City v. COBA, 45 OCB 52 (BCB 1990) [Decision No. B-52-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

DECISION NO. B-52-90

THE CITY OF NEW YORK

DOCKET NO. BCB-1268-90
(A-3354-90)

Petitioner,

-and-

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On April 9, 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, that the Correction Officers Benevolent Association ("the Union" or "COBA") submitted on or about February 15, 1990. The grievance asserted that the disrepair of certain Department of Correction ("the Department") mechanical equipment forces Correction Officers to violate a departmental firearms rule. The Union filed its answer on June 18, 1990. The City filed a reply on June 29, 1990.

BACKGROUND

The Manhattan House of Detention for Men is a criminal detention facility operated by the Department of Correction. A mechanically operated gate controls access to one of its yards. Sometime before March of 1988, the mechanical equipment that allowed the central control room to operate the gate allegedly became non-functional. As a result, the gate either must be operated by hand from the yard, or Correction Officers seeking to enter the yard allegedly must walk through a restricted area of the jail while in possession of their firearms.

On or about January 12, 1989, the Union filed a Step II grievance complaining of this situation. The grievance reads, in pertinent part, as follows:

> On March 7, 1988, this writer advised this agency that a violation of safety existed and requested that the mechanical equipment be repaired before serious death or injury resulted to staff. The mechanical equipment that allowed the central control room to open and close gates connected to Centre St. yard failed to function. The only other way these gates could be opened to let vehicles in and out of the sally port would be from the Centre St. yard post.
>
> The problem arose when the Officers once inside the yard wanted to egress. The Officer had to start the several hundred pound gate in a downward motion and at that time, the Officer would exit the yard by running out before the gate could close on him. This problem is twofold. For an Officer to enter the Centre St. yard, he must walk through the institution. Escorted by a Captain, the Officer armed with a firearm, enters a restricted area of the institution where inmates are commonly known to be, thus

> jeopardizing the safety of the institution. Rule and Regulation 5.10.100 specifically states, "A member of the Department shall not carry firearms or other weapons into any restricted area of the institution."
>
> These violations have existed for over more than a year and no effort has been made on the part of the administration to correct them. The agency has deemed it fit to save money at the expense of the health and safety of staff members (by eliminating the outside patrol post and by these careless actions).
>
> In conclusion, as a remedy of these violations the COBA demands that the department immediately:
>
> 1. Cease and desist any such future conduct which jeopardizes the health and safety of staff.
>
> 2. Assign additional staff until the mechanical equipment is corrected.

In an interdepartmental memorandum dated February 16, 1989, the Department's Acting Director of Labor Relations advised the Union that management had taken appropriate action to remedy the concerns described in the grievance. The memorandum reads, in part, as follows:

> In his original response to these concerns, Deputy Warden Sosa issued OP 75/88, dated March 7, 1988, which clearly prohibited the alleged practice of escorting armed officers through the Manhattan [House of Detention]. This memorandum further delineated the specific procedures to be followed whenever it became necessary for the yard post to allow a vehicle into the yard.
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> After your Step II grievance was submitted on January 31, 1989 the current Deputy Warden for Operations prepared

Institutional Memorandum #5/89[1] (Subject: "Yard Posts") which clarifies the policy and procedures for entering or exiting the yard and restates the prohibition against carrying firearms into [House of Detention] proper.

Based on these responses, it is apparent that the command has taken appropriate action with respect to the concerns outlined in your grievance.

However, part of your requested remedy relates to the demand for assignment of additional staff until the

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[1] Memorandum #5/89 reads as follows:

To clarify this Command's Policy on Officers assigned to the Yard Posts, the following procedures will be adhered to:

1. Armed Correction Officers assigned to the Yard posts will enter and exit their posts from either Baxter or Centre Streets.

2. The carrying of firearms into [Manhattan House of Detention] proper, while in route to the Yard, is absolutely prohibited.

3. The practice of staff walking under the Yard gates while they are in the process of closing, is prohibited.

4. Whenever it becomes necessary for an Armed Correction Officer to exit the Yard post, when no other staff is available to operate the Yard gate, the Officer will contact the Control Room Captain and request that a relief Officer be assigned temporarily, to operate the Yard gate.

5. The Control Room Captains will assign a relief Correction Officer to operate the Yard gates whenever it becomes necessary for an Armed Person to enter or exit the Yard.

> mechanical equipment is corrected. Please be advised that the New York City Collective Bargaining Law explicitly reserves to management the right to make manning and staffing determinations. It is expected that such decisions will be made with the security and safety of staff in mind.
>
> The above described measures indicate to this Review Officer that the command has adequately addressed the issues you raise. Therefore, except for that part of your grievance pertaining to "manning and staffing" which is herein denied, this matter is deemed to be resolved.

Thereafter, on or about July 19, 1989, the Union requested a Step III review of its grievance. In her decision, issued on or about November 15, 1989, the Step III Review Officer found that the Department's Step II determination was a correct and accurate response. Her decision further stated that "the grievance is in the process of being resolved by the Department," and that a Step III conference was unnecessary.

