City v. L.3, Inter. Brotherhood of Elec. Workers, 45 OCB 59 (BCB 1990) [Decision No. B-59-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner, Decision No. B-59-90

-and- Docket No. BCB-1287-90 (A-3435-90)

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

DETERMINATION AND ORDER

On May 31, 1990, the City of New York ("the City"), by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance brought by Local 3, International Brotherhood of Electrical Workers ("the Union"), in which the Union alleged that Albert Somma, Jr. ("grievant"), an electrician working for the Fire Department ("the Department"), was compelled to work overtime because of a misinterpretation or misapplication of written rules of the Department. The Union filed an answer on June 14, 1990. The City filed a reply on June 22, 1990.

Background

Grievant, an electrician whose wages and supplemental benefits are determined pursuant to a Comptroller's Consent Determination, works in the Buildings Unit of the Fire Department. All electricians in the Buildings Unit have regularly been ordered to work overtime. Grievant has refused to

work some of the overtime hours assigned to him.

A memo dated September 19, 1986 ("the 1986 memo"), from the Executive Assistant to the Deputy Fire Commissioner for Administration to the Supervisor of Mechanics, a copy of which was forwarded to the Supervisor of Electricians in grievant's unit, reads as follows:

> Per your request for a determination on overtime authorization, the Administrative Code of the City of New York, Chapter 54, Section 1173-5b [now Section 12-307 b], provides the following:
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> > 'It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over the organization and technology of performing its work.' [emphasis supplied]
>
> This section, in effect, allows the agency to order members to work overtime where necessary.

In a memo dated October 22, 1987 ("the 1987 memo"), the Director of the Bureau of Fiscal Services of the Department wrote to the Chief of the Buildings Unit, addressing the question of compulsory overtime. The memo states as follows:

> In an effort to equalize overtime among Wage Determination employees, managers are directed to disallow paid overtire to the top earners until the other eligible employees earn within 10% of the overtime paid to the top earner. Members with the

> lowest amount of overtime are given first priority to work the overtime. However, in an emergency situation, a member may be ordered to work the overtime, which cannot be declined.
>
> Since the overtime averages for a particular title are based on the earnings of all employees in that title, Electrician A. Somma cannot be excused from working overtime. He may decline a request to work regular overtime, but he must perform ordered overtime in an emergency situation.

On or about October 2, 1999, a supervisory conference was held between grievant and his supervisor, during which grievant was ordered to work overtime and refused. A copy of grievant's acknowledgment of his refusal to work overtime was placed in his personnel record.

Sometime between October 10, 1989 and November 29, 1989, a grievance was filed at Step I. Grievant alleged that he had been ordered to work all overtime assigned to him until he had earned within 10% of the overtime paid to the top earner in his unit. He challenged the Department's interpretation of Mayoral Directive 78-12[1], and requested that the Department investigate

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[1] Mayoral Directive 78-12, dated May 9, 1972, provides in relevant part:

> Executive Order No. 56, dated April 2, 1976, directs each agency head to allocate overtime to achieve economy and eliminate abuse. Overtime compensable in cash is to be evenly distributed, where practicable, within each agency or agency subdivision, among all those employees who are eligible to perform the overtime work required. No authorization shall be granted to an employee to work overtime compensable in cash in excess of five percent of the base salary received by the employee during the preceding 12-month period....

the way in which this Mayoral Directive is interpreted by other city agencies. The grievance was denied at Step I and was taken to Step II in November, 1989.

The grievance was denied at Step II on November 30, 1989. The hearing officer based her decision on "the Fire Department's interpretation of the City-wide policy concerning overtime equalization" set forth in Mayoral Directive 78-12, and concluded that "the Fire Department is within its rights to order overtime in an attempt to equalize the amount of money received by each Electrician in the Buildings Unit."

The grievance was taken to Step III on December 12, 1989, and a hearing was held on February 26, 1990. In a decision dated March 26, 1990, the hearing officer wrote:

> The underlying issue here is the interpretation of Executive order No. 56[2] and Mayoral Directive 78-12...
>
> Mr. Somma argues that [Directive 78-12] calls for the Department to equalize the opportunity to work overtime, not the number of hours actually worked... Management's response is that the intent of Directive 78-12 is to equalize the number of hours actually worked by employees about to retire... The Union

[2] Executive Order No. 56, dated April 2, 1976, provides in relevant part:

> §2. Authorization to work overtime compensable in cash shall be evenly distributed, where practicable, within each agency or agency subdivision, among all those employees who are eligible to perform the overtime work required. No authorization shall be granted to an employee to work overtime compensable in cash in excess of 5% of the base salary received by the employee during the preceding 12-month period unless such authorization is signed by the agency head....

