City v. COBA, 47 OCB 40 (BCB 1991) [Decision No. B-40-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

DECISION NO. B-40-91
DOCKET NO. BCB-1325-90
(A-3558-90)

THE CITY OF NEW YORK,
Petitioner,
-and-

THE CORRECTION OFFICERS
BENEVOLENT ASSOCIATION,
Respondent.
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DECISION AND ORDER

On September 24, 1990, the City of New York ("City") , through its office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Correction Officers Benevolent Association (“COBA” or "Union") . On December 14, 1990, COBA filed an answer and motion to dismiss the petition, and the City filed a reply on December 24, 1990. Subsequently, and without permission, the Union filed a sur-reply on January 4, 1991. The City filed its response to that pleading on January 28, 1991.

BACKGROUND

On October 25, 1989, the Union filed a Step I grievance on behalf of all Correction Officers assigned to the Support Services Division alleging that the City improperly stopped compensating these employees for meals. Referring to the City's past practice of paying Correction Officers a per diem allowance for lunch, and when overtime was incurred, an additional per diem allowance for dinner, the Union argued that the City discontinued this past practice in violation of the parties' collective

bargaining agreement. The Union based its argument on Article XXI, Section 1 (b) , of the contract which defines a grievance as "a claimed violation, misinterpretation, or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." The Union requested that the practice of compensating Correction Officers for their meals be reinstated and that the Officers be compensated on a retroactive basis.

On October 26, 1989, the Union's Step I grievance was denied. The Commanding Officer of the Support Services Division stated that divisions which did not house inmates on a twenty-four hour basis were not entitled to meal compensation. The Commanding Officer pointed out that Officers assigned to the Support Services Division were able to have their lunch at one of the designated facilities on Rikers Island and that those Officers assigned to projects off Rikers Island were able to have lunch at the closest off island facility to their job site.

At the Step II level the Union's grievance was similarly denied. The Assistant Commissioner of Labor Relations at the Department of Correction clarified that meals are provided to staff only in facilities with innate responsibilities which prevent the employee from leaving the location for the meal and that meal compensation is not provided for staff who do not work in

facilities with inmate responsibilities. The commissioner also denied the grievance on the basis that the collective bargaining agreement defines what constitutes a "grievance" and that "past practice" did not fall under that definition.

On December 11, 1989, a Step III grievance was filed alleging that "Correction Officers assigned to Support Services off Rikers Island are being denied per-diem compensation for their meals although there is no correction facility nearby to provide them with same." A Step III decision was never issued and the Union filed a request for arbitration pursuant to Article XXI, Section 6[1] of the collective bargaining agreement.

In its request for arbitration the Union claims the Correction Officers are being denied meal compensation, although the Department's past custom had been to provide the same, in violation of Article XXI, Section 1.[2] The Union seeks "reimbursement of per-

them meal compensation for those Correction Officers denied the same in addition to a declaration ruling prohibiting the non reimbursement in the future."

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[1] Article XXI, Section 6 states:

> If the City exceeds any time limit prescribed at any step in the grievance procedure, the grievant and/or the Union may invoke the next step of the procedure, except, however, that only the Union may invoke impartial arbitration under Step IV.

[2] Article XXI, Section 1(b) defines a "grievance" as:

> A claimed violation, misinterpretation or misapplication
> of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section la, the term "grievance" shall not include disciplinary matters.

POSITIONS OF THE PARTIES

City's Position

In seeking a dismissal of the request for arbitration, the City argues that there is no nexus between the subject matter of the grievance and the provision of the collective bargaining agreement alleged to have been violated. The Union claims a violation of Article XXI, Section 1(b), which defines a grievance as a violation of a rule, regulation, or procedure. Since a violation of "past custom" is not included within this definition of a "grievance," the City contends that the Union has failed to allege a violation of the collective bargaining agreement. The City emphasizes that COBA has not cited a rule, regulation, or procedure which would entitle the Officers to meal compensation, other than "past custom."