With no satisfactory resolution of the dispute having been reached, the Union filed a request for arbitration. The request seeks an arbitrator's ruling on whether the Department's failure to repair the mechanical equipment at the Centre Street security post "has unilaterally altered the terms and conditions of employment by, inter alia, requiring additional manning and workload, reducing security, [and] encouraging officers to walk through the institution with firearms, in violation of [Rule

5.10.100]."[2] As a remedy, the Union sought the immediate repair of the mechanical equipment and the assignment of additional staff until mechanical equipment is corrected.

POSITIONS OF THE PARTIES

City's Position

The City argues that there is no nexus between the firearms policy stated in departmental Rule 5.10.100 and the causes of action underlying Union's request for arbitration. In the City's view, the gravamen of the Union's grievance concerns the repair of mechanical equipment on the one hand, and the adequacy of staff on the other. While not disputing that the definition of a grievance includes a claimed violation of a departmental rule, the City maintains that Rule 5.10.100 applies solely to the purchase and handling of firearms by Correction Officers. The City points out that Memorandum #5/89, explaining the Rule, makes it clear that whenever an armed Officer wishes to exit the yard post and no other staff is available to operate the gate, the armed Officer "must" request the assignment of a relief Officer to the gate. Thus, the City argues that the Union did not show any violation of the Rule itself, or the Rule's clarification as explained by the Memorandum.

The City also objects to what it deems to be a new issue assertedly raised for the first time by the Union in its answering papers. Specifically, it objects to the Union's reference to departmental Rule 5.15.070, which

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[2] The full text of Rule 5.10.100 is as follows:

> A member of the Department shall not carry firearms or other weapons into any restricted area of the institution except by order of the head of institution or superior officer in charge of the institution.

concerns duties of Correction Officers when they are assigned to yard duty.[3] The City claims that neither it nor the Department knew of the new alleged violation until the Union filed its answer. It stresses that the only issue consistently raised through the grievance process was an alleged violation of a firearms rule, and not of a rule concerning work assignments.

The City then argues that the remedy sought by the Union, assignment of additional staff pending repair of mechanical equipment, is a matter expressly reserved to management under its statutory managerial rights authority.[4] According to the City, unless otherwise restricted, the Department has "an unfettered right to direct its employees," and it asserts that the Union has not shown how any other independent restriction has limited that right.

Finally, the City asserts that the Union "couches" its allegations in a way that would make it seem as if the Department's action jeopardizes the health and safety of its members. The City submits that a claim framed in this manner represents a safety impact allegation, and that this Board, not an

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[3] Rule 5.15.070 provides:

> A correction officer assigned to yard duty shall attend to the opening and closing of entrance gates and shall not allow any person to enter or depart except those on official business with proper authority. He shall examine and search for contraband all boxes, crates, and vehicles entering or leaving the yard. He shall see that the yard is free of all material which may provide the means of escape or attempt to escape by any inmate or inmates.

[4] The City cites Section 12-307b. of the New York City Collective Bargaining Law ("NYCCBL"), which provides as follows:

> It is the right of the city . . . to direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work.

arbitrator, retains exclusive jurisdiction over allegations of impact on employees' safety.

Union's Position

Citing the parties' contractual definition of a grievance,[5] the Union maintains that any claimed violation of a rule, regulation or procedure affecting terms and conditions of employment constitutes an arbitrable dispute. Therefore, according to the Union, its causes of action in this case qualify for arbitral review. Relying upon an earlier decision of this Board,[6] the Union argues that the relevance or applicability of a cited departmental regulation or procedure to the facts of a particular case is a matter going to the merits, and is for the arbitrator to decide. Thus, in the Union's view, the only issue before this Board is a determination of whether there exists a nexus between the violation of a departmental regulation and the action to which the Union objects.

According to the Union, before 1988, a central control room within the House of Detention operated the mechanical gates leading to Centre and Baxter Streets yard. Video cameras monitored activity at the gate posts. The Union further claims that the Department stationed an armed Correction Officer in the yard to assist officers escorting inmates to and from the facility. It theorizes that, due to equipment breakdown and budgetary constraints, the gates no longer can be operated from the central control room and the Department has eliminated the regular posting of an officer at the yard gate. As a result, an armed officer attempting to exit the yard allegedly must

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[5] Article XXI (Grievance and Arbitration Procedure), Section 1., defines the term "grievance" as, inter alia:

> b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment . . . .

[6] The Union cites Decision No. B-17-80 in support of its position.

operate the gate alone, a practice that entails activating the down control and ducking under the gate as it automatically descends. This condition, the Union asserts, not only creates safety and security hazards, but it encourages officers to walk through restricted areas of the jail while carrying firearms as well, a practice prohibited by Rule 5.10.100.

The Union acknowledges that Memorandum #5/89 restates the policies that prohibit armed officers from entering the jail and require a relief officer to operate the yard gate. It argues, however, that the memorandum "fails to address the underlying [security] deficiencies" of the system. Thus, according to the Union, the current yard procedures have "unilaterally and unreasonably altered working conditions with respect to hours and overtime, regular duty charts, emergency changes in work schedule and safety hazards on the job."

