

City v. PBA, 43 OCB 68 (BCB 1989) [Decision No. B-68-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the
Arbitration

-between-

DECISION NO. B-68-89

THE CITY OF NEW YORK,

DOCKET NO. BCB-1213-89
(A-3014-89)

Petitioner,

-and-

THE PATROLMEN'S BENEVOLENT
ASSOCIATION,

Respondent.

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DECISION AND ORDER

On September 28, 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 concerning duty tours for unit members assigned to the Police Department's Movie/T.V. Unit that is the subject of a request for arbitration filed by the Patrolmen's Benevolent Association ("the Union" or "the PBA") on or about February 9, 1989. The Union filed its answer on October 10, 1989. The City filed a reply on October 13, 1989.

BACKGROUND

On or about November 16, 1988, the PBA, on behalf of a group of its members assigned to the Queens Special Operations Division Movie/TV Unit, filed a grievance claiming that:

[M]embers in SOD/MTV are not working 8 hour 35 minute tours. These are full duty members assigned to outdoor activities. Members in SOD have been assigned sectors in the park and are expected to handle all jobs in the sector as well as issue summonses and make arrests. Members in MTV are assigned fixed posts at filming locations and are expected to handle any incidents that take place on the post summonses as well as arrests [sic]. These members are sometimes assigned solo and are not given radios.

The Union requested that "the duty chart of 8 hour and 35 minute tours" be provided for them.

On or about November 25, 1988, the grievance was denied by the Executive Officer of Police Department's Office of Labor Policy after he found that:

The correspondence submitted by the Association . . . alleging the assignment of members of the Movie/T.V. Unit and members of the Special Operations Division to tours of improper length is being returned as not grievable. * * *
Operations Order 105-2 s. 78, issued on January 29, 1979, reflects the agreements reached between the City and the Association regarding the various units within the department. It clearly indicates that members of the Movie/T.V. Unit are to perform 253 eight hour and fifteen minute tours per year.

On or about November 30, 1988, the Union referred the

grievance to the Police Commissioner for a Step IV determination. By letter dated February 2, 1989, the Commissioner denied the grievance. The Commissioner's letter reads, in pertinent part, as follows:

The length of tours and the number of appearances of police officers are mandatory subjects of bargaining. The agreement regarding members assigned to the Movie/TV Unit is reflected in Operations Order 105-2 s. 78; the agreement regarding members of the Special Operations Division is reflected in the stipulation of settlement in case A-2455-86. Any change must be made through collective bargaining; the subject is inappropriate for review under the contractual grievance procedure.

With no satisfactory resolution of the grievance having been reached, on or about February 9, 1989, the Union filed a request for arbitration, wherein it claimed that the Department was in violation of Operations Order Number 105 ("Order 105"), Operations Number Order 105-1 ("Order 105-1") and Operations

Order Number 105-2, s. 1978 ("Order 105-2")¹ by denying an "8 hour and 35 minute duty chart to members of the Movie/T.V. Unit of the Special Operations Division."

Positions of the Parties

City's Position

_____The City maintains that two of the three Operations Orders cited by the Union have no relationship to the underlying grievance. It cites numerous decisions to show that this Board has held that where arbitrability is challenged, we will inquire whether there exists a nexus between the alleged wrong complained

¹ Order 105, dated November 6, 1978, concerns the department-wide implementation of a modified duty chart that reduced the number of squads from 22 to 9. It is a general order that does not make reference to any specialized units.

Order 105-1, dated November 10, 1978, concerns the duty schedule for police officers assigned to clerical and administrative functions.

Order 105-2, dated January 1, 1979, concerns the duty schedules for a number of specialized units, including the Movie/TV Unit. It reads, in pertinent part, as follows:

In accordance with an agreement between the City of New York and the Patrolmen's Benevolent Association, police officers assigned to the following units will perform the number and length of appearances indicated, effective 2330 hours, January 31, 1979.

