

City v. PBA, 45 OCB 43 (BCB 1990) [Decision No. B-43-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DECISION NO. B-43-90

THE CITY OF NEW YORK,

DOCKET NO. BCB-1259-90
(A-3233-89)

Petitioner,

-and-

THE PATROLMEN'S BENEVOLENT
ASSOCIATION,

Respondent.
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DECISION AND ORDER

On March 22, 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 filed by the Patrolmen's Benevolent Association ("the Union") on or about October 12, 1989. The Union filed an answer on April 2, 1990. The City filed a reply on April 11, 1990.

BACKGROUND

According to the Union, the following series of events led to the filing of an informal grievance on behalf of P.O. Yvonne Maker, the grievant herein. During the course of these events the grievant was assigned to the Applicant Processing Division of the New York City Police Department ("the Department").

On February 23, 1989, the grievant was late for her tour of duty due to a delay on the Long Island Railroad. Upon arriving

at work, she received a message that her seven-year old son had a half-day session at school. She telephoned her son's school and was informed by a secretary that his whereabouts were unknown. After finishing her telephone conversation, the grievant discussed her predicament with a co-worker.

Sgt. Edwards-Motta, who had been standing and listening to the conversation, thereafter walked over to the grievant and asked her what the problem was. The grievant informed Edwards-Motta that her son was missing.

Subsequently, while the grievant was on her way out of the ladies room, Edwards-Motta asked her why she had been late that morning. The grievant responded that there had been a delay on the Long Island Railroad, and asked if she could return to the office to attempt to locate her son. Edwards-Motta thereupon advised the grievant that she wanted to talk to her in the office. As they walked back into the office together, Edwards-Motta began shouting at the grievant and informed her that she (Edwards-Motta) was going to "write her [the grievant] up". At this point the Integrity Control Officer ("ICO"), left his office to speak to Edwards-Motta. Upon the conclusion of his discussion with Edwards-Motta, the ICO informed the grievant that Edwards-Motta was going to give her a Command Discipline.

The grievant thereafter had two meetings with Lt. Joseph St. George and her PBA representative. Sgt. Edwards-Motta was not

present at either of these meetings. At the second meeting, the nature of the Command Discipline imposed upon the grievant was changed from "discourtesy" to "refusal to answer for lateness". At the close of the second meeting, the grievant exercised her option to reject the "finding/proposed penalty" of Lt. St. George and indicated her determination on her Command Discipline Election Report. The following day, the grievant was "confronted with strong talks of administrative transfer at every level" if she did not rescind this determination, and as a result, she did in fact revoke her rejection.

Thereafter, on May 4, 1989, an informal grievance was filed on behalf of the grievant. The informal grievance was denied on or about July 31, 1989. On or about August 18, 1989, a Step IV grievance was filed with the commissioner of the Police Department. The grievance was denied at Step IV on or about September 22, 1989. No satisfactory resolution of the dispute having been reached, the Union filed a Request for Arbitration pursuant to Article XXII of the collective bargaining agreement ("the Agreement"), on October 12, 1989.¹ The Union alleged

¹ Article XXII of the Agreement, entitled Grievance and Arbitration Procedure, states in relevant part as follows:

Section 1. Definitions

- a. For the purposes of this Agreement the term "grievance" shall mean: . . .

(continued...)

therein that the Department had violated Patrol Guide §118-9² and

¹ (... continued)

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

(3) A claimed violation, misinterpretation or misapplication of the Guidelines For interrogation of Members of the Department referred to in Article XX of this Agreement;

² Section 118-9 of the Patrol Guide, entitled "Interrogation of Members of the Service", states in relevant part :

PURPOSE To protect the rights of the member of the service (uniformed or civilian) in an official department investigation.

