City v. COBA, 45 OCB 41 (BCB 1990) [Decision No. B-41-90 (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-41-90

-and- DOCKET NO. BCB-1230-89 (A-3268-89)

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Respondent.
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DECISION AND ORDER

On November 27, 1989, the City of New York ("the City") filed a petition challenging the arbitrability of a grievance filed by the Correction Officers Benevolent Association ("COBA" or "the Union"). The Union, after receiving an extension of time, filed an answer on December 19, 1989. The City filed its reply on January 2, 1990.

Background

The uncontroverted facts set forth by the Union are as follows. On April 6, 1989, during the 3:30 P.M. to 12:01 A.M. roll call at the Correctional Institute for Men, Assistant Deputy Warden Marshall addressed a large number of Correction Officers concerning the use of force and written incident reports in connection therewith. The Union alleges, and the City does not deny, that:

> Marshall stated, as per Directive 5002R (use of force) and Executive Order No. 16, that a correction officer must submit a report. However, what [Marshall] failed to advise the officers is that they must submit a report only after he/she has received immunity under said order [emphasis in original].

Executive Order No. 16, issued by the Mayor on July 26, 1978 and amended on October 5, 1984, is entitled "Commissioner of Investigation, Inspectors General and Standards of Public Service." Executive Order No. 16 provides, in relevant part:

Section 1. Responsibilities of Commissioner

> The Commissioner of Investigation (hereinafter called the Commissioner) shall have general responsi-bility for the investigation and elimination of corrupt and or criminal activity, conflicts of interest, unethical conduct, misconduct and incompetence (i) by City agencies, (ii) by City officers and employees,....

Section 2. Responsibilities of Agency Heads

> All agency heads shall be responsible for establishing, subject to review for completeness and inter-agency consistency by the Commissioner, written standards of conduct for the officials and employees of their respective agencies and fair and efficient disciplinary systems to maintain those standards of conduct.

Section 4. Investigations

> (b) The Commissioner and, with the approval of the Commissioner, the Inspectors General and any person under the supervision of the Commissioner or the Inspectors General, may require any officer or employee of the City to answer questions concerning any matter related to the performance of his or her official duties ... after first being advised that neither their statements nor any information or evidence derived therefrom will be used against them in a subsequent criminal prosecution other than for perjury or contempt arising from such testimony...[emphasis added].
>
> (d) Every officer and employee of the City shall have the affirmative obligation to report, directly and without undue delay, to the Commissioner or an Inspector General any and all information concerning conduct which they know or should reasonably know to involve corrupt or other criminal activity or conflict of interest.... The knowing failure of any officer or employee to report as required above shall constitute cause for removal from office or employment or other appropriate penalty.
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> (f) No officer or employee other than the Commissioner, an Inspector General, or an officer or employee under their supervision, shall conduct any investigation concerning corrupt or

other criminal activity or conflicts of interest without the prior approval of the Commissioner or an Inspector General.

Section 8. Dissemination of Information

(a) All agency heads shall distribute to each officer and employee of their respective agencies within 90 days of the effective date of this Order and to each officer and employee appointed thereafter, a statement prepared by the Commissioner explaining the responsibilities of the Commissioner, Inspectors General, agency heads and all City officers and employees under this Order.

(b) Knowledge of the responsibilities of the Commissioner of Investigation and the Inspectors General and of relevant provisions of Articles 195 and 200 of the Penal Law, the City Charter, the Code of Ethics and this Order shall constitute an employment responsibility which every officer and employee is expected to know and to implement as part of their job duties and is to be tested in promotional examinations beginning January 1, 1979.

On October 26, 1978, the Commissioner of the Department of Correction distributed the following memorandum to all employees:

> Attached is a copy of the Mayor's Executive Order No. 16, a statement of explanation, relevant portions of the City Charter, Code of Ethics and the Penal Law, and a list of the Inspectors General in the City of New York.
>
> It is important that you familiarize yourself with this material. Please note the name, address and telephone number of the Inspector General for your Agency. You are responsible for reporting directly to the Inspector General or to the Department of Investi-gation ... any information concerning corruption, criminal activity or conflicts of interest. Any such report must be made directly and not through an inter-mediary. These communications will be kept confiden-tial. The Inspector General of this Agency is....

