

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-35-90  
DOCKET NO. BCB-1138-89  
(A-3004-89)

-and-

DETECTIVES' ENDOWMENT ASSOCIATION,

Respondent.

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**DECISION AND ORDER**

On February 9, 1989, the City of New York ("the City") filed a petition challenging the arbitrability of a grievance commenced by the Detectives' Endowment Association ("the Union"). The Union filed an answer on February 16, 1989. The City filed a reply on February 27, 1989. Although not specifically permitted by the Rules of the Office of Collective Bargaining, the Union filed a sur-reply on March 6, 1989.

**Background**

The parties do not dispute the facts underlying the grievance. Detective Paul Barone ("the grievant") retired from the Police Department in April, 1985 after fifteen years of service. On March 20, 1986, he requested reinstatement and was reinstated as an entry level police officer in December, 1986.

On September 30, 1986, the grievant signed a document (the "Forfeiture Waiver"), stating that "[d]ue to the fact that [his]

reinstatement has passed the time limit allotted for such, [he] understand[s] that [his] seniority rights are henceforth forfeited." He also signed a form labeled "Request for Reinstatement" which includes, inter alia, a "Reinstatement Consent" that provides, in relevant part, as follows:

I understand that this application for reinstatement does not confer upon me the right to reinstatement and that such reinstatement, if granted, is subject to the terms and conditions contained on this form. I have read and agree to the terms and conditions of this reinstatement as set forth in both sides of this form and all rules and regulations governing reinstatement.

Among the terms and conditions set forth on the reverse of the "Request for Reinstatement" is that the reinstatement is subject to Rules 6.2.1 through 6.2.7 of Rules and Regulations of the City Personnel Director.<sup>1</sup>

Sometime thereafter, the grievant applied to be elevated to first grade police officer based on his previous service in the Police Department. The City approved his request, promoted him, and granted him a salary increase retroactive to the date of his reinstatement.

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<sup>1</sup> Of particular relevance, is Rule 6.2.4 which reads as follows:

Effect on Continuous Service

Any such reinstatement effected more than one year after such separation shall not constitute continuous service.

In April, 1988, the grievant was promoted to the rank of detective. Later, in October, 1988, the City advised the grievant that he should not have received a first grade police officer's salary for the period after his reinstatement and before his promotion to first grade police officer. Consequently, the grievant was informed that the retroactive wage increase would have to be repaid to the City out of his future earnings. He was further advised that, in his new title, he would be paid at a rate appropriate for an individual with over one year seniority with the Police Department but less than one year as a Detective, Third Grade, thereby not taking into account his previous service in the Police Department.

On or about October 18, 1988, the Union filed a grievance on behalf of the grievant pursuant to the contractual grievance procedure.<sup>2</sup> In its grievance, the Union protested the "denial of

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<sup>2</sup> The pertinent collective bargaining agreement is the "July 1, 1984 to June 30, 1987 agreement between the parties ("the Agreement"). Article XXI of the Agreement defines a grievance, in relevant part, as follows:

1) a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;

2) a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment, providing that, except as otherwise provided in this Section 1(a), the term "grievance" shall not include disciplinary matters;

appropriate salary level for retired detective reinstated to the department." The grievance was subsequently filed with the Commissioner of the Police Department on or about November 21, 1988. The grievance was denied on or about December 23, 1988.

On January 19, 1989, the Union filed a request for arbitration alleging that the City had reduced the grievant's pay "without proper legal authority or City or Department rules or regulations to support such action." The Union alleged a violation of Articles VI, VIII, IX and X of the Agreement. As a remedy, the Union seeks the payment of "proper pay" and a restoration of any reduction in pay to the Grievant. The Union also requests that the City supply it with information upon which its action was based in compliance with Article XV, §5 of the Agreement.<sup>3</sup>

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<sup>3</sup> Article XV, §5 provides, in relevant part, that:

The Department will provide the Union with a copy of all Orders, Department Bulletins, "Open Door" issues, and press releases. The details of delivery shall be worked out between the parties.

The Department will provide to the Union on a semi-annual basis a computer printout containing names and addresses of employees listed alphabetically.