PROCEDURE Prior to questioning a member of service uniformed or civilian who is the subject or a witness in an official investigation:

INTERROGATING OFFICER

1. Permit member to obtain counsel if:
 - a. A serious violation is alleged or
 - b. Sufficient justification is presented although the alleged violation is minor.
 2. Notify member concerned two (2) business days prior to date of hearing to permit member to obtain and confer with counsel.
 3. Inform member concerned of:
 - a. Rank, name and command of person in charge of investigation.
 - b. Rank, name and command of interrogating officer.
 - c. Identity of all persons present.
 - d. Whether he is subject or witness in the investigation, if known.
 - e. Nature of accusation.
 - f. Identities of witnesses or complainants (address need not be revealed) except those of confidential source or field associate unless they are witnesses to
- (continued...)

Article XIX of the Agreement³ by treating the grievant "improperly" and forcing her to accept a Command Discipline under duress. As a remedy, the Union seeks rescission of grievant's acceptance of the disputed Command Discipline, dismissal of all charges against the grievant and expungement of all records of the instant incident.

² (... continued)
the incident.

- g. Information concerning all allegations.
- 4. Permit representative of department line organization to be present at all times during interrogation.
- 5. Conduct interrogation at reasonable hour, preferably when member is on duty during daytime hours.
- 6. Insure that interrogation is recorded either mechanically or by a department stenographer.
 - a. The Department Advocate will determine if a transcript is required in non-criminal or minor violation cases.
- 7. Do not use:
 - a. "Off the record" questions.
 - b. Offensive language or threats (transfer, dismissal or other disciplinary punishment).
 - c. Promises of reward for answering questions.
- 8. Regulate duration of question periods with break for meal, personal necessity, telephone call, etc.
- 9. Record all recesses. . . .

³ Article XIX of the Agreement, entitled "Bill of Rights", states:

The Guidelines for Interrogation of members of the Department in force at the execution date of this Agreement will not be altered during the term of this Agreement, except to reflect subsequent changes in the law or final decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York regarding the procedures and conditions to be followed on the interrogation of a member of the Department. . . .

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union's request for arbitration must be denied because the Union seeks to arbitrate a dispute that is beyond the scope of the agreement to arbitrate negotiated by the parties. It asserts that pursuant to Article XXII, §1(a)(2) of the Agreement "the term 'grievance' shall not include disciplinary matters". Consequently, the City argues that the instant grievance, involving Command Discipline, is expressly excluded from the arbitral forum.

The City also maintains that even if the instant grievance is deemed to be within the scope of the parties' agreement to arbitrate, the Union has failed to state a contractual provision of the Agreement which is "even arguably related" to the instant dispute. The City cites several Board decisions, the most recent being Decision No. B-52-88, which state that the respondent has a duty to show that the contractual clause cited as a basis for a request for arbitration "is arguably related" to the grievance at issue.

The City asserts in this respect, that Patrol Guide, Section 118-9, sets forth guidelines for interrogation of Police officers, and that in the instant case, the Union has failed to allege a specific instance of treatment which is violative of the procedure established therein. Thus, the City contends that the

Union has not demonstrated a nexus between Section 118-9 and the grievance in question.

Moreover, with respect to the Union's designation of Article XIX of the Agreement as a source of its right to seek arbitration in the instant matter, the City notes that Article XIX merely establishes requirements for altering the Guidelines for Interrogation. It contends that in the instant case, the Union has not alleged that the Department altered its guidelines or that it violated the requirements of Article XIX in any way. Therefore, the City maintains that there is no nexus between the grievance at issue and Article XIX.

Union's Position

The Union asserts that the grievant in the instant case does not contest the determination of Command Discipline herein, but rather alleges a violation of Section 118-9 of the Patrol Guide "as related to the contract by Article XIX". Thus, it contends that the allegations which it has raised are arbitrable within Article XXII, Section 1(a)(3) of the Agreement because they involve the violation of the established procedure for interrogating police officers which is set forth in the Patrol Guide. Moreover, the Union asserts that there is a nexus between the instant grievance and Patrol Guide Section 118-9.

