City v. COBA, 45 OCB 73 (BCB 1990) [Decision No. B-73-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

DECISION NO. B-73-90

THE CITY OF NEW YORK

DOCKET NO. BCB-1304-90
(A-3456-90)

Petitioner,

-and-

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On July 18, 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 filed by the Correction Officers Benevolent Association ("the Union" or "COBA"). The request for arbitration was dated May 21, 1990. The grievance asserted that the malfunction of certain Department of Correction ("the Department") fire safety systems and equipment at the Manhattan House of Detention violates a departmental rule concerning potential fire hazards in the institution. The Union filed its answer on October 3, 1990. The City filed a reply on October 15, 1990.

BACKGROUND

The Manhattan House of Detention for Men is a criminal detention facility operated by the Department of Correction. The building contains a fire alarm system for alerting the staff that a fire exists by means of alarm bells. It also contains automatic fire control mechanisms designed to shut down the building ventilation system, return elevators to the first floor, and

activate a smoke purge system, when a fire is detected. According to the Union, none of these systems function properly.

The Union filed a Step II grievance dated January 12, 1989, alleging that "since the building's opening in 1983, this system has failed to do what it was intended for, namely to ventilate the aforementioned dwelling and alert all personnel therein to a fire." The grievance sought to have the Manhattan House of Detention closed until the system works properly.

By letter dated July 19, 1989, the Union requested a Step III review of its grievance by the Office of Municipal Labor Relations. The Step III Review Officer, in his decision dated May 4, 1990, reported that the Department had advised him:

> that the alarm bell is operational, that there's an operational automatic shut off of the ventilation system once a finding [sic] is detected and further that elevators do automatically return to the main floor when the fire alarm is activated.

The Review Officer further reported that he had been advised:

> that the "purge system" works manually, that over 300 "smoke heads" have been installed, that fire alarms on each floor ring directly to the control room from the "officer sta-tion," . . . [and] that the entire electric-al system is currently an issue in litigation with the contractors who built the control system. Moreover, . . . there is substantial compliance by the Department with the fire codes.

The Officer concluded that the grievance had been resolved and he did not schedule a Step III conference.

The Union was not satisfied with the Review Officer's disposition of the grievance, however, and, on May 21, 1990, it filed a request for arbitration. The request seeks an arbitrator's ruling on whether the Department's "ongoing failure to install, repair or implement fire safety systems and equipment at the Manhattan House of Detention for Men has unilaterally altered the terms and conditions of employment by subjecting correction officers to safety and

health dangers in violation of [Rule 4.05.020]."[1] As a remedy, the Union seeks the immediate suspension of operations at the House of Detention until the Department installs a functional fire alarm system.

POSITIONS OF THE PARTIES

City's Position

While not disputing that the parties' definition of a grievance includes a claimed violation of a departmental rule,

[1] The full text of Rule 4.05.020 reads as follows:

> The head of an institution shall be fully informed at all times as to the condition of all fire-fighting equipment and appliances, fire alarm systems and the existence of fire hazards. He shall be responsible for the periodic training of selected employees and inmates in the use of first aid, fire appliances and for the designation of a fire-fighting unit, composed of employees and inmates, to be trained so that at all times a skilled company of firemen will be available. Each institution, in cooperation with the fire prevention section of the Division of Design and Engineering, shall institute a fire prevention program. A head of institution shall promptly notify the local fire department whenever there is a need. All fires shall be reported by the head of institution to the local fire department regardless of whether assistance is required or not. The Division of Design and Engineering shall periodically receive reports from all institutions and divisions on the condition of fire-fighting equipment and appliances.

the City argues that there is no nexus between the Department's alleged failure to install, repair or implement fire safety systems at the Manhattan House of Detention and departmental Rule 4.05.020. In its view, the Union's actual grievance concerns the repair of mechanical equipment, which, the City asserts, is not a matter addressed by the rule. After making a lengthy point-by-point analysis of the rule's provisions, the City concludes that Rule 4.05.020 is intended solely to provide information to the head of a detention facility regarding the condition of firefighting equipment, appliances and fire alarm systems. The City stresses that the rule does not give specifications for fire system operations, nor does it cover the circumstances under which repairs are to be ordered.

The City next argues that the remedy sought by the Union, suspending the operation of the Manhattan House of Detention until a functional fire alarm is installed, is a matter expressly reserved to management under its statutory managerial rights authority.[2] According to the City, 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.

The City also contends that the Union's allegations do not present an issue ripe for submission to arbitration, because the fire alarm bell allegedly is operational and because "the possibility that additional alterations have been completed is certainly distinct." It argues that since the Step III Review Officer found that the grievance had been resolved and that there is substantial compliance with the fire codes, the request for

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[2] 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.

arbitration must be dismissed.

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

Union's Position

Citing the parties' contractual definition of a grievance,[3] the Union asserts 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, the cause of action in this case qualifies for arbitral review. Relying upon an earlier decision of this Board,[4] 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 of the dispute, the only issue before this Board is a determination of whether there exists a nexus between the violation of a departmental regulation and the alleged failure of the City to install, repair or implement adequate fire safety systems and equipment at the Manhattan House of Detention.