**Positions of the Parties**

**City's Position**

The City argues that the Union has failed to demonstrate the necessary nexus between the acts of the City and provisions of the Agreement.<sup>4</sup> Specifically, the City contends that the Union has failed to establish a nexus between its claims and Article VI of the Agreement.<sup>5</sup> According to the City, the Union has failed to establish a nexus between Article VI and the grievance because it does not claim that the grievant was denied the proper salary as a First, Second or Third Grade Detective or claim any other benefits provided by Article VI of the Agreement.

The City also contends that the Union has failed to establish a nexus between Article VIII and the instant dispute.<sup>6</sup> The City claims that the Union has made no allegations that the grievant was denied a longevity increase as a First, Second or

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<sup>4</sup> The City cites Decision Nos. B-16-87; B-35-86; B-9-83; B-41-82; B-8-82; B-7-81; B-21-80; B-7-79; B-3-78; B-1-76.

<sup>5</sup> Article VI provides for base annual rates of pay for employees depending on what grade and step they have reached in the detective title. It also provides for general wage increases at specific times, the date and time for the delivery of paychecks, and the availability of payroll work sheets for inspection.

<sup>6</sup> Article VIII provides for longevity increases for detectives depending on years of service, grade and step. It also provides that in some circumstances, adjustment will not be computed as salary for pension purposes.

Third Grade Detective, and thus it has failed to establish a nexus.

The City further asserts that the Union has not established a nexus between Article IX and the grievance.<sup>7</sup> It argues that there are no assertions in the request for arbitration which allege that the grievant was denied holiday pay.

In addition, the City argues that there is no nexus between the Union's claim and Article X of the Agreement.<sup>8</sup> It asserts that the Union does not allege in its request for arbitration that the grievant was denied leave.

In its reply, the City maintains that the grievant acknowledged, by signing the waiver referred to supra, that he had forfeited his seniority rights. Thus, the City contends "there can be no dispute that Petitioner was entitled to reinstate the grievant as an entry level police officer."

Furthermore, the City notes that the grievant, pursuant to the "Request for Reinstatement" which he executed on September 30, 1986, agreed that his reinstatement was governed by the Rules and Regulations of the City Personnel Director, the breach of

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<sup>7</sup> Article IX provides for the payment of eleven paid holidays annually.

<sup>8</sup> Article X provides for various leaves including personal, sick, death-in-family, military and special leave, as well as leave to attend hearings.

which, cannot be the subject of a grievance under the Agreement.

Finally, the City argues that to the extent the Union seeks to stop the City from recouping monies already paid to the grievant, its claim is not arbitrable.<sup>9</sup>

### **Union's Position**

The Union contends that the issue it seeks to arbitrate in this case, is whether the grievant has received his proper salary under the Agreement. Citing Decision No. B-3-79, the Union contends that questions arising out of disputes over salaries are arbitrable,<sup>10</sup> and that a dispute over the appropriate salary to be paid to the grievant is clearly arbitrable under Article XXI of the Agreement.

With respect to the other provisions of the Agreement relied upon in its Request for Arbitration, the Union argues that the grievant is not receiving his proper "Longevity Adjustment" based on all years of service in the department and his years of service as a detective. As a consequence of not being properly credited for his years in service and, thus, of not being given the proper base pay upon which to calculate other entitlements, the Union asserts the grievant is also not receiving the appropriate compensation for "Holidays" and "Leave" due to an

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<sup>9</sup> The City cites Decision No. B-44-88.

<sup>10</sup> The Union also cites Decision Nos. B-23-86 and B-9-81.

employee of his experience. Consequently, the Union maintains that a nexus is clearly established in the instant matter.

The Union notes that the interpretation of the instant contractual provisions involves questions which must be resolved by an arbitrator.<sup>11</sup> In support of its argument, the Union relies on Decision No. B-1-84, wherein it asserts that we found the issue of whether an individual should be credited for prior service to be a question which should be adjudicated by an arbitrator.<sup>12</sup>

The Union claims that the issue of the grievant's alleged waiver of seniority rights, raised by the City for the first time in its reply, warranted the submission of a sur-reply. In its sur-reply, the Union claims that the grievant, in effect, executed an individual agreement between himself and the City when he signed the two alleged waivers. The Union argues that an individual member of a bargaining unit is bound by the terms of a unit collective bargaining agreement and cannot negotiate his own terms with the City.

