City v. COBA, 43 OCB 72 (BCB 1989) [Decision No. B-72-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
---------- x

In the Matter of
THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-72-89

-and-

DOCKET NO. BCB-1165-89
(A-3015-89)

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Respondent.
---------- x

DECISION AND ORDER

On May 12, 1989, the City of New York (the "City"), by its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance filed by the Correction Officers Benevolent Association ("COBA" or the "Union"), alleging that the City's implementation of medical removal proceedings pursuant to Section 71 and 72 of the Civil Service Law ("CSL") against disabled Correction officers violates past practice and several provisions of the parties' 1984-87 Collective Bargaining Agreement ("Agreement"). The Union filed an answer to the petition on August 8, 1989. The city filed a reply on September 11, 1989.

BACKGROUND

The implementation of medical removal proceedings against certain COBA members who became disabled from job-related injuries, and the issuance of notices to these employees

informing them of their rights pursuant to Section 71 of the CSL,[1] was the subject of an improper practice petition filed by COBA on June 11, 1986.[2] In that matter, the Union alleged that the City violated Section 12-306a(4) of the New York City Collective Bargaining Law ("NYCCBL")[3] by unilaterally changing the terms and conditions of employment of its affected members, and sought an order to bargain with respect to the impact of the City's actions on pension rights, health and welfare benefits, and changes in existing procedures.

---

[1] Section 71 of the Civil Service Law provides:

> **Reinstatement after separation for disability.** When an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the [worker's] compensation law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission.
>
> *** * ***

[2] Docket No. BCB-878-86.

[3] Section 12-306a(4) of the NYCCBL 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 with certified or designated representatives of its public employees.

On September 7, 1988, the Board of Collective Bargaining ("Board") issued Decision No. B-39-88, which found that the Union had failed to state a prima facie improper practice claim and dismissed the petition. In relevant part, however, the Board held that to the extent that COBA claimed that the City's action violated Article X, Section 2 of the Agreement[4] (by imposing unpaid leaves of absence on employees contractually entitled to unlimited sick leave) the Union may have stated a claim which properly could be raised in the context of the contractual grievance and arbitration procedure. In this respect, the Board noted:

> [T]here is nothing necessarily inconsistent in either Section 71 or 72[5] of the Civil Service Law that would compel an adverse effect upon COBA's members' contractual right to unlimited sick leave [footnote omitted]. Nor do we disagree with the Union's contention that "a contract provision ... may modify, supplement or replace forms of protection afforded public employees under the Civil Service Law [footnote omitted]."

---

[4] Article X, Section 2 of the Agreement between the City and COBA provides:

> **Sick Leave**. Each Correction Office shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service-connected in accordance with existing procedures.

[5] Section 72 of the CSL, which was not at issue in Decision No. B-39-88, allows initiation of medical removal proceedings for the purposes of imposing an involuntary leave of absence on "an employee [who] is unable to perform the duties of his or her position by reason of a disability, other than a disability resulting from Occupational injury or disease [emphasis added]."

Consequently, the Board held that dismissal of the Union's improper practice petition shall not "constitute prejudice to the Union's filing a request for arbitration on the contractual issues raised. "[6]

On or about September 16, 1988, COBA filed a Step III grievance with OMLR claiming that the City's use of medical removal procedures pursuant to Section 71 and 72 of the CSL, whether resulting in unpaid leaves of absence or termination, reflects a change in practice and violates the following provisions of the Agreement:

> Article VI - Salaries; Article VII - Uniform Allowance; Article VIII - Longevity Adjustments; Article X, Section 2 - Sick Leave; Article XII Health and Hospitalization Benefits; Article XV Seniority.

The OMLR Review Officer dismissed the grievance on February 1, 1989, concluding that the Union's complaint did not constitute a grievance as defined by Article XXI, Section 1 of the Agreement.[7]

---

[6] Id, at 18.

[7] Article XXI, Section 1 of the Agreement defines as a grievance, inter alia:

> a. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement:
>
> b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment ....

No satisfactory resolution of the dispute having been reached, on February 15, 1989, COBA filed the instant request for arbitration seeking, as a remedy:

> Reinstitution of Past Practice in regard to standards for terminating the services and contractual benefits of injured and disabled employees.

POSITIONS OF THE PARTIES

City's Position

In its petition challenging the arbitrability of COBA's grievance, the City cites two grounds for dismissal: (1) the Union cannot file a valid waiver pursuant to Section 12-312(d) of the NYCCBL inasmuch as it had previously filed a verified improper practice petition concerning the same underlying dispute which the Board dismissed in Decision No. B-39-88; and (2) an alleged violation of "past practice" does not fall within the contractual definition of an arbitrable grievance, thus, COBA cannot demonstrate the necessary nexus.

