Labor Relations of the Department of Corrections for resolution.

By memorandum dated August 10, 1988, the Union filed the grievance with the Director of Labor Relations. In a memorandum, which was signed by the grievant, the Union alleged that the City breached Executive Order No. 75 ("EO No. 75").²

¹Article XVIII ("No Discrimination") of the Agreement provides that:

[i]n accord with applicable law, there shall be no discrimination by the City against any correction Officer because of union activity.

²EO No. 75 entitled "Time Spent on the Conduct of Labor Relations Between the City and Its Employees and on Union Activity," provides, in relevant, part that:

[e]mployee representatives, duly designated by certified employee organizations, when acting on matters related only to the interests of employees in their certified bargaining units shall be permitted to perform the following functions, subject to the conditions set forth in this Executive Order, without loss of pay or other employee benefits:

a. To investigate grievances, assist in their early resolution, and to process them at all levels of the grievance procedure.

By decision dated September 21, 1988, the Director of Labor Relations denied the grievance. His decision noted that the grievant did not cite any specific violation of the Agreement. He also noted that the City transferred the grievant from ARDC for disciplinary reasons and, as such, the City's actions were specifically excluded from the grievance process by Article XXI, §1b of the Agreement.³ The memorandum refers to conduct and behavior of the grievant which took place on June 29, 1988, as being "most serious."

By memorandum dated October 4, 1988, labeled "Grievance Step 3: Unfair Labor Practice," to James Hanley, Deputy Director of the Office of Municipal Labor Relations, the grievant set forth his version of the events which led to his transfer. He noted that the Director of Labor Relations incorrectly characterized his transfer as being disciplinary. He claimed that he was transferred because he was "fulfilling [his] responsibility as a union delegate." Specifically, he alleged that he tried "to

³Article XXI, §1b defines "grievance" and provides that "the term 'grievance' shall not include disciplinary matters."

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expose the imminent danger that awaited those officers working in commissary at ARDC.” As a result of the transfer, he argued, he was not able to fulfill the informational and representational functions of a union delegate, which violates EO No. 75, as well as Article XVII, §2 of the Agreement.⁴

In its request for arbitration dated March 2, 1989, the Union requested arbitration of the grievance based on the City's alleged violation of Article XVII, §2 and Article XVIII of the Agreement, as well as EO No. 75. As a remedy, it seeks the grievant's transfer back to the ARDC from Bellevue and his reinstatement as Alternate Union Delegate of ARDC.

Positions of the Parties

City's Position

The City argues that there is no nexus between any of the provisions of the Agreement or EO No. 75 and the right claimed by the Union. It argues that Article XVII, §2 only excuses Union

⁴ Article XVII ("Union Activity"), §2 provides:

C.O.B.A. officers and delegates shall be recognized as representatives of the C.O.B.A. within their respective commands. For the purposes of attending the regularly scheduled monthly meeting, C.O.B.A. delegates shall be excused from duty if the meeting coincides with the delegate's scheduled tour, provided that the command has received at least seventy-two (72) hours advance notice of such request for excusal.

officials from their scheduled tours so that they may attend Union meetings. Because the Union does not allege that the grievant was denied the right to attend a Union meeting, it has not established an adequate nexus.

Moreover, the City claims that EO No. 75 also protects release time for Union activity. Because the Union has made no allegations that the grievant was denied release time, it has not established the requisite nexus.

The City argues that the Union has failed to set forth any specific violation of Article XVIII as required by Revised Consolidated Rules of the Office of Collective Bargaining (“OCB Rules”), §7.5.⁵

Finally, the City rejects the Union's argument that Article XVII, §2 and Article XVIII of the Agreement should be read together to provide a basis for the claim which the Union seeks to arbitrate, i.e. a right not to be transferred and to maintain an assignment in the same command.

⁵Although the City cites OCB Rules §7.5, that rule is clearly inapplicable to requests for arbitration. We assume that the portion of the OCB Rules to which the City refers is OCB Rules §6.5 which contains analogous language and provides that “(a] request for arbitration shall contain a plain and concise statement of the grievance to be arbitrated; . . .”

Union's Position

The Union notes that it inadvertently omitted the statement of the grievance to be arbitrated on its request for arbitration form, but argues that the City is on notice of its claim because the waiver attached to the form states that the grievance to be arbitrated is the "(i)mproper transfer motivated by Anti-Union [sic) animus in violation of Article XVIII of contract."