* * *

d. Police officers assigned to the units listed below will perform 253, eight (8) hour and fifteen (15) minute tours annually:

Movie T.V. Unit (T.P.U. personnel)

* * *

of and the cited contractual provision.² According to the City, with respect to Orders 105 and 105-1, this nexus does not exist. Therefore, the City concludes, to the extent that the Union relies upon either of these two orders, its request for arbitration should be dismissed.

The City supports its position by pointing out that the purpose of Order 105 was to effectuate a new nine squad duty chart for those police officers who formerly were assigned to a 22 squad chart. It goes on to point out that, because members of the Movie/T.V. Unit of the Special Operations Unit were not and are not part of the reorganized nine-squad patrol schedule, the order has never had any application to this unit. Thus, the City maintains, there is no nexus between Order 105 and the instant request for arbitration.

Similarly, according to the City, the purpose of Order 105-1 was to create new tours of duty for police officers performing clerical and administrative functions. The City asserts that inasmuch as members of the Movie/T.V. Unit allegedly perform neither clerical nor administrative duties, there is no nexus between Order 105-1 and the request for arbitration.

With respect to Order 105-2, the City first notes that the Union concedes that the Department had the right to promulgate

² Decision Nos. B-16-87; B-35-86; B-9-83; B-41-82; B-8-82; B-7-81; B-21-80; B-7-79; B-3-78; B-3-76; and B-1-76.

Order 105-2 under its statutory managerial rights authority, and it points out that there is no dispute that the grievants are assigned to the Movie/T.V. Unit. It then quotes Order 105-2 as providing that officers assigned to the Movie/T.V. Unit "will perform 253, eight (8) hour and fifteen (15) minute tours annually." Finally, the City argues that nowhere in Order 105-2 are tours set on the basis of responsibilities, duties or activities. Rather, it contends, tours are set on the basis of unit assignments. Therefore, according to the City, the Union has failed to demonstrate a grievable cause of action.

Union's Position

The PBA maintains that it is not challenging the right of the Department to promulgate Order 105-2. Rather, it is challenging the Department's interpretation of the Order. According to the Union, Order 105-2 "is not unambiguous on its face but rather can reasonably be read to provide 243 rather than 253 tours for the SOD/MTV members based on the change in responsibilities, duties, and activities since the original agreement was reached over ten (10) years ago."

Discussion

As a preliminary matter, we note that the parties do not

dispute that they are obligated to arbitrate their controversies, nor do they deny that a claimed violation of an Operations Order is within the scope of their agreement to arbitrate. The dispute before us is limited, therefore, to the City's contention that the Union has failed to establish a nexus between the scheduling practices of the Police Department with respect to members of the Queens Movie/T.V. Unit or members of the Queens Special Operations Division, and a provision in one of the Operations Orders cited by the Union as the source of its right to seek arbitration.

We have repeatedly held that if challenged, a union has a duty to show that a substantive provision that it cites is arguably related to the grievance that it is seeking to arbitrate.³ We must determine, therefore, whether a prima facie relationship exists between the terms of Operations Orders 105, 105-1 and/or 105-2 and the assignment of members of the Movie/T.V. Unit and/or members of the Special Operations Division, to 253, eight hour and thirty-five minute tours of duty annually.

On the face of the documents, Order 105 and Order 105-1 clearly do not apply to Movie/T.V. Unit personnel or to members of the Special Operations Division. Order 105-2, on the other

³ E.g. Decision Nos. B-27-88; B-35-86; B-25-83; B-28-82; B-6-81; and B-1-76.

hand, expressly provides that officers assigned to the Movie/T.V. Unit "will perform 253, eight (8) hour and fifteen (15) minute tours annually." The parties do not dispute that members of the Queens Movie/T.V. Unit are working in conformance with this schedule.

Although the policy of the NYCCBL is to promote and encourage arbitration as the selected means for adjudicating and resolving grievances, we cannot create a duty to arbitrate where none exists. Where contract language or a provision of a departmental order or policy is clear and unambiguous on its face, as in this case, we will look no further into the intent of the parties or to other provisions of the policy at issue.⁴ We find, therefore, that no arbitrable dispute exists concerning Order 105-2 and the scheduling assignments of the members of the Movie/T.V. Unit.