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<sup>11</sup> The Union cites Decision No. B-34-80.

<sup>12</sup> The Union also cites Decision No. B-31-85.



### **Discussion**

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate their controversies and, if they are, whether that contractual obligation is broad enough to include the acts complained of by the Union.<sup>13</sup> Furthermore, when challenged, as it is in this case, the Union must establish a nexus between the City's acts and the contract provisions it claims have been breached.<sup>14</sup> We resolve doubtful issues of arbitrability in favor of arbitration.<sup>15</sup>

The Union asserts that the City has failed to pay the grievant his proper salary under the Agreement. It argues that the grievant should be given credit for the time he spent as a detective before he retired in April, 1985.

The City argues that there is no nexus between the Union's claims and Article VI of the Agreement. It also contends that the grievant waived his right to be reinstated at a particular grade and step and cannot now contend that he is entitled to any benefits beyond those granted to him. Finally, to the extent that the Union alleges that the City has wrongfully withheld

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<sup>13</sup> Decision Nos. B-65-88; B-28-82; B-15-79.

<sup>14</sup> Decision Nos. B-7-81; B-6-81.

<sup>15</sup> Decision Nos. B-65-88; B-15-80.

payments, the City, relying on Decision No. B-44-88, claims that the instant dispute is not arbitrable.

We note, as a preliminary matter, the City's discretion to assign police officers into the detective grades.<sup>16</sup> We specifically acknowledged this right in Decision No. B-15-77. However, once the City assigns a police officer, the officer accrues certain rights under the Agreement. The Union argues that the City's actions have infringed upon the grievant's rights under the Agreement.

Pursuant to the Agreement, the parties have agreed to arbitrate their grievances as defined therein. Article XXI of the Agreement broadly defines "grievance" to include "a claimed violation, misinterpretation or inequitable application of the provisions of" the Agreement.

The City does not contest that, generally, disputes arising under Article VI are arbitrable. Article VI establishes pay levels for Detectives' dependent on their grade and their placement at a step within the grade. The grievant contends that he is not receiving a salary commensurate with his grade because the City placed him at the wrong step in grade. The issue, thus, is whether Article VI prescribes grievant's appropriate placement in grade and step. We find that Article VI arguably may be construed as the source of the right asserted by the grievant,

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<sup>16</sup> Administrative Code, §434.a-3.0.

and that the issue of the appropriate grade and step into which the grievant should be placed is a question requiring the interpretation and application of Article VI. We therefore reject the City's argument that the Union has failed to establish a nexus between the grievant's claimed right and Article VI of the Agreement.

With respect to the two documents signed by the grievant which the City has termed "waivers", we find that they do not bar the arbitration of the instant claims arising under the Agreement. The City argues that pursuant to the Forfeiture Waiver, the grievant has forfeited his seniority rights. We note that the Forfeiture Waiver does not, on its face, address the issue of any rights the grievant would accrue upon subsequent promotion to the rank of Detective. Moreover, it clearly does not appear to be a waiver of the grievant's or the Union's right to seek arbitration under the Agreement. We note in this respect that the grievant was not even a member of the Union's bargaining unit upon his reinstatement as a police officer. Moreover, we find that even if the grievant has agreed to waive benefits which he would accrue only upon subsequent promotion to Detective, but which were dependent on his years of service, the effect of such a waiver is an issue involving the merits of the grievance, and not its arbitrability under the terms of the Agreement.<sup>17</sup>

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<sup>17</sup> Decision Nos. B-2-89; B-65-88.

To the extent the "Reinstatement Consent" similarly may be deemed to constitute a waiver of rights accruing at a time other than that of initial reinstatement, it does not act as a waiver of grievant's right to seek arbitration at a later time of other rights. Further, to the extent it may act as a waiver of those rights, that question also should be left for an arbitrator.

The City's argument notwithstanding, the Union's grievance does not arise out of a claimed violation of the Rules and Regulations of the City Personnel Director. Rather, the Union's grievance directly arises out of a claimed denial of benefits arguably created by the Agreement. Although not argued by the City, we find nothing in the Rules and Regulations of the City Personnel Director that would bar the arbitration of the grievances challenged in the instant petition nor prohibit bargaining on a contract provision modifying the terms of the those Rules and Regulations.