In its answer, COBA amends its request for arbitration "to allege a violation of Article X, Section 2 of the Agreement as the principal source of [its] grievance." In response, the City submits that in the event the Board finds the Union's claim arbitrable, that the request "proceed [only] on the basis of Article X, Section 2." The City maintains, however, that Article X, Section 2 cannot be construed to restrict the City's power to

remove employees for "medical" reasons. In support of this argument, the City submits that the Union erroneously relies upon case law involving Section 76 of the CSL which provides, in relevant part, that Section 75 (Removal and other disciplinary action) and Section 76 (Appeals from determinations in disciplinary proceedings) "may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization." By contrast, the City argues, "[t]his language is conspicuously absent from Section 72."

COBA'S POSITION

In opposition to the city's waiver defense, the Union notes that the Board, in Decision No. B-39-88, specifically precluded the City from raising this defense in the event COBA files a grievance concerning the contractual issues raised by that improper practice petition.

With respect to the City's argument that the request for arbitration fails to establish a nexus, COBA has abandoned the claimed violation of past practice and clarified its position by stating that its request for arbitration rests primarily on an alleged violation of Article X. Section 2 of the Agreement. COBA contends that there is a "clear and bona fide relationship" between a contract provision which "unequivocally grants each and every correction officer unlimited sick leave" and the City's use

of medical separation procedures to place injured and disabled members on unpaid leaves of absence.

COBA also argues that unilateral implementation of the medical removal procedures in dispute violates the "existing procedures" clause alluded to in Article X, Section 2 of the Agreement.

Finally, COBA claims that the requisite nexus is evidenced by the fact that the Board, in Decision No. B-39-88, denied the improper practice petition because "the basis of the claimed statutory violation is derived from a provision of the Collective Bargaining Agreement."

DISCUSSION

It is well-settled that Section 12-312(d) of the NYCCBL[8] imposes a statutory condition precedent which must be satisfied before a request for arbitration may be considered.[9] The Board is the sole agency charged with enforcement of the NYCCBL,

---

[8] Section 12-312(d) of the NYCCBL provides:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration 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 and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

[9] E.g., Decision Nos. B-35-88; B-31-80; B-8-79; B-7-76; B-6-76; B-11-75.

including the waiver provision set forth in Section 12-312(d) thereof.[10] In prior decisions, we have stated that the purpose of the waiver provision is to prevent multiple litigation of the same underlying dispute.[11] In determining whether the waiver defense is applicable, however, we have held that "[t]he intention to prevent unnecessary or repetitive litigation should not be so implemented as to impede thorough and effective litigation.[12] In view of our clear and unequivocal policy favoring the arbitrability of disputes, we have long-interpreted the statute's waiver provisions "with consideration of the process of which they are a part, and with due regard to the protection which the waivers are intended to afford. "[13]

In the instant matter, the City contends that the waiver filed by COBA was invalid because it already had sought to litigate the same underlying dispute in an improper practice proceeding.[14] It is true that in the earlier proceeding COBA alleged that Article X, Section 2 of the Agreement operated to limit the exercise of a management prerogative. There, we determined that this Board has no jurisdiction over a contractual

---

[10] E.g., Decision Nos. B-7-76; B-12-71.

[11] E.g., Decision Nos. B-35-88; B-10-85; B-13-76; B-9-74.

[12] Decision No. B-13-76 (Overruled, in part, by Decision No. B-28-87.) See Also, Decision No. B-35-88.

[13] Decision No. B-12-71.

[14] Decision No. B-39-88.

violation that does not otherwise constitute an improper practice and found, therefore, that no cause of action under Section 12-306a(4) of the NYCCBL had been stated. However, it cannot be said that the claimed violation of Article X, Section 2 was fully litigated and disposed of in that proceeding. Instead, we stated that our improper practice jurisdiction "may not be invoked when the basis of the claimed statutory violation is derived from a provision of the [Agreement]" and expressly dismissed the petition without prejudice to the Union's right to request arbitration on the contractual claims alleged.[15] Accordingly, we deny the City's petition challenging arbitrability based on the waiver requirement of Section 12-312(d) of the NYCCBL.

The remaining issue in dispute is whether the Union has demonstrated an arguable relationship between the act complained of, i.e., the City's placement of injured and disabled employees on unpaid leaves of absence pursuant to Sections 71 and 72 of the CSL, and the contractual right of COBA's members to unlimited sick leave under Article X, Section 2 of the Agreement. The City argues that Article X, Section 2 "cannot be construed to restrict" its right to remove employees for medical reasons. In contrast, the Union alleges that Article X, Section 2 arguably imposes a limitation on the exercise of this management right.

