

City v. PBA, 45 OCB 25 (BCB 1990) [Decision No. B-25-90 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-25-90

-and-

DOCKET NO. BCB-1204-89  
(A-3023-89)

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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#### **DECISION AND ORDER**

On August 31, 1989, the City of New York, appearing by its Office of Municipal Labor Relations ("City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed on or about February 16, 1989, by the Patrolmen's Benevolent Association ("PBA" or "Union"). The Union filed an answer to the petition on September 13, 1989. The City filed a reply on September 19, 1989.

#### **Background**

On or about November 16, 1988, the PBA filed a grievance on behalf of its members assigned to the Headquarters Security Unit ("Grievants"), with the New York City Police Department, Office of Labor Policy ("OLP"). The Union's complaint, which concerned the number of appearances and the length of tours performed by Grievants, alleged that:

[M]embers of the Headquarters Security Unit are scheduled to perform 247 tours of 8 hours and 27 minutes per tour rather than the patrol chart which provides for 243 tours of 8 hours and 35 minutes per

tour. When the schedule of tours was negotiated in 1978, members doing patrol functions were allowed to work 243 8 hour 35 minute tours. The duties of members assigned to the Headquarters Security Unit has substantially changed since that time and is now a totally patrol function. . . . The remedy sought is a reduction in tours from 247 to 243 in recognition that the Headquarters Security Unit is a patrol function, and members thereof should be assigned the patrol chart.

Attached to the grievance were several documents compiled by the Union, which purportedly demonstrate that the duties performed by the Headquarters Security Unit support the claim that Grievants perform patrol-related functions and that they therefore should be assigned to a duty chart commensurate with these functions.

In a letter dated November 25, 1988, OLP denied the grievance, noting that the length of tours performed and the number of appearances made by members of the service are mandatory subjects of bargaining. Maintaining that the length and number of tours currently performed by Grievants are appropriate under Operations Order No. 105-2/78,<sup>1</sup> OLP asserts that any change

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<sup>1</sup> Operations Order No. 105-2/78, in relevant part, provides:

Subject: POLICE OFFICER PATROL DUTY SCHEDULES

1. In accordance with an agreement between the City of New York and the [PBA], police officers assigned to the following units will perform the number and length of appearances indicated, effective 2330 hours, January 31, 1979.

b. Police officers assigned to the units listed below will perform 247, eight (8) hour and twenty-seven (27) minute tours annually:

Harbor Unit  
Central Booking  
Headquarters Security ...

c. Police Officers assigned to the units listed below will  
(continued...)

must be addressed through collective bargaining rather than through the grievance procedure.

On or about November 30, 1988, the Union referred the grievance to the Police Commissioner for a Step IV determination. The Commissioner denied the grievance by letter dated February 10, 1989. No satisfactory resolution of the dispute having been reached, on February 16, 1989 the Union filed the instant request for arbitration, wherein it claimed that the "denial of a 8 hour 35 minute duty chart to [Grievants]" was in violation of Operations Order Nos. 105-78,<sup>2</sup> 105-1/78,<sup>3</sup> and 105-2/78.

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<sup>1</sup>(...continued)

perform 243, eight (8) hour and thirty-five (35) minute tours annually:

Traffic Division  
Parking Enforcement Squad  
Traffic Enforcement Section  
Neighborhood Stabilization Units  
Patrol Borough Task Forces  
Street Crime Unit  
Auto Crime Unit  
Aviation Unit  
Precinct Anti-Crime  
Mounted Unit  
Precinct Patrol and Highway District  
(not performing duty with the 9 Squad Police Officer  
Duty Schedule).

<sup>2</sup> Operations Order No. 105-78, 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.

<sup>3</sup> Operations Order No. 105-1/78 provides that police officers assigned to clerical and administrative functions shall perform tours consisting of 8 hours and 23 minutes and, therefore, will be scheduled for 249 appearances annually.

**Position of the Parties**

**City's Position**

The City maintains that the PBA has failed to cite a provision of the collective bargaining agreement which is even arguably related to the underlying grievance. It points out that the purpose of Operations Order No. 105-78, was to effectuate a new nine squad duty chart for those police officers formerly working the 22 squad duty schedule. The City maintains that because Grievants "are not part of the reorganized Nine Squad Patrol schedule, they are not subject to Operations Order 105-78 and, thus, no nexus exists between it and the [Union's] request for arbitration."

Similarly, the City argues, the purpose of Operations Order No. 105-1/78, was to create new tours of duty for officers performing clerical and administrative functions. Inasmuch as Grievants are not police officers performing these functions, the City asserts, there can be no arguable relationship between the grievance and this Order.

Finally, the City points out that Operations Order No. 105-2/78 clearly and unambiguously sets the number and length of Grievants tours at eight (8) hours and thirty-five (35) minutes. Therefore, the City contends, a claim that this Order has been violated is without merit.

In further support of its position that this dispute is not arbitrable, the City maintains that "the setting of work charts is a managerial right,"<sup>4</sup> and that the promulgation of Operations Order 105-2/78 was simply an exercise

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<sup>4</sup> The City cites Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL").

of this right.<sup>5</sup> Accordingly, the City argues, any contrary ruling which might dictate that Grievants' tours be adjusted would violate the NYCCBL and upset Board of Collective Bargaining precedent.