In support of its argument, the City cites several cases. It notes that the Board has denied arbitration of a past practice, if the contract's definition of the term "grievance" fails to include

past practice. Thus, the existence of a past practice, without more, is insufficient to establish a basis for arbitration. The City also points to several Board decisions which state that the mere passage of time will not convert a past practice into a rule, regulation, or procedure within the definition of a grievance.

The City places particular emphasis on City of New York v. Patrolmen's Benevolent Association, Decision No. B-43-88. In this case the Union filed a grievance requesting that two police pilots be reimbursed for a meal they missed while outside the City. The Union contended that the City had a longstanding practice of compensating pilots who were unable to avail themselves of their meal periods. The Board granted the City's petition challenging arbitrability on the ground that the definition of the term "grievance" in the contract did not include past practice. The Board reaffirmed that the mere passage of time does not convert a past practice into a rule, regulation, or procedure.

The City also argues that COBA's request to arbitrate a past practice subverts the collective bargaining process since it did not acquire the right to do so through bargaining.

In its reply, the City argues that COBA's filing of a motion to dismiss is "untimely, unfair and prejudicial to the Petitioner." The City explains that had it known that COBA was going to file a motion to dismiss, "consent for extensions resulting in an

additional three months for Respondent to answer, may never have been given."

In its reply, the City notes that COBA in its answer did not dispute that the request for arbitration is based upon an alleged violation of a past practice. The City asserts that COBA has not rebutted its claim that there is "no written policy, rule, or regulation in existence justifying the submission of the grievance arbitration." The City contends that it "cannot be forced to go to arbitration on an issue which the parties have chosen to exclude from the definition of a grievance within the parties' collective bargaining agreement."

In its response to COBA's sur-reply, the City argues that this pleading "must be rejected as it is untimely, no prior request has been made to submit this pleading herein and no provision in the Rules specifically allows this type of pleading to be submitted." The City notes that COBA had ten days to submit an answer, that it gave COBA additional time to submit its answer, and that now COBA "has served a second answer without requesting an extension of time to do so or requesting permission to submit this pleading." The City contends that "[t]his second answer is, therefore, untimely." The City also argues that the serving of the sur-reply "gives Respondent an unfair advantage over Petitioner in that it allows Respondent to submit additional arguments in response to arguments

raised on the reply."

The City explains that COBA now is attempting "to submit a document it alleges for the first time is the equivalent of a rule or regulation." The City argues that COBA, after reading the arguments in the reply which stated that no rule or regulation other than a past practice had been alleged, is trying once again "to make its claim grievable." Noting that "[t]his is the first time that anything besides a past practice has been alleged," the City claims that not only is COBA "evading the time limits in the Rules for submitting an answer, it is evading the time limits in the grievance procedure for submitting a claim to arbitration." Contending that COBA had "more than adequate time to locate the additional document," the City argues that the "untimely submission is, therefore, unfair and prejudicial to Petitioner." Moreover, the City argues that COBA's sur-reply should be rejected because "there are no provisions in the Rules allowing for such a pleading." The City contends that COBA "should not be allowed to submit an endless succession of pleadings to argue its case, each time making a new attempt to succeed in its claim."

Finally, noting that COBA has submitted a document in its sur-reply "which it claims is a grievable rule or regulation," the City insists that the document "is an internal institution specific document over eleven (11) years old which has no application to the

facts at hand." The City explains that the "grievance concerns meal compensation practices at the Support Services Division, a unit separate and apart from the prison facility that this document applies to." Contending that the document is "irrelevant and inadequate to raise any other claim in addition to the claim of a violation of past practice," the City requests that an order be issued dismissing the request for arbitration.

Union's Position

In its answer and motion to dismiss, COBA argues that the Department's policy of providing meal compensation to Correction Officers was effectuated by a rule, regulation or procedure of the agency that affects the terms and conditions of Correction Officer's employment and, accordingly, is not a mere past practice. COBA asserts that the Department of Correction has been authorizing payments to Correction Officers for meal money. COBA attaches as exhibits payment stubs and other documents demonstrating that such payments have been made. COBA contends that authority must exist for the City to make these payments because, otherwise, "the City of New York has paid considerable sums of money to City employees without some written authority to do so. " COBA submits that "although [it] has been unable to procure the written policy authorizing meal money reimbursements, it must exist."

