City v. DEA, 43 OCB 71 (BCB 1989) [Decision No. B-71-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- X
In the Matter Between

THE CITY OF NEW YORK,

Petitioner,

-and-

THE DETECTIVES' ENDOWMENT ASSOCIATION,
Respondent.

Decision No. B-71-89
Docket No. BCB-1154-89
(A-3002-89)

- X

DECISION AND ORDER

The City of New York ("the City") filed a petition on April 5, 1989 challenging the arbitrability of a grievance commenced by the Detectives' Endowment Association ("the Union") alleging that the City violated Article III, §1 of the relevant collective bargaining agreement by failing to compensate detectives for the loss of an entire regular day off even if they only worked on a portion of that day.[1] The Union filed its answer to the petition

[1] The Union cites Article III, §1 (c) as being the source of its grievance. We note that Article III, §1 (c) of the 1982-1984 collective bargaining agreement between the parties addresses the subject matter herein. However, as the city notes in its petition, the pertinent agreement is for the period July 1, 1984 to June 30, 1987 ("the Agreement") which we deem to be the Agreement at issue. The same language which appears in Article III, §1 (c) of the prior collective-bargaining agreement appears in Article III, §1 (b) of the Agreement. The relevant sections of Article III ("Hours and Overtime") are as follows:

> **Section 1(a) (iii)** Effective January 1, 1986, all ordered and/or authorized overtime in excess of 40 hours in any week or in excess of the hours required of an employee by reason of the employee's regular duty chart if a week's measurement is not appropriate, whether of an emergency nature

on April 17, 1989. The City filed a reply on May 1, 1989. Additional information was requested of the parties by this Board by letter dated September 8, 1989. Responses were filed by the Union and the City on September 25, 1989, and September 27, 1989, respectively.

Background

This matter has its genesis in an arbitration hearing held on July 18, 1988 before Arbitrator Milton Rubin (A-2784-88) ("Rubin Arbitration") in which the arbitrator examined issues

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1(...continued)
or of a non-emergency nature, shall be compensated for either by cash payment or compensatory time off, at the rate of time and one-half, at the sole option of the employee. Such cash payments or compensatory time off shall be computed on the basis of completed fifteen (15) minute segments.

Section 1(b) In order to preserve the intent and spirit of this section on overtime compensation, there shall be no rescheduling of days off, except that for the purpose of night watch coverage an employee's swing period shall not be diminished by more than 8 hours. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory reassignment of personnel to different days off. Prior to the completion of the steps in the grievance procedure under Article XXI of this Agreement, the President of the D.E.A. may informally discuss a question in regard to the application of this Section 1(b) with the Police Commissioner and the Chairman of the Personnel Grievance Board in an effort to resolve the matter.

relating to Article III of the 1982-1984 collective bargaining agreement between the parties.[2]

During the course of the hearing, the following took place:

> Union's Counsel: Is it your opinion, given the grievance that is in front of you, Mr. Hanley, that the City violated the collective bargaining agreement vis-a-vis that 15 minutes that goes into the [regular day off]?
>
> James Hanley: Only to a maximum of 15 minutes, yes, and if you read the Sands decision, he said that anything from 001 to 2400 hours was -- .
>
> Union's Counsel: Are we going to have a response to the question, or are we having an opinion on the Arbitrator's decision?
>
> James Hanley: The answer is yes.
>
> City's Counsel: The City will stipulate for the record in the cases where a Detective's tour was changed to encroach upon that 24-hour [regular day off] that they did, indeed, violate Article III and the Detective should be compensated pursuant to the collective bargaining agreement, . . .

Thereafter, by letter dated September 16, 1988 from Marc Z. Kramer to Vincent D. McDonnell ("the Kramer Letter"), the City

[2] In an earlier arbitration decision rendered by Arbitrator John Sands in A-2026-84 ("Sands Arbitration"), Sands held that Article III, §1(c) "prohibits rescheduling days off only." By letter dated November 5, 1985 to Vincent D. McDonnell, attorney for the Union and to Marc Z. Kramer, Associate General Counsel for the Office of Municipal Labor Relations ("OMLR"), Arbitrator Sands stated that the grievance before him covered "only rescheduling tours of duty and not rescheduling days off [emphasis in original]" and did not "affect either Article III, Section 1(c)'s prohibition of rescheduling days off or what premium must be paid if work is required on days off."

agreed to compensate the twelve detectives who were originally the subject of the Rubin Arbitration award for 15 minutes of overtime compensation.