To the extent that the request for arbitration asserts a claim that Movie/T.V. Unit personnel should work fewer than 253 annual tours, or tours other than eight hours and fifteen minutes in length, because of "changed responsibilities, duties and activities" of Movie/T.V. Unit members, we find that such matter is not properly addressed to the arbitral forum. If changed circumstances have made the organization of job categories listed in Order 105-2 obsolete, thus calling for an adjustment in the

⁴ Decision Nos. B-37-80; B-10-79 and B-19-75.

length or the number of annual scheduled appearances that members of the Unit must make, the bargaining table is the appropriate forum at which this situation can be addressed.⁵

Finally, to the extent that the request for arbitration covers unit members assigned to the Special Operations Division who do not work in the Movie/T.V. Unit, we take notice of the stipulation of settlement referred to by the Police Commissioner in his Step IV determination. That stipulation of settlement, docketed as OCB Case No. A-2455-86 reads, in pertinent part, as follows:

Members currently assigned to security duty at the Special Operations Division shall be scheduled to work a chart which provides for 247, eight (8) hour and twenty-seven (27) minute tours annually. This shall be effective on the date of execution of this stipulation.

The Union's grievance seeks 243, eight hour and thirty-five minute tours. The stipulation of settlement, however, refers to 247 eight hour and twenty-seven minute tours, and the cited Operations Orders do not include the Special Operations Division within the listing of those units which are assigned 243, eight hour and thirty-five minute tours. We find, therefore, that in this respect as well, the PBA has failed to establish a prima

⁵ See Decision Nos. B-4-89 and B-24-75, where we have said that bargaining over hours of work is a mandatory subject of negotiation.

facie relationship between the act complained of and either the stipulation of settlement or any provision of the cited Operations Orders.

Accordingly, because it appears that members of the Queens Movie/T.V. Unit are working the proper number and length of tours prescribed by Order 105-2, and because the PBA is not claiming that other members of the Special Operations Division are being scheduled in violation of the stipulation of settlement, we find that no arbitrable issue exists, and we shall grant the City's petition challenging arbitrability.

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, and docketed as BCB-1213-89 be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association's in Docket No. BCB-1213-89 be, and the same hereby is, denied.

DATED: New York, N.Y.
November 20, 1989

Decision No. B-68-89
Docket No. BCB-1213-89
(A-3014-89)

11

This case is complicated, however, by the parties' willingness to allow the theory of the underlying grievance to undergo significant alteration. The original grievance, filed by the Queens P.B.A. Trustee on behalf of the "SOD/MTV" Delegate, sought "a duty chart of 8 hour 35 minute tours." The complaint did not mention the annual number of appearances that either Movie/T.V. Unit members or Special Operations Division members allegedly should be making. The Executive Officer of the Department's Office of Labor Policy responded by pointing out that Order 105-2 requires members of the Movie/T.V. Unit "to perform 253 eight hour and fifteen minute tours per year." He asserted that "the assignment of members of the Movie/T.V. Unit and members of the Special Operations Division to tours of improper length" was not grievable.

Thereafter, the focus of the grievance changed.

, made reference for the first time to . Thereafter, the P.B.A., for the first time in its request for arbitration, raised the issue of an annual number of appearances. We note, however, that the City made no comment concerning these changes, and we assume that the parties, being more familiar with their personnel practices than we are, intended for us to evaluate the annual number of appearances claim in behalf of members of the Department's Special Operations Division.

On October 22, 1987, the P.B.A. and the City entered into a stipulation of settlement on behalf of unit members "assigned to permanent security duty at the Special Operations Division," Therefore, we shall deny that portion of the City's petition challenging arbitrability concerning the allegation that Special Operations Division personnel have been assigned to work in excess of 247, eight hour and twenty-seven (27) minute tours annually. By so finding, we are not deciding the merits of the claim. We are merely finding that the Department has recognized that a limit on the number of annual tours that Special Operations Division personnel may be assigned exists, and that there is an allegation that such number has been exceeded.