By letter dated June 22, 1989, counsel for COBA filed a Step III grievance pursuant to Article XXI, Section 4 of the 1984-87 Collective

Bargaining Agreement between the parties ("Agreement").[1] The Union maintained that the failure of Deputy Warden Marshall to advise affected Correction Officers of the full extent of their immunity rights under Executive Order No. 16 during his address on April 6, 1989, constitutes a violation of Article XXI, Section 1(b) of the Agreement.[2]

In its Step III Decision dated November 3, 1989, the City denied the grievance. No satisfactory resolution of the dispute having been reached, COBA filed the instant request for arbitration on November 17, 1989. As a remedy, the Union asks that Marshall be required "to make an official retraction or clarification to the entire command of the Correctional Institute for Men."

Positions of the Parties

City's Position

[1] Article XXI, Section 4 of the Agreement provides:

> Any grievance of a general nature affecting a large group of employees and which concerns the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement shall be filed at the option of the Union at Step III of the grievance procedure, without resort to previous steps.

[2] Article XXI, Section 1(b) of the Agreement defines the term "grievance" as, inter alia:

> [A] claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employ-ment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters.

The City contends that the Union has failed to state a cause of action upon which relief may be granted because alleged violations of "written policies of the Mayor" are not among the types of disputes the parties have agreed to submit to arbitration. In support of its position, the City relies on the principle of inclusio unius est exclusio alterius,[3] pointing out that the phrase "executive order" is conspicuously absent from the mutually agreed upon definition of the term "grievance" set forth in Article XXI, Section 1(b) of the parties' Agreement.

In further support of its argument, the City alleges that if the parties intended to arbitrate disputes of this nature, they would have incorporated the terms of Executive Order No. 16 in the Agreement, as they had in two other instances. In this connection, the City submits that Article II, Section 2 of the Agreement specifically refers to Executive Order No. 98 (concerning dues checkoff); and Article XVII, Section 1 expressly incorporates Executive Order No. 75 (concerning release time for union officials and representatives).

The City also argues that application of the policy of the Board of Collective Bargaining ("Board") favoring arbitrability is inappropriate where the Agreement's grievance and arbitration clause is not sufficiently broad to include matters not arguably related to a substantive provision of the Agreement. Here, the City asserts, the Union would have the Board "rewrite" the parties' Agreement to add the phrase "Executive Order" to the cited definition in order to find this dispute arbitrable.

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[3] The City cites Decision No. B-13-79.

Finally, the City contends that the facts distinguish the instant matter from the cases cited by COBA for the proposition that Mayor's Orders constitute "rules, regulations or policies of the agency."[4] The City argues that the Board's finding in Decision No. B-13-77 (reconsideration denied, Decision No.
B-1-78) is inapposite to the instant case because there, the grievants did not enjoy the benefit of a collective bargaining agreement. However, the City submits, where, as here, an agreement setting forth a mutually negotiated grievance and arbitration procedure exists, the Board has "steadfastly refused" to expand the scope of disputes that the parties have agreed to submit to arbitration thereunder.[5]

Union's Position

COBA seeks dismissal of the City's petition, contending that Executive Order No. 16 is the "equivalent" of a rule, regulation or procedure of the agency affecting terms and conditions of employment. "Clearly," the Union argues, a directive which concerns "the interview of employees regarding use of force and the submission of reports is a term and condition of employment"

[4] In Decision No. B-13-77, the Board decided that an alleged violation of Executive Order No. 4 was grievable under Executive Order No. 83, which defines a grievance, inter alia, as "a claimed violation ... of the written rules or regulations of the mayoral agency by whom the grievant is employed." Executive Order No. 83 provides a grievance and arbitration procedure to employees who are not covered by a collective bargaining agreement (e.g., many titles covered by Section 220 of the State Labor Law). In Decision No. B-1-78, the Board denied the City's Motion for Reconsideration of Decision No. B-13-77.

[5] The City cites Decision Nos. B-28-85; B-29-83; B-4-78.

within the meaning of Article XXI, Section 1(b) of the Agreement. Moreover, COBA asserts, the Board has already considered whether an Executive Order of the Mayor is a rule, regulation or procedure of an agency in contemplation of grievance clauses such as Article XXI, Section 1(b) and has decided that it is.[6] In support of its position, the Union quotes the following language from Decision No. B-13-77:

[6] The Union cites Decision Nos. B-13-77 and B-1-78, discussed supra, note 4, at 6.