**PBA's Position**

The PBA denies the City's allegation that Operations Order Nos. 105-78, 105-1/78 and 105-2/78 are not related to the grievance. The Union contends that it has demonstrated the necessary nexus in that all three Orders directly correlate the duties assigned to police officers with the appropriate number of tours to be worked.

Moreover, the Union maintains that it is not challenging the right of the City to promulgate Operations Order No. 105-2/78. Rather, it is challenging the City's interpretation of the Order, arguing that it "can reasonably be read to provide 243 rather than 247 tours for the Headquarters Security Unit 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 issue we must address, therefore, is limited to the City's contention that the Union has failed to demonstrate a substantive

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<sup>5</sup> The City cites Decision Nos. B-4-89; B-5-75.

relationship, rather than a causal relationship, between the right claimed to have been violated and a contract provision which is deemed to afford such a right.

It is well-settled that where challenged, a union has a duty to show that a substantive provision cited is arguably related to the grievance sought to be arbitrated.<sup>6</sup> We must determine, therefore, whether a prima facie relationship exists between the terms of Operations Order Nos. 105-78, 105-1/78 and 105-2/78 and the Union's claim that Grievants should be assigned to a different chart on the basis of a change in their duties and functions.

In this connection, the City argues, and we agree that the Union has failed to allege facts which support a finding that Operations Order Nos. 105-78 and 105-1/78 are arguably related to the instant matter. Indeed, we find that only Operations Order 105-2/78 is even remotely related to this dispute. That fact notwithstanding, the City asserts that because this Order is clear on its face, and that nowhere within Operations Order 105-2/78 does it provide that tours shall be set on the basis of a police officer's "responsibilities, duties, and activities," the Union cannot claim that this Order has been violated. In response, the Union maintains that since Operations Order No. 105-2/78 "directly address[es] the violation cited," it has demonstrated the requisite nexus.

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<sup>6</sup> Decision Nos. B-68-89; B-27-88; B-35-86; B-25-83; B-28-82; B-6-81; B-1-76.

Although the policy of the NYCCBL is to promote and encourage arbitration as the selected means for adjudicating and resolving grievances,<sup>7</sup> we cannot create a duty to arbitrate where none exists or enlarge a duty to arbitrate beyond the scope established by the parties by contract or otherwise.<sup>8</sup> Where contract language or a provision of a departmental order or policy is clear and unambiguous on its face, as in this case, it is not necessary to examine further the intent of the parties or to consider other provisions of the contract, order or policy at issue.<sup>9</sup> It is clear on its face that Operations Order No. 105-2/78 is couched in terms - not of duties and functions performed by a police officer - but of the unit, squad, subdivision or task force to which he or she is assigned. Those police officers who are assigned to units listed in subdivision 1.b. of the Operations Order are to work 247, eight (8) hour and twenty-seven (27) minute tours per year and those who are assigned to units 1.c. of the Order are to work 243, eight (8) hour and thirty-five (35) minute tours per year. Police Officers assigned to the Headquarters Security Unit, including Grievants, are covered by subdivision 1.b. and work 247, eight (8) hour and twenty-seven (27) minute tours. If change in these prescriptions has become necessary by reason of significant changes in the duties of officers assigned to any of these units, the appropriate means is the bargaining process rather than arbitration.

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<sup>7</sup> See Section 12-302 of the NYCCBL.

<sup>8</sup> Decision Nos. B-27-87; B-53-88; B-20-79; B-12-77.

<sup>9</sup> Decision Nos. B-68-89; B-37-80; B-10-79; B-19-75.

In Decision No. B-68-89, we denied a similar request for arbitration filed by the PBA (Docket No. BCB-1213-89), alleging essentially the same grievance on behalf of its members assigned to the Movie/TV Unit and/or the Special Operations Division. In that case, we held:

To the extent that the request for arbitration asserts a claim that Movie/TV 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/TV 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 105-2/78 obsolete, thus calling for an adjustment in the 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 [footnote omitted].<sup>10</sup>

Accordingly, because it appears that members of Headquarters Security Unit are working the proper number and length of tours prescribed by Operations Order No. 105-2/78, and because there is no apparent relationship between the grievance and Operations Order Nos. 105-78 and 105-1/78, we shall grant the City's petition challenging arbitrability.

**ORDER**

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<sup>10</sup> In any event, we find that the question whether a matter concerns a mandatory subject of bargaining is not relevant to our determination of the issue of arbitrability here. In Decision No. B-22-80, we stated:

Arbitrability is dependent upon what the parties have bargained for and included in their contract, not what they might be required to bargain over. The scope of the parties' agreement to arbitrate need not be (and usually is not) as broad as the scope of collective bargaining.



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 be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association be, and the same hereby is, denied.

DATED: New York, New York  
May 24, 1990

MALCOLM D. MacDONALD  
CHAIRMAN

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MEMBER

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CAROLYN GENTILE  
MEMBER

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