The Union contends that there is a nexus because the lack of fire safety systems and equipment allegedly constitutes a failure to institute a fire prevention system. The Union concludes that this failure violates the rules, regulations and procedures created by the Department to promote safety and prevent fire hazards. Further, according to the Union, the alleged deficiencies have unilaterally and unreasonably altered working conditions with respect to safety hazards on the job.

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[3] 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 . . . .

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

The Union denies the City's claim that the fire systems problems have been corrected. It maintains that the bells and elevator controls remain non-operable, that the ventilation system does not automatically shut off once a fire is detected, and that the smoke purge system does not work. In support of its charge, the Union alleges that several kitchen grease fires flared undetected in the absence of an operable bell alarm system, spreading smoke to other areas of the facility through the ventilation system. According to the Union, the failure of the smoke purge system required the use of fans to exhaust the fumes.

The Union further contends that the lack of a complete contingent of fire watch officers, who, it says, should be available in case of fire, exacerbates the alleged deficiencies of the mechanical systems. The Union charges that although the Department trains fire response team members to perform specific fire emergency tasks, the members are routinely unavailable because they are reassigned from security posts to other duties involving direct contact with inmates. It specifically notes that the White Street facility was opened without an operable fire alarm system "on the express condition" that the City would maintain a contingent of fire watch officers at each level of the facility to escort officers and inmates in the event of fire. The Union claims that those officers routinely work at other posts instead.

Finally, the Union agrees that an employer is not obligated to negotiate nonmandatory subjects of bargaining, 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. The Union points out that the COBA Agreement, applicable in this case, 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.[5]

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.[6] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[7]

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 has not established a nexus between allegedly malfunctioning fire systems and equipment, and a departmental rule concerning fire emergencies. Thus, we must decide whether a nexus exists between the act complained of (malfunctioning systems and equipment) and the departmental regulation cited as the source of the alleged right to arbitration (Rule 4.05.020). In circumstances such as these, the union has a duty to show the existence of an arguable relationship between the provisions invoked and the

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

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

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

grievance to be arbitrated.[8]

This is the second time in recent months that we have had to decide the arbitrability of a COBA grievance concerning allegedly defective equipment at the Manhattan House of Detention. Decision No. B-52-90, issued on September 17, 1990, concerned a request for arbitration in which COBA contended that by not keeping yard gates in sound mechanical condition the Department was violating two of its firearms rules, and it unilaterally and unreasonably altered working conditions with respect to hours, scheduling and safety hazards. We did not agree with the Union's reasoning, however, because there was no evidence that allegedly malfunctioning gates had ever forced Correction Officers to violate either of the departmental rules cited by the Union as the basis of its claim. Thus, we found no nexus between the rules and a set of gates that allegedly were defective.

Rule 4.05.020 covers reporting, training and fire prevention. The main theory behind the Union's grievance in this case is that by not keeping certain fire systems in sound working condition, the Department has violated Rule 4.05.020, and it has "unilaterally and unreasonably altered working conditions with respect to safety hazards on the job." As in Decision No. B-52-90, however, the Union neither has shown that the Department itself has violated the rule, nor that Correction Officers have been forced to violate it. Thus, there is no demonstrable nexus between Rule 4.05.020 and various fire response systems and equipment that allegedly do not function properly.

With regard to the White Street facility, we take notice of two command level orders furnished us by the Union as part of its answer. The first, entitled "Facility Fire Response Team," became effective October 15, 1989 and applies to the North Tower and the South Tower. The order provides a fire reporting procedure and outlines the duties of the Fire Response Team,

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

including the requirement that "[a]t the sound of the Fire Alarm, the Control Room Captain/designee shall ensure that all elevators are returned to the first floor. (This can be accomplished by manually operating the over-ride switch for each elevator)."

The second order, entitled "Manhattan Detention Complex Interim Fire Plan - North Tower," became effective July 27, 1990. It outlines an interim fire response plan for the North Tower to be used "until the fire alarm system becomes operational." The order designates fire watch posts, provides an evacuation procedure, and lists the manual firefighting equipment that is to be contained on fire emergency wagons and in fire equipment lockers.

Neither of the command level orders have anything to do with the repair or operation of central fire safety systems and equipment of the sort that the Union refers to in its grievance. As such, the orders do not establish a nexus necessary to advance the Union's grievance to arbitration.

The Union also misplaces its reliance upon Decision No. B-3-83. Therein we held 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 the rule cited by the Union nor the command level orders are even remotely related to a procedure for achieving the repair of central fire systems and alarms.

Thus, the Union has not established any basis for a finding that its demand for arbitration is appropriate to the circumstances of this case. 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 fire systems 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.

Therefore, we shall grant the City's petition challenging arbitrability of the Union's grievance concerning the alleged failure of the Department of Correction to maintain the operability of certain fire systems at the Manhattan House of Detention. Our decision is without prejudice to the right of the Union to serve and file a scope of bargaining petition concerning the impact that the allegedly non-operational systems 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 docketed as BCB-1304-90, be, and the same hereby is, granted without prejudice to the filing of a scope of bargaining petition in the appropriate forum; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers Benevolent Association is denied without prejudice to the filing of a scope of bargaining petition in the appropriate forum.

DATED: New York, N.Y.
November 19, 1990

MALCOLM D. MACDONALD
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