> contends that all other mayoral agencies equalize overtime in the manner Mr. Somma is proposing... It is the Department's position that although Mr. Somma raises interesting arguments, his proposals would not help the Department comply with the intent of Executive Order No. 56 which is to eliminate the possibility of abuse of overtime.
>
> The Fire Department has consistently interpreted and applied Executive Order No. 56 and Directive 78-12 so as to control the abuse of overtime. It is the position of the Fire Department that it has correctly interpreted and applied the order and the Directive...
>
> Mr. Somna also argues that every overtime situation is considered "emergency" so as to warrant compulsory overtime. Management concedes that there is a shortage of 'manpower' in the Buildings Unit. It is the Department's position that while this shortage remains in effect, all overtime is necessary.

The Union appealed the Step III decision on behalf of grievant. The City denied the appeal on April 30, 1990, stating that the Union "failed to cite a violation pursuant to the definition of a grievance in Executive Order 83 ...."[3] No satisfactory resolution of the dispute having been reached, the Union filed a Request for Arbitration, alleging "compulsory overtime pursuant to misinterpretation or misapplication of written rules governing the Fire Department." As a remedy, the Union seeks an "arbitrator's award directing [the] Fire

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[3] Executive Order No. 83, dated July 26, 1973, provides a procedure for the resolution of grievances between the City of New York and its employees. It provides, in relevant part:

> Section 5(b)(ii) ... the term 'grievance' shall mean ... (B) a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms or conditions of his or her employment....

Department cease compelling overtime absent emergencies."

Positions of the Parties

City's Position

The City submits that the Request for Arbitration is defective because it does not cite a section of "the agreement, rule or submission" under which the demand for arbitration is made. The City states that if, for argument's sake, the Union has submitted its request pursuant to Executive Order No. 83 ("E.O. 83"), the grievance still cannot be maintained because the Union has not cited a written rule or regulation that is arbitrable under E.O. 83.

The City argues that the Union incorrectly uses the 1986 and 1987 Department memos to establish a nexus for arbitration. It states that the 1987 memo is not a written rule or regulation of the Department because it addresses a specific situation involving grievant, and is merely a response to grievant's complaint of three years ago. The City alleges that the Union has taken the 1987 memo out of context and wrongly interpreted it as a grievable matter under E.O. 83.

The City maintains that it is the 1986 memo that sets the standard for Department policy. It argues that this memo only restates § 12-307b of the New York City Collective Bargaining Law ("NYCCBL"), and that this Board has previously held, in Decision No. B-27-84, that an alleged violation of this section of the

statute is not an appropriate subject for arbitration. The City argues further that, because the NYCCBL is not included in §5(b)(ii)(B) of E.O. 83, it cannot form the basis of an arbitrable grievance.

Lastly, the City asserts that S 12-307b of the NYCCBL gives it an "unfettered managerial right" to assign overtime unless the parties have contractually limited that right. Since no such limitation exists, the City argues, the decision to assign overtime to grievant was an exercise of managerial prerogative that cannot be the subject of arbitration.

Union's Position

The Union states that it did not cite a specific section of the rule upon which it relies because that rule is not divided into sections, but rather is contained in Department memoranda. It submits that the Department routinely promulgates its rules in memoranda, such as the 1986 and 1987 memos.

The Union maintains that the first paragraph of the 1987 memo is a written rule or regulation of the Department because it issues a direction to "all managers." Referring to the 1986 memo, the Union asserts that it did not allege a violation of the NYCCBL in its Request for Arbitration; therefore, it argues, the City's reliance on the Board's holding in B-27-84 that a violation of § 12-307b does not form the basis of an arbitrable grievance is misleading.

In response to the City's argument that § 12-307b of the NYCCBL grants the City the right to "take all necessary actions to carry out its mission in emergencies", the Union submits that the term "emergency" has an objective meaning. Although the Department may claim an emergency, the Union asserts, it may merely be a pretext for assigning regular overtime. The Union argues that the question of whether the Department may claim an emergency in order to compel overtime work in the absence of an actual emergency is an arbitrable issue. The Union maintains that the Department has limited its managerial right to assign overtime by the rule set forth in the 1987 memo, which permits electricians to "decline a request to work regular overtime".