The Union further contends that the assignment of a relief officer to operate the yard gate, according to Rule 5.15.070,[7] has proved "unworkable," because "the procedures for requesting a relief officer are time consuming and inefficient." Therefore, the Union contends, the Department has violated its own security procedures. The Union bolsters this claim with an account of twenty-five arriving inmates who became "unruly, then riotous" while waiting for the gate to be opened. The disturbance allegedly had to be quelled by a security team. According to the Union, this "serious security breach" would not have occurred if an officer had been assigned to open and close the yard gate.

Finally, the Union agrees that an employer may not be obligated to bargain over nonmandatory subjects, such as its methods of operation. It contends, however, that once a permissive subject voluntarily becomes incorporated into an agreement, that subject cannot be shielded from arbitral review. It points out that the COBA Agreement, applicable in this case,

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[7] Supra, note 3.

provides that violations of the Department's rules regulations or procedures affecting terms and conditions of employment are grievable and arbitrable. The Union concludes, therefore, that the City voluntarily has agreed to arbitrate questions on whether its method of operation has violated various rules, regulations and procedures affecting the terms and conditions of employment.[8]

DISCUSSION

It is well established that it is the policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[9] However, we cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[10]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement, nor is it denied that alleged violations of departmental "rules, regulations or procedures affecting terms and conditions of employment" are within the scope of their agreement to arbitrate. The City contends, however, that the Union failed to establish a nexus between the actions of the Correction Department and the two departmental rules, one involving handling of firearms and the other involving yard responsibilities, that it claims were violated.

We must decide, therefore, whether a prima facie relationship exists between the act complained of, non-repair of a mechanical gate, and two

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[8] The Union cites Decision No. B-3-83 in support of this argument.

[9] E.g. Decision Nos. B-35-89; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[10] Decision No. B-41-82 and B-15-82.

departmental regulations, the sources of the alleged right to arbitration. In circumstances such as these, we have held that a union, where challenged to do so, has a duty to show the existence of an arguable relationship between the provisions invoked and the grievance to be arbitrated.[11]

The main theory behind the Union's grievance is that by not keeping the yard gate in sound mechanical condition, the Department "fail[ed] to address the underlying deficiencies of the system . . . for maintaining security at the Yard gate post," and it "unilaterally and unreasonably altered working conditions with respect to hours, [scheduling] and safety hazards." The sophistry of this reasoning, however, lies in the Union's failure to provide evidence of even a single case where the Department specifically caused Correction Officers to violate either of the cited departmental rules. To the contrary, the issuance of Memorandum #5/89 by the Department, which explains Rule 5.10.100, effectively negates the potential risk of forcing officers to violate the departmental firearms policy by expressly prohibiting them from carrying firearms into the detention facility itself, and by requiring officers to await relief whenever it becomes necessary for them to leave the yard.[12] Indeed, the Union cited no instance where a member had been required to enter the jail while armed.

Similarly, Rule 5.15.070 merely requires that officers assigned to yard duty open and close gates and search for contraband. We do not perceive the nexus between an inspection and search rule and a set of gates that allegedly cannot be remotely operated from a central control room.

To accept the Union's reasoning, we would, in effect, have to find arbitrable a <u>potential</u> violation of departmental rules affecting terms and conditions of employment, notwithstanding a departmental directive which

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[11] Decision Nos. B-11-90; B-27-88; B-4-81; B-21-80; B-7-79; B-3-78 and B-1-76.

[12] <u>Supra</u>, note 1.

reiterates that the rules in question are not to be violated, and which provides an alternate means to redress the problem complained of by the Union. We are not persuaded that such a claim is within the scope of the parties' agreement to arbitrate.

The Union's reliance upon Decision No. B-3-83 also is misplaced. In that case, we said that the alleged failure of the City to follow its own guidelines and criteria set forth in a policy concerning merit pay increases was sufficient to allow arbitral consideration of that issue. In the present case, neither of the rules cited by the Union is even remotely related to a procedure for achieving the repair of security gates.

We stress that our decision herein is not meant to signal our approval of dangerously deficient equipment or working conditions. The difficulty with this case, however, is that without the necessary nexus, we cannot order a review of allegedly faulty equipment via the grievance arbitration process. As the City correctly points out, this Board holds exclusive jurisdiction over allegations of impact on employees' safety. A scope of bargaining petition predicated upon an alleged impact to employee safety would be an appropriate way for the Union to bring its safety concerns before this Board for review.

As indicated above, however, in the instant proceeding the Union has failed to establish any basis for a finding that its demand for arbitration is appropriate to the circumstances of this case. Therefore, we shall grant the City's petition challenging arbitrability of the Union's grievance concerning the alleged refusal of the Department of Correction to repair the remote control apparatus of the yard gate at the Manhattan House of Detention, without prejudice to the right of the Union to serve and file a scope of bargaining petition concerning the impact that malfunctioning gates may have upon employees' safety.

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 and the New York City Department of Transportation, and docketed at BCB-1268-90, be, and the same hereby is, granted without prejudice; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers Benevolent Association is denied without prejudice.

DATED: New York, N.Y.
September 17, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

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