DISCUSSION

It is the policy of the New York City Collective Bargaining Law ("the NYCCBL") to promote and encourage arbitration as the selected means for the resolution of grievances.⁴ It is equally well-established that in resolving disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies, and if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.⁵

The Board cannot, however, create a duty to arbitrate where none exists, nor can it enlarge a duty to arbitrate beyond the scope established by the parties in their agreements.⁶ In circumstances where the arbitrability of a grievance is challenged, we have held that the Union is required to demonstrate that the subject of the dispute is within the scope of the parties' agreement to arbitrate,⁷ and that the contract

⁴ See, NYCCBL §12-302; Decision Nos. B-25-83; B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

⁵ Decision Nos. B-50-89; B-27-89; B-65-88.

⁶ Decision No. B-25-83.

⁷ See, Decision Nos. B-69-89; B-61-88; B-30-86.

provisions invoked are arguably related to the subject matter of the grievance in question.⁸

In the instant case, the City asserts that a Command Discipline is a "disciplinary matter", and is expressly excluded from arbitration pursuant to Article XXII, Section 1(a)(2) of the Agreement. The Union asserts that the grievance herein does not involve a wrongful disciplinary action, but rather, that the grievance involves a violation of guidelines for the interrogation of police officers. Thus, the Union contends that the subject of the instant dispute is expressly within the scope of the parties' agreement to arbitrate, as it is set forth in Article XXII, Section 1(a)(3) of the Agreement.

We accept the Union's argument in this respect. We find that the City has mischaracterized the nature of the instant grievance. The Union has made it clear that the grievance does not challenge the determination to impose Command Discipline upon the grievant. Accordingly, we find that the grievance, which on its face alleges a violation of guidelines for the interrogation of Police officers as they are set forth in Patrol Guide, Section 118-9, is a matter within the scope of the definition of a grievance set forth in Article XXII, Section 1(a)(3) of the Agreement.

⁸ Decision Nos. B-43-88; B-35-86; B-10-86.

The City further contends, however, that the Union has failed to establish that the cited provisions of the Agreement and the Patrol Guide are arguably related to the dispute in question. consequently, it alleges that the Union has failed to establish the necessary nexus between the alleged wrongful Departmental activity and the contractual provisions which it cites as the basis for the claim. In this respect, we agree that the Union has failed to demonstrate the required nexus.

Article XIX of the Agreement, entitled "Bill of Rights", sets forth the procedure for altering the Guidelines for Interrogation of members of the Department. The Union has not alleged that the Department altered guidelines in violation of this provision, or that it arguably violated this provision in any other way. Therefore, we find that to the extent the Union seeks to arbitrate a claim which it alleges to be grounded in Article XIX, it has not demonstrated an arguable relationship between the series of incidents of which the grievant complains and the terms of Article XIX.

Additionally, we find that the Union has failed to establish a nexus between the "improper treatment" of the grievant and Patrol Guide, Section 118-9. This provision establishes a procedure to be followed during the formal interrogation of police officers. Although the Union asserts that the grievant "was confronted with strong 'talks' of administrative transfer"

after she declined to accept the "finding/proposed penalty" of Lt. St. George, the Union does not allege that these "talks" occurred within the context of an official interrogation. Moreover, the Union has not specified the nature of these "talks", except to allege in a vague fashion that they were coercive. Consequently, we hold that the Union has not alleged the occurrence of a managerial act which would arguably constitute a violation of Patrol Guide, Section 118-9.

Accordingly, we find that the Union has not established the existence of a nexus between either Article XIX of the Agreement, or Patrol Guide, Section 118-9 and the management conduct of which it complains. Consequently, we shall deny the Union's request to arbitrate this matter.

ORDER

Pursuant to the powers vested in the Board of collective Bargaining by the New York collective Bargaining Law, it is hereby

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association, AFL-CIO be, and the same hereby is, denied; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted.

DATED: New York, N.Y.
July 26, 1990

MALCOM D. MacDONALD
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