The Union filed a request for arbitration with the City on January 26, 1989. The grievance to be arbitrated was set forth as follows:

> The City proposes fifteen minutes' pay, at overtime rate, for scheduling work on detectives' Regular Day off . . . . The union contends this is a violation of Article III, §1(c) of its contract, which prohibits scheduling work on days off. . .

As a remedy, the Union seeks full pay at time and one-half for the entire regular day off on which work was performed.

Positions of the Parties

City's Position

The City challenges the arbitrability, of the grievance an two grounds. First, the City argues that the Union has attempted to raise a novel claim at the arbitration stage without going through any of the steps of the contractual grievance procedure.[3] The City characterizes the union's reliance on the Rubin

[3] The City, in its petition, generally denied that the Union utilized any of the contractual grievance procedure steps. As set forth, infra, the Union claims that the contractual Step III grievance mechanism does not exist. In response to a request by this Board for additional information on the existence of Step III of the grievance procedure, the City merely stated that the Agreement contains a Step III to the grievance procedure which was "available" to the parties.

Arbitration and the Sands Arbitration as an improper use of the doctrine of res Judicata. The City argues that the Union cannot rely on compliance with the grievance procedure in prior arbitrations as a substitute for going through the grievance procedure to resolve the instant, separate grievance.

Second, the City contends that there is no nexus between the Union's claim and Article III of the Agreement. It argues that Article III provides for overtime compensation at time and a half only for hours worked. The City has offered to compensate detectives for that portion of their regular day off which was lost as a result of rescheduling. The Union, the City claims, is seeking compensation for hours which have not been worked, thus there is no nexus between the right sought by the Union and the Agreement.

Union's Position

The Union argues that it is excused under the terms of the Agreement, from going through three of the four preliminary steps to arbitration. With respect to Steps I and II of the grievance procedure, the Union relies on Step III of the grievance procedure which provides, in relevant part, that:

> [i]t is understood and agreed by and between the parties that there are certain grievable disputes which are of a Department level or of such scope as to make adjustments at Step I or Step II of the grievance procedure impracticable, and, therefore, such grievances may be instituted at Step III of

> the grievance procedure by filing the required written statement of the grievance directly with the Chairman of the Personnel Grievance Board; . . .

The Union claims that because the grievance raises a question, the resolution of which would affect department policy, it did not have to proceed through Steps I and II of the grievance procedure.

Step III of the grievance procedure provides that grievances not satisfactorily resolved at Step II be reviewed by a Personnel Grievance Board.[4] The Personnel Grievance Board is composed of three members: a Deputy Commissioner or other designee of the Police Commissioner, who is the Chairman of the Board, the Chief of Operations or the Chief of Operations' designee and the President of the Union or his designee. The Union alleged in its

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[4] Step III provides as follows:

> If the grievance is still not satisfactorily adjusted, the grievant may, not later than ten days after notification of the Reviewing Officer's decision [in Step II], seek further review. . . [before the Personnel Grievance Board]...
>
> . . . The Personnel Grievance Board shall meet at least once a month on a date designated by the Chairman. At each meeting, the Board shall consider all grievances which, at least five days prior to such meeting, have been properly referred to the Board. The grievant may choose to have the grievant's representatives present at the meeting, at which time oral and written statements may be presented.

answer that the Personnel Grievance Board did not exist.

In response to the Board's request for additional information, the Union confirmed its position that the Personnel Grievance Board did not exist. It further stated the following:

> The Department replaced [the Personnel Grievance Board] with a third step by the Executive Officer, office of Labor Policy of the Police Department. While [the Union] could technically object to such change, it did, and does, not elect to do so since it has the chance to argue its case with the Commissioner's representative i.e. the above stated commanding Officer now holding an Assistant Commissioner rank.

Finally, with respect to Step IV of the grievance procedure, which is a request for a determination by the Police Commissioner, the Union argues that the instant grievance need not have been brought before the Police Commissioner, because Step IV provides that "[g]rievances which affect substantial numbers of employees may be compressed by elimination of the fourth Step of the Grievance Procedure." The Union claims that the instant grievance is a class grievance affecting departmental policy and need not be considered at Step IV.

The Union also alleges that the subject of the instant grievance was based on a decision made by OMLR in the Kramer Letter, which was in effect a decision made at a high enough level to warrant elision of steps at lower levels of the grievance procedure. The Union also notes that the individual detectives who were the subject of the Rubin Arbitration and who

were also the subject of the Kramer Letter, had processed their grievances through the contractual grievance procedure, including the alternative to Step III which the parties have been utilizing.