> [The Board] cannot hold that an agency's failure to abide by an Executive Order of the Mayor applicable to it is not arbitrable because an Executive Order is not a rule or regulation of the mayoral agency. On the contrary, if the Mayor issues a rule in the form of an Executive Order applicable to all mayoral agencies, such rule becomes a rule of each mayoral agency unless a different effect is specifically prescribed. It would be inconsistent, for arbitration purposes, to hold that an agency must abide by the rules as set forth in the Executive Order, but that said rule is not a "rule or regulation of the mayoral agency" so as to preclude arbitration over an alleged violation of it.[7]

Therefore, the Union argues, because the Department must abide by the procedures set forth in Executive Order No. 16, a claim that it has been violated and/or misinterpreted constitutes an arbitrable dispute as defined by Article XXI, Section 1(b) of the Agreement.

Discussion

Inasmuch as the parties do not dispute that they have agreed to arbitrate their controversies, the question before this Board in the instant matter is whether the particular controversy at issue is within the scope of the Agreement to arbitrate.[8] The City argues that absent a specific reference to the phrase "executive order" within Article XXI, Section 1(b) of the Agreement, alleged violations of written policies of the Mayor are not arbitrable. COBA maintains that because Executive Order No. 16 is the equivalent of rules, regulations or procedures by which the agency must abide, an arguable violation of Article XXI, Section 1(b) has been stated.

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[7] Decision No. B-13-77, at 6.

[8] E.g., Decision No. B-28-87.

Section 12-309a(3) of the New York City Collective Bargaining Law ("NYCCBL") authorizes us "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration...." We exercise this authority whether the vehicle for resolution of disputes is derived from a collective bargaining agreement or from an executive order.[9] Where there exists a collective bargaining agreement, however, the power of the Board to determine that a matter is arbitrable pursuant to the contract rests upon the agreement of the parties.[10] It is well-settled that we cannot create a duty to arbitrate where none exists nor can we enlarge a duty beyond the scope established by the parties.[11] Thus, where challenged, the proponent of arbitration has the duty to demonstrate that the contract provision invoked is arguably related to the grievance to be arbitrated.[12]

In the instant matter, we find that Article XXI, Section 1(b) of the Agreement is sufficiently broad so as to arguably encompass an alleged violation, misinterpretation or misapplication of an Executive Order generally. As COBA correctly points out, in Decision No. B-13-77, we expressly stated:

> [I]f the Mayor issues a rule in the form of an Executive Order applicable to all mayoral agencies, such rule becomes a rule of each mayoral agency ... [emphasis added].

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[9] E.g., Executive Order No. 83. See Decision Nos. B-17-83; B-9-83; B-1-78; B-13-77.

[10] Decision No. B-4-78.

[11] Decision Nos. B-10-90; B-35-89; B-26-88; B-28-83; B-36-80; B-15-79; B-7-79.

[12] Decision Nos. B-50-89; B-6-88; B-19-83; B-9-79; B-1-76.

We are not persuaded by the distinction the City urges, i.e., that Decision No. B-13-77 is inapposite because of the "mere existence of [a] collective bargaining agreement" in the present case. Rather, we have long held that where the parties have agreed to submit a broad range of matters to arbitration, we require arbitration of disputes which arguably fall within its ambit despite the fact that the clause makes no specific mention of the particular type of dispute presented in a given case.[13] For example, in Decision No. B-8-78 we considered whether an alleged misapplication of the Patrol Guide was properly a subject for arbitration where the parties, in their collective bargaining agreement, defined a grievance as "a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department." There, we found that an alleged misapplication of the Patrol Guide is clearly arbitrable "in view of the broad nature of the grievance provision."[14]

In further support of this conclusion, we are guided by prior decisions where we considered the arbitrability of alleged violations of handbooks, guides, procedures, manuals, executive memoranda, informationals, rules and regulations and other documents external to the collective bargaining agreement in the context of a similar definition of the term "grievance."[15]

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[13] Decision No. B-1-78.

[14] See also, Decision Nos. B-17-80; B-15-80.