COBA argues that the City's reliance on Decision No. B-43-88 is misplaced. COBA distinguishes Decision No. B-43-88 from the instant matter, arguing that in the former case "the union never argued that a written policy specifically authorizing meal money payments existed." COBA contends that since the union in Decision No. B-43-88 "relied an a section of [its] Patrol Guide which described the procedure a patrolman must follow in order to take a meal period," that decision is not dispositive of the instant matter.

In its sur-reply, COBA notes that in its answer it stated that written policies authorizing meal allowances existed, although it was unable to procure them at the time. COBA asserts that since that time, "two documents have come into Respondent's possession as the result of a diligent and exhaustive search that in fact support Respondent's position that a written policy exists with respect to meal reimbursements." Noting that its prior efforts to locate the supporting written documentation were in vain, COBA claims "the City [was) uncooperative and went so far as to claim to their knowledge no such documents existed, although these documents were always within their possession." COBA "now reasserts that the Department of Correction's policy of providing meal compensation to Correction Officers was effectuated by a rule, regulation or procedure of the agency that effects the terms and

conditions of Correction Officers' employment."

COBA claims that Department of Correction Institutional Memorandum No. 12/79 ("Memo 12/79")[3] details the policy a Correction officer must follow in order to receive meal reimbursements. COBA argues that Memo 12/79 is a rule, regulation or procedure of the agency; accordingly, "the Department's refusal to now provide meal allowances therefore constitutes a violation

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[3] Institutional Memorandum 12/79 reads, in part, as follows:

> Department of Correction - Intradepartmental Memorandum
> Institutional Memorandum No. 12/79
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> Date: June 26, 1979
> To: All Personnel
> From: Alexander Jenkins, commanding Officer, K.C.H.P.W.
> Subject: Meal Expense Vouchers
>
> 1. Institutional Memorandum No. 65 dated May 31, 1977 is not being complied with. Effective immediately, all personnel are hereby directed to comply with the provisions of said memorandum outlined below.
>
> a. Each individual will fill out and file (Form 24A) a personal expense form in duplicate on a biweekly basis, commencing July 6, 1979.
>
> b. If the date on the meal receipt is changed, it will be disallowed, however, if it is a cash register error, the employee will so state on the meal receipt "Cash Register Error" and will sign the meal receipt.
>
> c. Personnel assigned the 8:00AM to 4:15PM tour of duty, Monday through Sunday, including holidays will be allowed $1.65 per meal. Personnel assigned the 4:OOPM to 12:15AM tour of duty, Monday through Sunday, including holidays will be allowed $2.00 per meal.

and/or misinterpretation of the rules, regulations or procedures of the agency affecting terms and conditions of employment as set forth in Article XXI, Section 1.b of the collective bargaining agreement between the parties."

Moreover, COBA claims that an interdepartmental memorandum, dated December 22, 1986 ("OLR Memo"),[4] further evidences that "the granting of meal allowances has always been much more than a mere past practice." Thus, COBA claims that the Department's recision of meal allowances constitutes an arbitrable dispute.

DISCUSSION

It is the policy of the New York City Collective Bargaining Law ("NYCCBL") to promote and encourage arbitration as the selected

[4] The memorandum dated December 22, 1986, written on Office of Labor Relations letterhead, states as follows:

> To: All Concerned Agencies
> Office of Payroll Administration
>
> From: Harry Karetzky, First Deputy Director
>
> Pending execution of the 1985-1987 Citywide Agreement, you are hereby -authorized to implement the following meal allowance schedule effective January 1, 1987.