The nexus between its claim for relief and Article III of the Agreement is clear, according to the Union. It relies on the Sands Arbitration in which it was held that Article III, §1(c) prohibits rescheduling days off and the admission of counsel for OMLR that the City had violated that provision during the Rubin Arbitration hearing. It argues that the Rubin Arbitration left open the question of remedy for the rescheduling of a regular day off. The remedy the Union seeks in the instant grievance is not barred by the terms of Article III.

Discussion

The City claims that the issue presented by the Union herein is not arbitrable because the Union is first raising it in a request for arbitration. The Union contends that it is relieved from complying with Steps I, II and IV of the contractual grievance procedure by the terms of the Agreement. It also argues that because the contractual Step III Personnel Grievance Board does not exist, it is excused from going through that step.

This Board will not impose contractual obligations on the parties where none exist. We will, thus, not require the parties

to go through a step grievance procedure before going to arbitration where they have not provided a mechanism to implement such a procedure or where they are arguably excused from going through steps of the procedure. Under long-standing doctrine of this Board, whether a union has complied with the requisite steps of a grievance procedure or whether those steps exist and are applicable to a given situation, are issues of procedural arbitrability for an arbitrator to determine.[5]

In Decision No. B-6-68, we held that the issue of a union's alleged failure to submit a grievance to a particular step of the contractual grievance procedure was one of procedural arbitrability. We relied upon and quoted the language of John Wiley Sons v. Livingston,[6] which bears repeating:

> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract. . .
>
> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. . . .

[5] Decision Nos. B-9-81; B-8-81; B-6-68

[6] 376 U.S. 543 (1964).

Relying on our unique umpireship status and the essentially single-employer collective bargaining relationship with which we deal, we have not always followed that practice.[7] In order to promote the development of a single consistent body of precedent on the subject, to prevent abuse of the process and to save the parties the expense of needlessly undertaking arbitration, in some instances, we have resolved such issues of procedural arbitrability and refused to permit a grievance that is significantly defective to proceed to arbitration.[8]

We find that the instant grievance is not so significantly defective as to bar its arbitration. The Union raises no novel issues or claims nor does it appear to have abused the process. The underlying issues have been fully expounded and, if not adjudicated, have been mooted by concessions and by the specific offer of remuneration put forward by counsel for the City in the course of the Rubin Arbitration. It appears from the history of the underlying action as set forth in the parties' pleadings, that arbitration in this matter would not be a needless undertaking. The only dispute at this point has to do with the amount of recompense due the grievants. Thus, we find that the instant matter is not one in which the Board should exercise its discretion and bar the grievance from proceeding to arbitration.

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[7] Decision No. B-13-87.

[8] See Decision Nos. B-13-87; B-40-86.

our decision is, of course, without prejudice to the City raising any of these or any other procedural objections before an arbitrator.

The City also argues that the Union has not established a nexus between its claim and the Agreement. When so challenged, the Union must establish a nexus between the City's acts and the contract provisions it claims have been breached.[9] We resolve doubtful issues of arbitrability in favor of arbitration.[10]

The City alleges that because Article III provides for overtime compensation at the rate of time and a half only for hours worked, there is no nexus between the Union's claim for compensation for an entire swing period regardless of hours actually worked and the Agreement. The City relies on its offer to compensate employees who have had their regular day off diminished for the amount of time in which they performed work on that day.

The Union alleges that the Sands Arbitration held that Article III, §1(c) (now known as §1(b)) forbids the rescheduling of regular days off and that Arbitrator Sands left open the question of appropriate compensation for a loss of day off. The Union also relies on the statement of counsel for the City during the Rubin Arbitration in which he stipulated that the City was

[9] Decision Nos. B-1-89; B-7-81.

[10] Decision Nos. B-65-88; B-15-80.

liable to employees under Article III, §1(b).

The Union argues that by working even a portion of a regular day off, detectives are effectively deprived of the entire day, a right which is arguably based on Article III, §1(b). The issue raised in the instant grievance has to do with the proper remedy for the breach of Article III, §1(b), which on its face, does not appear to be limited to the relief offered by the City. Whether it is in fact so limited is a question of contract interpretation for an arbitrator, not this Board, to determine along with the weight to be given the statements of counsel for the City in the Rubin Arbitration. Whether the City's offer of compensation satisfactorily compensates detectives, is also a question for an arbitrator. Accordingly, we find that there is a nexus between the Union's claim and Article III, §1(b) of the Agreement and dismiss the City's petition in its entirety.

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 denied; and it is further

ORDERED, that the request for arbitration of the Detectives' Endowment Association be, and the same hereby is granted.

Dated: New York, New York
December 18, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

* City Member Dean L. Silverberg dissents from this Decision and Order without opinion.