City v. Corr. Captains Ass., 45 OCB 11 (BCB 1990) [Decision No. B-11-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

DECISION NO. B-11-90

THE CITY OF NEW YORK,

DOCKET NO. BCB-1251-90
(A-3286-89)

Petitioner,

-and-

THE CORRECTION CAPTAINS
ASSOCIATION,

Respondent.
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DECISION AND ORDER

On February 9, 1990, 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, which was submitted by the Correction Captains Association ("the Union") on or about November 30, 1989. The grievance contests the demotion in rank of a probationary Correction Captain. The Union filed an answer and cross motion to dismiss the City's petition on February 16, 1990. The City filed a reply on February 26, 1990.

BACKGROUND

Raymond Krull ("the grievant") was appointed as probationary Correction Captain on or about August 12, 1987. Upon graduation from the academy, he was assigned to the Housing unit of the Adolescent Remand Detention Center. On or about September 2, 1988, the grievant was demoted from probationary Correction Captain to Correction Officer.

On or about December 29, 1988, the Union, in behalf of the grievant, filed a Step II grievance claiming that the Department of Correction ("the

Department") failed to follow its own rules and regulations in evaluating the grievant before demoting him. In a Step II determination, the Department's acting Director of Labor Relations denied the grievance on the ground that Directive #2219, cited as the basis of the grievance, was inapplicable because it applies specifically to probationary Correction Officers, and not to probationary Correction Captains.[1]

On or about March 15, 1989, the Union appealed the grievance to Step III. In a Step III decision, dated November 13, 1989, the Office of Municipal Labor Relations concurred with the Step II finding and denied the grievance on the grounds that Directive #2219 is inapplicable, and that the grievant failed to prove that his demotion was a violation as claimed.

With no satisfactory resolution of the grievance having been reached, the Union filed a request for arbitration. The request continued to claim that the grievant's demotion was in violation of Directive #2219, and was in violation of Article XX, Section 1.(b) of the parties' collective bargaining agreement as well.[2]

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[1] Directive #2219, effective 9/15/82, is a ten-page departmental policy with a two-page amendment, the subject of which is "Probationary Correction Officer Evaluation." The Directive's stated purpose is "to establish procedures for evaluating a Probationary Correction Officer's job performance prior to a recommendation for continuation of employment, extension of probation, permanent status, or termination of services," and "to establish procedures for processing a probationer's end-of-probation medical examination." The remainder of the directive describes the policy and procedures that "Commanding Officer/Division Heads" must follow in its implementation. The directive gives no indication that it applies to a title other than Probationary Correction Officer.

[2] Article XX of the parties' collective bargaining agreement sets out the grievance and arbitration procedure. Section 1.b., inter alia, defines the term "grievance" as:

> a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and

As a remedy, the Union sought that the grievant "be restored to the position of Corrections Captain for additional six monthly evaluation to be done in accordance with Department Rules & Regulations and Practice."

POSITIONS OF THE PARTIES

City's Position

The City maintains that it is under no obligation to arbitrate the grievant's demotion in this case because allegedly the Union has failed to cite a provision of the collective bargaining agreement that is arguably related to the demotion of a probationary Correction Captain. According to the City, although the Union "couches its allegations in terms which would demonstrate a nexus with Classification 2219," this case has nothing to do with that Directive.

The City contends that what the Union is really grieving is the Department's unwillingness to evaluate a probationary Correction Captain according to the procedure developed for evaluating probationary Correction Officers. The City submits that the Department is under no obligation to do so because the procedure cited by the Union, Directive #2219, specifically applies solely to probationary Correction Officers. Thus, the Union's grievance assertedly is without merit because the grievant's demotion was not covered by the directive.

In response to the Union's past practice claim, the City denies that it has ever applied Directive #2219 to probationary Correction Captains. To the contrary, the City points to "Form 18" entitled "Rating Report Probationary

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conditions of employment, provided that, except as otherwise provided in this Section 1a the term "grievance" shall not include disciplinary matters.

(Section 1.a. includes in the term "grievance" a "claimed violation, misinterpretation or inequitable application of the provisions of this Agreement.)"

Employees," a one-page rating form for preceptors to use in making recommendations for permanent appointment, to show that an entirely separate rating system exists for evaluating present employees who are promoted to a higher position subject to successful completion of a probationary period.

The City concludes that because there is no relationship between "the gravamen of the Respondent's allegations" and Directive #2219, and because the Department acted within its managerial authority under Section 12-307b. of the New York City Collective ("NYCCBL"),[3] the Union's request for arbitration must be dismissed.

Union's Position

The Union claims that because the policy of the NYCCBL is to encourage the City and its employee organizations to enter into written collective bargaining agreements that contain grievance and impartial binding arbitration procedures, and because Article XX, Section 1.b. of the parties' unit Agreement provides such a procedure, the grievant's demotion in this case should be arbitrable.

The Union contends that since the inception of Directive #2219, the Department "has always applied" its provisions to probationary Correction

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[3] Section 12-307b. of the NYCCBL, provides, in pertinent part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; . . . .

Captains. The Union maintains that the Department has always observed and evaluated probationary Captains, and it has always provided evaluations at the end of the fourth, seventh and tenth months. The Union also maintains that these ratings are performed by no less than five uniformed supervisors who have direct working contact with the person being evaluated.