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties have obligated themselves to arbitrate controversies and, if they have, whether that contractual obligation is broad enough to include the act complained of by the Union.[4] When challenged, the burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[5] Additionally, when the City asserts a management rights defense to arbitration, the Union must establish that a

[4] See, e.g., Decision Nos. B-19-89; B-65-88; B-28-82.

[5] Decision Nos. B-1-89; B-7-81.

substantial issue under the contract has been presented.[6] This requires close scrutiny by the Board.[7] Doubtful issues of arbitrability are resolved in favor of arbitration.[8]

The City argues that the Request for Arbitration is defective because it does not cite "a section of the agreement, rule or submission" under which the demand for arbitration is made. This argument is not contradicted by the Union. Failure to state a basis for arbitration ordinarily would compel us to find the grievance not arbitrable, since the Board cannot create a duty to arbitrate where none exists.[9] There is, however, a basis for arbitration in the instant matter. E.O. 83 provides a grievance and arbitration procedure which may be used when such a grievance and arbitration procedure has not been incorporated into a written collective bargaining agreement.[10]

The City and the Union are parties to a Comptroller's Consent Determination under § 220 of the Labor Law. The Determination does not contain a grievance and arbitration clause. The parties, therefore, are governed by the grievance and arbitration procedure set forth in E.O. 83.[11]

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[6] Decision Nos. B-16-87; B-8-81.

[7] Decision No. B-8-81.

[8] Decision Nos. B-65-88; B-15-80

[9] Decision Nos. B-17-84; B-36-80; B-12-77.

[10] Decision No. B-17-84.

[11] Decision Nos. B-18-83; B-9-83; B-13-77.

The City asserts that, even if the Union had submitted its petition pursuant to E.O. 83, the grievance could not be maintained because the Union has not cited a written rule that provides a basis for arbitration under E.O. 83. We are not persuaded by the City's argument on this point. A grievance under the provisions of E.O. 83 is defined as "a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms or conditions of his or her employment.... In Decision B-1-78, we stated:

> The Board of Collective Bargaining is the body empowered by statute to determine whether an Executive Order of the Mayor provides for arbitration of a grievance. In B-13-77, we exercised our statutory power to construe E.O. 83 and found that under that Executive order, "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." [footnotes omitted]

As the Department's hearing officer correctly noted, an underlying issue in this case is the interpretation of Executive Order 56 ("E.O. 56"), which is incorporated into Mayoral Directive 78-12. Since E.O. 56 is an executive order within the meaning of the aforementioned decisions, we construe it to be a written rule of the Department, and thus arbitrable under the provisions of E.O. 83.

The Department appears to interpret E.O. 56 to mean that actual overtime hours must be allocated equally among all employees in a department, so that the Department must order

employees to work overtime to achieve parity in overtime hours. The Union appears to interpret the order to mean that an equal opportunity to work overtime must be offered to all employees. Each interpretation is plausible; the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide.[12]

Next, we address the Union's contention that the Department has promulgated written rules in its 1986 and 1987 memoranda, copies of which were forwarded to grievant's direct supervisor. A response to a complaint, or a request for clarification of a work standard, will not be accorded the status of a "written policy or rule" unless such a response is addressed generally to the Department and sets forth a general policy applicable to the affected employees. It is the policy of this Board not to inquire into the merits of a claim when determining arbitrability.[13] Where, however, we must determine whether a statement by the Department is arguably related to the grievance to be arbitrated, we must examine its content more closely than we might otherwise, to determine whether it provides a basis for grievant's claim.[14] In the instant case, we have examined closely the content and context of the memoranda in question to determine whether they are addressed generally to the Department

[12] Decision Nos. B-27-89; B-9-75; B-2-75.

[13] See, e.g., Decision Nos. B-9-83; B-12-79; B-8-74.

[14] Decision Nos. B-9-83; B-21-80.

and have set forth a general policy applicable to affected employees, because only if they meet these criteria tan they be considered written rules of the Department.

The City asserts that the 1986 memo simply restates § 12-307b of the NYCCBL. It is true that a restatement of § 12-307b comprises most of the memo. That quotation, however, is prefaced by the words, "Per your request for a determination on overtime authorization", and followed by the sentence, "This section, in effect, allows the agency to order members to work overtime where necessary." The memo is a response from Department management to a line manager's request for interpretation of a Department rule. The response appears to constitute a statement of general policy on the authorization of overtime. Considering the content of the 1986 memo, and its surrounding circumstances, we find that the conclusion stated in the 1986 memo constitutes a written rule of the Department.