The Union argues that by transferring the grievant, the City deprived him of his right, as an elected union delegate, to represent the members of the ARDC and attend regularly scheduled monthly meetings of his ARDC command. The City's claim in the lower steps of the grievance procedure that the grievant was disciplined is a sham, according to the Union; the real reason, it is alleged, for his transfer was that he was a union delegate acting on behalf of the Union members in his command to improve the standards and conditions of employment in the ARDC. Citing several decisions of the Public Employment Relations Board, the Union argues that Article XVIII of the Agreement bars the City from discriminating against an employee for union activity in accord with applicable law and bars the transfer and reassignment of an employee for anti-union reasons.

Discussion

As a preliminary matter, the City claims that the Union's request for arbitration is barred because the Union failed to complete the portion of the "Request for Arbitration" form which calls for a "concise statement of the grievance to be arbitrated." This Board will not dismiss an otherwise valid request for arbitration unless genuinely significant omissions or oversights actually obscure the issues as to which arbitration is sought.⁶ In the instant matter, we find that the omission was not significant given that the Union, in fact, described the grievance which it seeks to arbitrate in the waiver attached to its request. The City has neither argued nor has it presented any evidence that the omission in the request for arbitration has impeded its ability to respond or otherwise prepare for an arbitration. Accordingly, we deny the City's petition insofar as it seeks dismissal of the Union's request because of the Union's failure adequately to complete the request for arbitration form.

Although the City asserted that the transfer of the grievant was related to discipline in the lower steps of the grievance procedure and was, therefore, contractually excluded from arbitration, it has not raised that objection in the instant petition challenging arbitrability. The City only challenges the

⁶Decision Nos. B-29-89; B-20-79; B-9-79.

existence of an appropriate nexus between each of the provisions of the Agreement and EO No. 75 and the right and remedy sought by the Union.

When challenged, as it is in this case, the Union must establish a nexus between the City's acts and the contract provisions or policies it claims have been breached.⁷ We resolve doubtful issues of arbitrability in favor of arbitration.⁸

The City alleges that there is no nexus between EO No. 75 and Article XVII, §2 of the Agreement, both of which on their faces address the issue of release time, and the substance of the Union's claim, because there are no allegations that the grievant was denied the opportunity to be released to participate in Union activities associated with being a delegate. The Union, on the other hand, contends that because the grievant was transferred out of ARDC, he could not be released to participate in activities on behalf of the employees in ARDC, and thus the City has deprived him of release time.

Article XVII, §2 of the Agreement provides that the City must recognize Union delegates as representatives "within their respective commands." On its face, the article does not vest a delegate with the right to be assigned within a specific command or the right to be a delegate for members outside of that command

⁷Decision Nos. B-27-89; B-19-89; B-7-81.

⁸Decision Nos. B-65-88; B-15-80.

to which he is assigned. Although it is for an arbitrator and not this Board to interpret a collective bargaining agreement, we have held that a provision of an agreement that is so patently unrelated to the right alleged by a union cannot form the basis for an arbitrable claim.⁹

In the instant matter, moreover, EO No. 75 is also unrelated to the right alleged by the Union. It provides that union representatives be given release time to participate in union activities. The record is devoid of any substantive allegation that the grievant was denied release time. Thus, we find that there is no nexus between the Union's claim and Article XVII, §2 and EO No. 75 either jointly or severally.

However, the Union has established a nexus between its claim and Article XVIII of the agreement which prohibits discrimination against any Correction Officer because of union activity. The Union claims that the City transferred the grievant because of his activism on behalf of fellow unit employees concerning, among other things, commissary conditions at ARDC. A transfer initiated in response to an employee's participation in protected activity arguably is barred, at least on its face, by Article XVIII of the Agreement. In the absence of any other substantive challenge by the City, there is clearly an arguable relationship between the grievant's right to be free from involuntary

⁹See Decision Nos. B-20-89; B-4-85.

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transfers prompted by Union activity and Article XVIII of the Agreement. Accordingly, the Union's grievance with respect to the alleged violation of Article XVIII will be submitted to 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 petition of the City of New York challenging arbitrability be, and the same hereby is granted with respect to claims allegedly arising under Executive Order No. 75 and Article XVII, §2 of the collective bargaining agreement between the parties, and the same hereby is denied with respect to claims allegedly arising under Article XVIII of collective bargaining agreement between the parties; and it is further

ORDERED, that the request for arbitration of the Correction Officers Benevolent Association be, and the same hereby is denied with respect to claims allegedly arising under Executive Order No. 75 and Article XVII, §2 of the collective bargaining

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agreement between the parties, and the same hereby is granted with respect to claims allegedly arising under Article XVIII of collective bargaining agreement between the parties.

Dated: New York, New York
October 23, 1989

MALCOLM D. MacDONALD
CHAIRMAN

GEORGENICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

FREDERICK P. SCHAFFER
MEMBER