	Effective 1/1/87
1. For two continuous hours of overtime	$6.75
2. For five continuous hours of overtime	7.25
3. For seven continuous hours of overtime	9.25
4. For ten continuous hours of overtime	10.25
5. For fifteen continuous hours of overtime	11.25

means for the adjudication and resolution of grievances.[5] 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.[6] The question before this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate.[7]

Before addressing the question of whether there is a nexus between the subject matter of the grievance and the provision of the collective bargaining agreement alleged to have been violated, we first must address certain questions raised with regard to the pleadings submitted by the parties. In its reply, the City argues that COBA improperly moved to dismiss its petition challenging arbitrability. Noting that COBA had requested several extensions of time in order to file an answer, the City contends that it would not have granted these extensions if it had known that a motion to dismiss would be filed. The City claims that it is unfairly prejudiced by COBA's filing of a motion to dismiss.

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[5] Decision Nos. B-31-90,, B-20-90; B-11-90; B-35-89; B-30 84; B-25-83.

[6] Decision Nos. B-31-90; B-20-90; B-11-90; B-35-89; B-24 86; B-30-84; B-25-83.

[7] Decision Nos. B-31-90; B-20-90; B-11-90; B-43-88; B-11 88; B-12-87.

In addressing the City's claim of prejudice, we note that COBA filed one pleading entitled "answer and cross motion for dismissal of petition challenging arbitrability." Thus, COBA filed an answer, in which it "admit[ted] the allegations contained in Paragraphs 1,2,3,4,5, and 6 of the Petition" and "den[ied] the allegations contained in Paragraphs 7 to 15," as well as a motion to dismiss. Since COBA filed an answer, the instant case may be distinguished from one in which only a motion to dismiss is filed.[8] Accordingly, the City, which did not object to the several extensions of time requested by COBA in order to file its answer, now may not claim it was prejudiced by the delay.

We next consider the City's argument that COBA improperly filed a sur-reply. As the City correctly notes, the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") do not provide for the filing of sur-replies. It is the policy of this Board not to encourage the filing of subsequent pleadings.[9] Thus, we will not consider such submissions unless it can be shown that special circumstances warrant consideration of

[8] See, for example, Decision No. B-33-91 wherein the Board ordered HHC to file an answer to an improper practice petition which HHC had previously moved to dismiss.

[9] Decision Nos. B-17-90 n.1; B-16-90 n.2; B-20-85 n.1; B-16-83; B-14-83.

the material in question.[10]

We have long held that before we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation is within the definition of the term "grievance" set forth in the parties' collective bargaining agreement.[11] We also have long held that the mere passage of time will not convert a past practice into a rule, regulation or procedure.[12]

In the instant case, the parties have defined the term "grievance" to include "a claimed violation, misinterpretation or misapplication of the rules, regulations, and procedures of the agency affecting terms and conditions of employment." Clearly, an alleged violation of a past practice is not included within this definition. A grievant proceeding under Article XXI, §1(b) of the contract must identify an alleged violation of a specific rule, regulation or procedure in order to proceed to arbitration. In the instant matter, however, COBA failed to identify in its request for arbitration or in its answer, a specific rule, regulation or procedure allegedly violated. Thus, on the basis of either of

[10] Decision Nos. B-17-90 n.1; B-16-90 n-2; B-20-85 n.1; B-16-83; B-14-8-3.

[11] Decision Nos. B-20-90; B-11-90; B-35-89; B-20-72.

[12] Decision Nos. B-43-88; B-11-88; B-25-83; B-20-72.

those pleadings, COBA could not establish a sufficient nexus to allow its claim to proceed to arbitration. However, in its sur-reply, COBA identified two documents, Memo 12/79 and the OLR Memo, which it argues constitute rules, regulations, or procedures under which Correction Officers may be entitled to meal compensation.

As previously stated, we will not consider subsequent pleadings submitted by the parties unless it can be shown that special circumstances warrant consideration of the material in question. In determining whether special circumstances may be found in the instant case, we consider two factors. First, we note that COBA's claim would not proceed to arbitration on the basis of its earlier pleadings. Thus, in order for COBA's claim to proceed to arbitration, the material contained in its sur-reply must give it the right to do so. Consideration of the material in COBA's sur-reply, therefore, is consistent with our policy favoring arbitration as the selected means for the adjudication and resolution of grievances.