The City maintains that the 1987 memo is not a written rule of the Department because it only addresses grievant's situation in 1987 and "does not set the standard for department policy, which [the 1986 memo] does set forth." The Union argues. that, because the first paragraph is directed to "all managers", it effectively states a written rule of the Department. This memo, from the Department's Director of the Bureau of Fiscal Services to the Chief of the Buildings Unit, states:

> In an effort to equalize overtime among wage Determination employees, managers are directed to disallow paid overtime to the top earners until the

> other eligible employees earn within 10% of the overtime paid to the top earner. Members with the lowest amount of overtime are given first priority to work the overtime. However, in an emergency situation, a member may be ordered to work the overtime, which cannot be declined.
>
> Since the overtime averages for a particular title are based on the earnings of all employees in that title, Electrician A. Somma cannot be excused from working overtime. He may decline a request to work regular overtime, but he must perform ordered overtime in an emergency situation.

From the language of the second paragraph, it appears that grievant's direct supervisors had requested a determination from senior management on his refusal to work overtime. The memo, which is directed to all of the Department's managers, presents the Department's general policy governing equalization of overtime in the first paragraph, and then applies the policy to grievant's situation in the second paragraph. We conclude from the content and circumstances of the 1987 memo that, at least arguably, the first paragraph constitutes a written rule of the Department.

In its argument, the Union cites the provision of§ 12-307b in which the City is provided the right to "take all necessary actions to carry out its mission in emergencies". The Union asserts that it is entitled to seek arbitration as to whether the Department may define an "emergency" in a way that compels overtime in the absence of emergencies. We find no distinction made in E.O. 56 or Mayoral Directive 78-12 between "regular" and "emergency" overtime, a distinction made by the Department when

ruling that grievant must work all assigned overtime, nor do we find a definition of the term "emergency". In addition, there is no requirement that the Department "disallow paid overtime to the top earners until the other eligible employees earn within 10% of the overtime paid to the top earner", the rule set forth in the 1987 memo by which grievant was ordered to work compulsory overtime. These apparent discrepancies between the terms of E.O. 56 and its interpretation and application by the Department also raise substantive issues of interpretation which may be resolved by arbitration.

The City's final argument, that § 12-307b of the NYCCBL gives it an "unfettered" right to assign overtime, relies on our decision in B-16-87, which states:

> in the absence of a limitation in the contract or otherwise, the assignment of overtime is within the City's statutory management right to determine the methods, means and personnel by which government operations are to be conducted.

The City asserts that, there being no limitation in the contract or otherwise, the Department's decision to compel grievant to work overtime was an exercise of its management right. The Union does not dispute that assigning overtime is a management right. It contends that the Department has limited its own right to assign overtime by ruling in the 1987 memo that electricians may "decline a request to work regular overtime", and that, this having been done, the Department can be required to arbitrate a claimed misinterpretation or misapplication of its own rule.

The question of whether the 1987 memo actually imposes a limitation on management's right to assign overtime is not appropriate for consideration and determination by the Board. Where, as here, it is claimed that the Department has limited its own management right, the matter is one of interpretation, which is properly for an arbitrator to decide.[15] Our task is only to inquire whether the Union has presented a prima facie showing that such a limitation may exist.[16] We find that by issuing a ruling that grievant may choose to decline "regular overtime", the Department has arguably imposed a limitation on its right to assign overtime. This finding in no way reflects the Board's view on the merits of the Union's claim, nor do we suggest that it is inappropriate for the City to exercise its management prerogative to assign overtime. The issue here is solely whether the Department has limited the exercise of its right by its ruling in the 1987 memo.

Accordingly, for all the aforementioned reasons, we find the grievance presented to be arbitrable.

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[15] Decision Nos. B-24-88; B-1-87.

[16] Decision No. B-47-88.

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 by the City of New York be, and the same hereby is, denied, and it is further

ORDERED, that the Request for Arbitration filed by Local 3 of the International Brotherhood of Electrical Workers be, and the same hereby is, granted.

Dated: New York, New York
September , 1990

CHAIRMAN

MEMBER

MEMBER

MEMBER

MEMBER

MEMBER

MEMBER