We emphasize that our ruling herein is limited in scope. The only issues that we find to be arbitrable involve the determination of whether the Agreement has vested in the grievant the rights claimed by the Union, and, if so, whether the grievant effectively waived those contractual rights. Any venture into territory beyond the boundaries thus defined - the consideration of any other issues of fact or law whatsoever - would constitute action by the arbitrator in excess of the powers vested in

him/her by the contract as limited by this determination. We make no determination on any issue other than whether there exists a nexus between the rights and benefits claimed by the Union and the terms of the Agreement.

Furthermore, we find that the grievance is arbitrable only to the extent that the grievant's salary as a detective is alleged to have been affected -- i.e., to the extent that he has allegedly been paid less than that to which he is entitled under the Agreement -- because of the recoupment of alleged overpayments made while the grievant was a police officer. In Decision No. B-44-88, cited by the City, we found that a grievance challenging the City's right unilaterally to recoup overpayments based only on the overtime provisions of the collective bargaining agreement between the Patrolmen's Benevolent Association ("PBA") and the City was not arbitrable. The PBA, in that decision, did not challenge the effect of a recoupment of the grievant's salary based on the salary provisions of the collective bargaining agreement.

In the instant matter, Article VI provides an entitlement to a benefit.<sup>18</sup> To the extent the Union complains of a deprivation of a benefit rather than challenging the City's right to recoup an overpayment, the grievance is arbitrable. However, the issue of whether the grievant was originally entitled to receive the

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<sup>18</sup> See, Decision Nos. B-30-86; B-31-85; B-3-79.

salary of a first grade police officer is not arbitrable under the Agreement. Article VI of the Agreement, upon which the Union relies, defines the salary rights of Detectives . The grievant's salary rights as a first grade police officer were defined in another agreement, negotiated and administered by the PBA. Clearly, the Detectives' Endowment Association has no standing to assert or to seek enforcement of any right that grievant may have had under the PBA Agreement.

Finally, we find that the Union's claims of alleged violations of Articles VIII, IX and X are arbitrable. The union contends that because the benefits under these Articles are dependent on the base salary and grade of the grievant, they too, are put at issue in the instant grievance. We note that while the City asserts that there are no allegations that the grievant has been denied benefits under those Articles, the City has not rebutted the Union's contention that the amount of those benefits, e.g., the amount of compensation paid for work on a holiday or for an authorized leave day, is dependent on the grievant's base salary under Article VI. We find that although the grievant's entitlement under these Articles is not the primary source of the dispute herein, it is incidental to his primary salary grievance raised herein under Article VI of the Agreement, a matter which we have found to be arbitrable. Accordingly, we are satisfied that there exists a prima facie relationship between VIII, IX and X and the instant grievance.

In conclusion, for the reasons stated above, we find that the Union has established an arguable relationship between Articles VI, VIII, IX and X of the Agreement and the City's alleged failure to compensate the grievant in the amount to which he was contractually entitled. To the extent the Union alleges a failure to compensate the grievant under the PBA's collective bargaining agreement, the Union's grievance is not arbitrable. Therefore, the Union's grievance, only to the extent it alleges a misapplication or violation of Articles VI, VIII, IX and X of the Agreement may be submitted to arbitration.

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**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 be, and the same hereby is, dismissed to the extent the petition challenges the arbitrability of the grievance filed by the Detectives' Endowment Association arising under Articles VI, VIII IX and X of the Agreement, and is granted to the extent it challenges the arbitrability of any grievance arising under the collective bargaining agreement between the City of New York and the Patrolmen's Benevolent Association, and

ORDERED, that the request for arbitration submitted by the Detectives' Endowment Association be, and the same hereby is, granted to the extent it seeks the arbitration of a grievance alleging a violation, misinterpretation or inequitable application of Articles VI, VIII, IX and X of the Agreement, and is denied to the extent it alleges a grievance arising under the collective bargaining agreement between the City of New York and the Patrolmen's Benevolent Association.

Dated: New York, New York  
June 27, 1990

MALCOLM D. MacDONALD  
CHAIRMAN

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MEMBER

DANIEL G. COLLINS  
MEMBER

CAROLYN GENTILE  
MEMBER

THOMAS J. GIBLIN  
MEMBER

ELLEN R. ROSENBERG  
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