According to the Union, the Department understood that this had become a standard procedure because, in fact, it selected five Assistant Deputy Wardens to evaluate the grievant. The Union agrees that providing for three sets of evaluations by five supervisors who have direct contact with a probationary employee "avoids a situation where an incompetent employee can hide his incompetence during the evaluation and allows a competent employee to demonstrate his abilities." The problem with the grievant's evaluations in this case, however, was that while other probationary Captains were being evaluated by supervisors who had direct contact and who were able carefully to observe them, the grievant's evaluators allegedly had no such direct contact.

The Union further notes that in Decision No. B-12-87, we defined a procedure as "a course of action or method or plan, unilaterally instituted by the employer to further the mission of the agency." According to the Union, Directive #2219 constitutes a plan of evaluation that was unilaterally instituted by the Department to further its mission because part of the mission of the Department of Correction is to provide competent supervisors who are chosen after a full, fair and consistent evaluation. The Union concludes that the Department's previous applications of the evaluation procedure described in Directive #2219 places it under our definition of a procedure. Because Article XX, Section 1.b. of the parties' Agreement defines "grievance" as, inter alia a "claimed violation, misinterpretation or misapplication of the . . . procedures of the agency affecting terms and conditions of employment," the Union contends that the instant matter is arbitrable.

Finally, the Union asserts that it is within the exclusive province of an arbitrator to make a final determination as to what occurred, to interpret the procedure contained in Directive #2219, and to apply it together with any other relevant laws, procedures and past practices.

DISCUSSION

It is well-established that it is the policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[4] However, we cannot create a duty to arbitrate where none exists nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[5]

We are called upon, therefore, to determine whether a prima facie relationship exists between the act complained of, the demotion of a probationary Correction Captain, and Directive #2219, the source of the alleged right, redress of which is sought through arbitration. In circumstances such as these, we have held that a union, where challenged to do so, has a duty to show that the provision invoked is arguably related to the grievance to be arbitrated.[6]

The Union has made two arguments concerning the applicability of Directive #2219 to the demotion of the grievant in this case: First, it maintains that the policy of the NYCCBL links it to the parties' grievance procedure because the directive is concerned with furthering the mission of the agency. Therefore, allegedly the directive qualifies as an arbitrable

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[4] E.g. Decision Nos. B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

[5] Decision No. B-41-82 and B-15-82.

[6] Decision Nos. B-27-88; B-4-81; B-21-80; B-7-79; B-3-78 and B-1-76.

"procedure" under the parties' grievance and arbitration provisions. Second, the Union maintains that in the past, the directive's provisions have always been applied in evaluating probationary Correction Captains, and the practice should have been followed in this case.

A fair reading of Directive #2219 indicates that it was designed with newly hired probationary Correction Officers in mind. Nowhere does it even remotely imply that its procedures should be generally applicable to promotees as well as to new hires. To the contrary, the directive unambiguously sets out the procedure for evaluating "newly appointed Correction Officers," and not newly promoted correction officers.

As far as the parties' past practice is concerned, we need not make a detailed inquiry in this regard. Even if, arguendo, the Department, in the past, had applied Directive #2219 to some probationary promotees, such application would be inapposite to this request for arbitration because the parties' definition of the term "grievance" does not include past practice. We have consistently denied arbitration of claimed violations of past practice or policy absent an agreement defining the term "grievance" to include such claims.[7]

With respect to Decision No. B-12-87, cited by the Union, we note that that case did not result in a decision in favor of arbitrability. The dispute involved the removal of beds by the Police Department from one of its central booking facilities. The Union asserted that the past practice of providing beds amounted to a procedure, and, therefore, was within the meaning of the parties' definition of a grievance. In denying arbitration, we referred to an earlier PBA case, and we said that other than the vague reference to long-standing policy, none of the papers submitted by the Union had identified any rule, regulation or procedure of the Department that had been violated. That

[7] Decision Nos. B-35-89; B-43-88; B-11-88; B-12-87; B-25-83 and B-20-72.

situation is nearly identical with the facts that the Union has presented us with in the present case. We see no evidence indicating that the Department applies the procedure contained in Directive #2219 to probationary Correction Captains.

Finally, with respect to the Union's cross motion for dismissal of the City's petition challenging arbitrability, we point out that Section 12-309a.(3) of the NYCCBL requires us "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure . . . ." We would not be able to comply with this mandate unless we have a complete understanding of the nature of the dispute before us. Thus, unless the merits of a case are so obviously one-sided that there is no genuine issue to be decided, we will not grant a request for an accelerated judgment, for doing so would deny us the ability to make a proper determination as to whether a dispute is entitled to proceed to arbitration.

After carefully reviewing the applicable provisions of the parties' grievance procedure and the purpose behind Directive #2219, we find that the dispute herein is not arbitrable. The Union has failed to establish a prima facie relationship between the act complained of, the grievant's demotion, and a source of the alleged right of 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 challenging arbitrability filed by the City of New York, and docketed at BCB-1251-90, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the New Correction Captains Association in Docket No. BCB-1251-90 be, and the same hereby is denied.

DATED: New York, N.Y.
March 28, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER