HHC v. L.237, IBT, 45 OCB 13 (BCB 1990) [Decision No. B-13-90 (Arb)]

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

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Respondent.

DECISION NO. B-13-90
DOCKET NO. BCB-1196-89 (A-3072-89)

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DECISION AND ORDER

On August 16, 1989, the New York City Health and Hospitals Corporation ("HHC" or "City"), appearing by its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance initiated by Local 237, International Brotherhood of Teamsters, AFL-CIO ("Local 237" or "Union") on behalf of Special officer Albert Amoros ("Grievant"). The Union filed an answer on September 13, 1989. The City filed a reply on September 25, 1989.

Background

Grievant is employed as a Special officer at Elmhurst Hospital, a division of HHC. On March 30, 1988 at approximately 1:30 AM and during off-duty hours, Grievant observed a person

breaking into his automobile parked outside his home. After calling 911 for assistance, Grievant apprehended this individual and placed him under arrest pursuant to his authority as a peace officer.[1] Grievant states that he was involved with legal proceedings in connection with this arrest until approximately 3:00 PM that day. Although Grievant arrived at Elmhurst Hospital at 3:30 PM, he did not work his regularly scheduled 4:00 PM to 12:00 AM tour of duty that day. There is no dispute that HHC refused to grant Grievant either premium pay or compensatory time for the arrest or court appearance, charging the absence to annual leave.

On April 7, 1988, the Union filed a Step IA grievance alleging that Grievant should be appropriately compensated for all time spent processing the arrest and defending his actions as a peace officer. The Union contends that inasmuch as Section

[1] Section 2.10(40) of the Criminal Procedure Law ("CPL") designates Special Officers employed by HHC as peace officers.

Section 2.20(l) of the CPL, confers in persons designated as peace officers, inter alia, the power to make warrantless arrests.

2.20(3) of the CPL[2] deems this activity to be within the scope of Grievant's public employment, it follows that he should be credited with this time for purposes of computing overtime compensation. HHC denied the grievance on September 14, 1988.

The appeal at Step II was denied on November 16, 1988. HHC found that because Grievant's actions were taken on his own time, off HHC premises and in his own personal interest, no restitution should be made.

On November 18, 1988, Local 237 filed a Step III grievance with OMLR. The Union alleged that, in addition to Section 2.20 of the CPL, HHC's actions violate Article IV, Sections 1, 2, and 14 of the 1980-82 Citywide Agreement ("Agreement").[3] The

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[2] Section 2.20(3) of the CPL provides:

> A peace officer, whether or not acting pursuant to his special duties, who lawfully exercises any of the powers conferred upon him pursuant to this section, shall be deemed to be acting within the scope of his public employment for purposes of defense and indemnification rights and benefits that he may be otherwise entitled to under the provisions of section fifty-k of the general municipal law, section seventeen or eighteen of the public officers law, or any other applicable section of law.

[3] Article IV of the Agreement, entitled "Overtime", in relevant part, provides:

> Section 1.a "Authorized voluntary overtime"... shall be defined as overtime ... for work authorized by the agency head or the agency head's designee, which the employee is free to accept or decline.

(continued...)

grievance was denied in a decision dated April 4, 1989. The OMLR Review officer found no violation of Article IV, Sections 1 and 2 inasmuch as Grievant was not ordered or authorized to work overtime. The Review Officer further found no inconsistency between the overtime provisions of the Agreement and Federal or State Law, concluding, therefore, that Article IV, Section 14 of the Agreement did not apply to this dispute.

No satisfactory resolution of the grievance having been reached, on April 18, 1989, Local 237 filed the instant request for arbitration. The Union contends that "failure to compensate grievant for time spent as a peace officer on an off duty arrest" violates Article IV, Sections 1, 2 and 5[4] of the Agreement.

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[3](... continued)
Section 1.b "Ordered involuntary overtime" ... shall be defined as overtime ... which the employee is directed in writing to work and which the employee is therefore required to work. Such overtime ... may only be authorized by the agency head or a representative who is delegated such authority in writing.

Section 2.a Ordered involuntary overtime which results in an employee working in excess of forty (40) hours in any calendar week shall be compensated in cash at time and one half (1-1/2 times).

Section 14 In the event of any inconsistency between this Article and standards imposed by Federal or State Law, the Federal or State Law shall take precedence unless such Federal or State Law authorizes such inconsistency.

[4] Article IV, Section 5 of the Agreement provides:

(continued...)

Positions of the Parties

The City's Position

The City contends that in order to be compensable under Article IV, Section 1 and 2 of the Agreement, overtime must be ordered and/or authorized; and that Article IV, Section 5, which provides the manner in which the workweek is to be computed for purposes of overtime compensation, is only applicable within the context of ordered and/or authorized overtime. Thus, the City argues, because Local 237 does not allege that the Grievant was at any time directed to work overtime in connection with the off-duty arrest on March 30, 1988, it cannot demonstrate a nexus between the denial of overtime wages and an applicable provision of the Agreement.[5]

The City also alleges that the Union's argument with respect to Section 2.20 of the CPL is "entirely disingenuous." Referring to the full text, meaning and legal effect thereof, the city contends that Section 2.20 of the CPL places the performance of warrantless arrests within the scope of public employment only "for purposes of defense and indemnification rights and benefits"

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[4] (... continued)
Time during which an employee is in full pay status, whether or not such time is actually worked, shall be counted in computing the number of hours worked during the week.

[5] The City cites Decision No. B-9-83 and the cases cited therein.

and not for the purpose of entitling Grievant to contractual overtime compensation.

The Union's Position

Local 237 submits that to the extent Section 2.20 of the CPL deems Grievant's actions taken pursuant to his authority as a peace officer to be within the scope of his public employment, the performance of such work arguably constitutes "time during which an employee is in full pay status" for purposes of computing overtime compensation under Article IV, Section 5 of the Agreement. Moreover, the Union argues, by virtue of the statute, the performance of such work is, in effect, "authorized voluntary overtime" within the meaning of Article IV, Section 1.a of the Agreement. Therefore, the Union contends, the City's failure to credit Grievant with the time he spent effecting and processing the arrest at issue arguably violates a contractual right to be compensated for overtime.

Local 237 characterizes the City's challenge to the arbitrability of this matter as an attempt to persuade the Board to inquire into the merits of this dispute. Any further inquiry into the issue of whether overtime is authorized by the statute,

the Union argues, is a factual dispute which should be determined by an arbitrator.[6]

Discussion

It is well-settled that the function of this Board on a petition challenging arbitrability is to determine whether the parties to the dispute are obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy.[7]

It is undisputed that the parties herein are bound to arbitrate "grievances" as defined by Article XV of the Agreement.[8] Rather, the petition raises the question of whether Local 237 has adequately demonstrated that the contractual arbitration clause applies to the instant dispute. The Union contends that the source of the alleged right to arbitrate this grievance "flows from a reading of [Section 2.20 of the CPL] together with the contract." The City maintains that any

[6] The Union cites Decision Nos. B-1-84; B-25-75; B-25-72; B-12-69.

[7] E.g., Decision Nos. B-20-89; B-54-87; B-9-83; B-2-69.

[8] Article XV, Section 1 of the Agreement provides:

> Definition: The term "grievance" shall mean a dispute concerning the application or interpretation of the terms of this Agreement.

suggestion that Section 2.20 of the CPL is somehow relevant to this dispute is without merit.

As the Union points out, in Decision No. B-25-72 we held:

> In cases seeking arbitration, the relevance or applicability of the cited statute or departmental regulation to the situation of the case and to the basic grievance propounded is a matter going to the merits of the case and, hence, one for the arbitrator to determine.

However, we have long held that "[t]he grievant, where challenged to do so, has a duty to show that the statute, departmental rule or contract provision he invoked is arguably related to the grievance to be arbitrated."[9] Therefore, while it is our policy not to adjudicate the merits of a claim, in certain cases, we necessarily must scrutinize the terms of a provision more closely than we might otherwise in order to determine, as a threshold matter, whether it provides a colorable basis for the claim.[10]

Based upon our examination of the clear and unambiguous language of Section 2.20(3) of the CPL,[11] we agree with the City that the provision upon which the Union relies as the source of the right alleged does no more than create an entitlement to the benefits which are specified therein. That is, Section 2.20(3)

[9] Decision No. B-1-76. See also, Decision Nos. B-36-88; B-22-86; B-27-84; B-10-83.

[10] See Decision Nos. B-54-87; B-9-83; B-21-80.

[11] Supra, note 2, at 2.

of the CPL provides that a peace officer "shall be deemed to be acting within the scope of his public employment for purposes of defense and indemnification ... [emphasis added]" in any civil action or proceeding in state or federal court.[12] We note that Section 2.20 of the CPL was amended in 1985 to require state and local government employers to extend otherwise available indemnification benefits to situations where their peace officer employees utilize the powers provided by the statute in situations unrelated to their particular employment assignments. However, we are not persuaded that it even arguably was intended to expand upon the contractual definition of "[t]ime during which an employee is in full-pay status" for purposes of computing overtime compensation, pursuant to Article IV, Section 5 of the Agreement.

Similarly, we find untenable the Union's analogy that because certain acts of a peace officer are deemed to be within the scope of public employment for purposes of defense and indemnification rights and benefits, that authorization for overtime be deemed "automatic" for purposes of Article IV, Sections 1 and 2 of the Agreement. In this connection, we note that in the absence of a limitation in the contract or otherwise, the circumstances under which overtime is assigned or authorized

[12] See Section 50-k of the General Municipal Law and Sections 17 & 18 of the Public Officers Law.

are within the City's statutory management right to "determine the methods, means and personnel by which government operations are to be conducted."[13] We do not find that Section 2.20(3) of the CPL either provides or implies that a peace officer is deemed to be acting within the scope of his employment for any purposes other than those enumerated therein. Thus, we are unable to conclude that Section 2.20 of the CPL arguably constitutes a limitation on this express managerial prerogative.

Finally, we have stated that "the mere fact that an individual actually worked time for which he seeks compensation is not determinative of a challenge to arbitrability."[14] Rather, in cases where the contract requires that overtime be ordered and/or authorized, a union must raise a substantial question as to whether the grievant was, in fact, ordered or authorized to perform the duty.[15] Having found that Section 2.20 of the CPL does not provide a colorable basis for such authorization, and because Local 237 has not otherwise demonstrated a condition precedent to the assertion of a claim for overtime compensation

[13] Section 12-307b of the Now York City Collective Bargaining Law. See e.g., Decision Nos. B-20-89; B-3-89; B-20-87; B-17-87.

[14] Decision No. B-71-88.

[15] Id.

under Article IV of the Agreement, we find that it has failed to establish any basis for arbitration thereunder.[16]

Accordingly, we grant the City's petition challenging the arbitrability of this dispute 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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied.

DATED: New York, New York
March 28, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

[16] See Decision No. B-52-88.