[15] See Also, Decision No. B-35-88.

There is no dispute that the removal of employees who are no longer fit to perform the duties of their positions is within the realm of the City's managerial prerogative.[16] This authority is expressly granted in Section 12-307b of the NYCCBL, which, in relevant part, provides:

> It is the right of the City ... to ... relieve its employees from duty because of lack of work or for other legitimate reasons ....

However, we have long-held that when an action falls within an area of management prerogative, but also arguably conflicts with the rights granted to an employee under a collective bargaining agreement, the City is not insulated from an inquiry into its actions by claims of management prerogative.[17] Where the City has voluntarily negotiated and reached agreement on a subject which arguably limits the exercise of a management right, controversies concerning the subject are arbitrable under an agreement to arbitrate a "claimed violation, misinterpretation or inequitable application of the provisions of this Agreement [Article XXI, Section lb of the Agreement]."[18] Moreover, if an arguable limitation has been demonstrated, an allegation that the

---

[16] Decision No. B-39-88.

[17] Decision No. B-35-89; B-47-88; B-4-87; B-27-84; B-8-81; B-13-74.

[18] Decision Nos. B-24-88; B-14-84; B-3-83; B-11-81.

City has exercised a management prerogative as though no contractual limitation existed presents an arbitrable issue.[19]

In the instant matter, COBA has adequately demonstrated that a limitation of the City's right to place injured and disabled members on unpaid leaves of absence arguably has been imposed through a substantive provision of the Agreement (Article X, Section 2). We reject the City's contention that since language allowing the parties to "modify, supplement or replace" Section 72 of the CSL is "conspicuously absent" from the statute, Article X, Section 2 cannot be construed even to arguably limit the City's power to exercise its statutory authority.[20] While it is true that our authority does not extend to the administration or interpretation of any statute other than the NYCCBL, the City may not insulate its action from compliance with applicable requirements of the NYCCBL or oust this Board of its jurisdiction in collective bargaining and contractual matters merely by demonstrating that the measures it took were permitted by law.[21] We conclude, therefore, that an allegation that the City has violated a contractual right and has exercised its management

---

[19] Decision No. B-4-83.

[20] See Pastore v. The City of Troy, 126 Misc. 2d 113, 481 N.Y.S. 2d 306 (1984), where the New York Supreme Court held that "[i]n this court's judgment, there is nothing in §72 of the Civil Service Law that adversely affects petitioner's contract right to unlimited sick leave."

[21] Decision Nos. B-39-88; B-41-87; B-25-85.

prerogative as though no contractual limitation on the prerogative existed constitutes an arbitrable claim.[22]

Having found that COBA has established a prima facie relationship between the acts complained of and the source of the alleged right, we need not inquire further into the merits of the instant dispute.[23] The interpretation of contract terms, e.g., the "existing procedures" clause of Article X, Section 2, and the determination of their applicability is a function for the arbitrator and not for the forum dealing with the question of the arbitrability of the underlying dispute.[24]

We further note that what COBA has done is to state that it relies primarily on an alleged violation of Article X, Section 2 of the Agreement. At no point, however, does the Union withdraw its claims with respect to Articles VI, VII, VIII, XII and XV of the Agreement; nor did the City challenge the Union's claims based on these other Articles except to request that if the matter is found arbitrable, that it proceed on the basis of only Article X, Section 2. We note that arguments concerning these other provisions would not relate to substantive arbitrability but rather to the question of remedy if the grievance is found meritorious. Questions of remedy are separate and distinct from

---

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

[23] Decision Nos. B-63-88; B-10-77; B-2-77.

[24] Decision Nos. B-49-89; B-32-87; B-29-85; B-17-80; B-5-77; B-9-76; B-5-76; B-2-71.

questions of arbitrability.[25] It is well-settled that once we find that a matter is arbitrable, the dispute is to be submitted to the arbitrator, including the question whether the requested remedy, or any other remedy, is appropriate.[26] Accordingly, we direct that in the event an arbitrator finds an arguable violation of Article X, Section 2 of the Agreement, nothing in this decision shall be construed to limit the power of the arbitrator to fashion remedial relief appropriate to the circumstances.

Accordingly, we grant the Union's request for arbitration and dismiss the City's petition challenging arbitrability 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 challenging arbitrability be, and the same hereby is, denied; and it is further

---

[25] Decision No. B-4-85.

[26] E.g., Decision Nos. B-39-89; B-65-88; B-33-82; B-14-81; B-2-77.

ORDERED, that the Union's request for arbitration 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