[15] See e.g., Decision Nos. B-67-89; B-28-87; B-27-84; B-38-85; B-31-82; B-34-80; B-7-71. In these decisions, we considered whether the claims fell within the contemplation of the parties agreement where they defined the term "grievance" as an alleged violation of rules and regulations,
(continued...)

In several of those cases, we found that directives not unlike Executive Order No. 16, which met certain criteria as to what constitutes "written policy," were subject to arbitral resolution although not specifically enumerated within the cited contractual definition.[16] Furthermore, we found these disputes arbitrable whether the directives were applicable to employees City-wide,[17] or only to employees of a particular agency.[18]

Accordingly, we find that the parties' agreement to arbitrate alleged violations of "rules, regulations or procedures of the agency affecting terms and conditions of employment," arguably encompasses a claim concerning an Executive Order of the Mayor which, by its own terms, is applicable to the agency and its employees. This finding is consistent with the policy of the

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[15](...continued)
written policy, or orders of the employer - or some variation thereof.

[16] In Decision No. B-28-83, we defined "written policy" as:

> [A] course of action, a method or plan, procedures or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency. The agreement of the union may be sought but is not required. Neverthe-less, a policy must be communicated to the union and/or to the employees who are to be governed thereby.

[17] Decision No. B-39-89 (OMLR Memorandum adopting a Mayor's order directing all agencies to evaluate certain provisional employees prior to termination); Decision No. B-17-83 (Executive Order No. 56 directing the even distribution of overtime within each agency); Decision No. B-13-77 (Executive Order No. 4 directing all agency heads to make appointments and promotions from Civil Service eligibility lists).

[18] Decision No. B-67-89 (Gouverneur Employees Handbook setting forth guidelines on attendance, punctuality and personal conduct); Decision No. B-47-88 (Executive Memorandum No. 49-79 directing Assistant Commissioners of the Department of Probation to consider certain factors in implementing involuntary transfers).

NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[19] It does not, however, abandon the requirement of a prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[20]

Therefore, we next consider whether COBA has demonstrated a sufficient nexus between Executive Order No. 16 and its grievance. In this respect, the Union contends that because the Department of Correction has invoked the reporting requirements set forth in Executive Order No. 16 in connection with the investigation of incidents involving the use of force, it has an express obligation under the Order to advise Corrections Officers of both their duties and their rights under the Order.

Executive Order No. 16 was issued in furtherance of the City's mission to investigate and eliminate certain undesirable conduct by City employees. While the content of such a directive is within the discretion of management, it is clear to us that the Union is grieving the agency's alleged failure to follow the procedures set forth in the directive, which regulate the actions of agency heads as well as the actions of employees.

In this connection, we note that Executive Order No. 16, inter alia, requires employees, under threat of discipline, to report any information which "they know or should reasonably know" to involve corrupt or criminal conduct, conflicts of interest, unethical conduct or incompetence; directs

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[19] NYCCBL Section 12-302. See Decision No. B-6-68.

[20] Decision No. B-4-86.

each agency head to disseminate information concerning the Order to all employees; and requires that each employee be aware of his/her responsibilities under the Order.

In view of these bilateral obligations, we find that COBA has met its burden of demonstrating that Executive Order No. 16 arguably creates a substantive right in Correction Officers that allegedly has been violated. In other words, the Union has established a colorable basis for its claim that Deputy Warden Marshall violated Executive Order No. 16 when he allegedly failed to advise Correction Officers of a right arguably created by a rule or regulation of the agency.[21]

Accordingly, we find that the Union has established a sufficient nexus between its allegations and the City's actions to support the conclusion that this dispute is within the scope of the parties' agreement to arbitrate. This finding, however, is in no way a determination of the merits of the underlying dispute. Whether the employer violated, misinterpreted or misapplied Executive Order No. 16 in the execution of its responsibility to disseminate information pursuant to the Order is a matter going to the merits of the dispute and, hence, for the arbitrator to determine.[22]

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[21] Decision No. B-15-80. See also, Decision No. B-40-85.

[22] Decision Nos. B-30-89; B-14-87; B-29-85; B-18-83; B-34-80.

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, denied; and it is further

ORDERED, that the Correction Officers Benevolent Association's request for arbitration be, and the same hereby is, granted.

DATED: New York, New York
July 26, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
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EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
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