Second, we consider the fact that Memo 12/79 and the OLR Memo were documents within the sole possession of the City. Although .the City always had these documents in its possession, the City asserted in its reply that COBA had not rebutted its claim that there was "no written policy, rule, or regulation in existence justifying the submission of the grievance to arbitration." We

cannot accept the City's argument that COBA's sur-reply should be rejected when the City previously had denied the existence of the documents referred to in the sur-reply. In light of our policy favoring arbitration, and the fact that the documents which COBA sought were in the sole possession of the City, we find that the special circumstances test has been met. Accordingly, we will consider the subsequent pleadings submitted by COBA and the City.

We next consider the City's claim that COBA's sur-reply should be rejected because "(t)his is the first time [COBA has alleged] anything besides a past practice." We note that in its request for arbitration, COBA stated the grievance to be arbitrated as: "Correction Officers have been denied meal compensation although the Department's past custom has been to provide the same." However, in its answer, COBA asserted that, although it was sure that "authority exist[ed] for making the payments," it had been "unable to procure the written policy authorizing meal money reimbursements." Moreover, throughout the earlier steps of the grievance procedure, in its request for arbitration, and in its answer, COBA alleged a violation of Article XXI, §1(b), which defines a grievance as "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." Thus, as COBA consistently alleged that a written policy authorizing meal

money existed and, accordingly, that the City was in violation of Article XXI, §I(b) of the contract, we cannot find that the City lacked notice of this claim. As we stated in Decision No. B-55-89,

> to interpret the framing of the Union's grievance as literally as the City suggests would be tantamount to our adoption of a strict pleading rule which would, in effect, defeat arbitrability although the nature of the underlying claim is clear. Accordingly, our finding herein is not to be construed as permitting a party to belatedly broaden the scope of its grievance. Rather, it is an acknowledgment that, in appropriate cases, we may find that the City was or should have been on notice of the nature of a claim, based upon the totality of the grievance as expressed by the Union. This conclusion is consistent with the clear mandate of Section 12-302 of the NYCCBL and with our own well established policy of favoring the resolution of disputes through impartial arbitration [citations omitted].[13]

We next consider whether there is a nexus between the documents referred to in COBA's sur-reply and COBA's grievance. A written statement will be accorded the status of a "written policy or rule" if it is addressed generally and sets forth a general policy applicable to the affected employees.[14] We note that Memo 12/79, issued by the Department of Correction, is addressed generally to "All Personnel" and sets forth a general policy applicable to the affected employees. Therefore, we will

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[13] See also, Decision Nos. B-31-90; B-9-89; B-44-88; B-35-87; B-14-87; B-21-84; B-6-76.

[14] Decision Nos. B-74-90; B-59-90.

consider Memo 12/79 to be a "written policy or rule." Accordingly, an arbitrator will decide whether this Memo creates a right on the part of the grievants to receive meal compensation. We further note that the City's argument that Memo 12/79 has no application to the instant grievance because the "grievance concerns meal compensation practices at . . . a unit separate and apart from the prison facility [to which] this document applies" is an argument going to the merits of COBA's grievance, which is for an arbitrator to decide.

However, we reach a different conclusion with respect to the OLR Memo. While this document arguably constitutes a written policy or rule of the agency under the standards applied by this Board,[15] it is inapplicable on its face to the instant grievance. In this regard, we note that the OLR Memo refers to the Citywide Agreement and that COBA is not a party to that agreement. Furthermore, we take formal notice that the New York City Collective Bargaining Law creates and defines a unique bargaining structure for employees covered by its provisions and provides for the negotiation of certain subject matter in Citywide bargaining.[16]

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[15] A written statement will be accorded the status of a "written policy or rule" if it is addressed generally and sets forth a policy applicable to affected employees. Decision Nos. B-74-90; B-59-90. The OLR Memo appears to satisfy these requirements.

[16] NYCCBL §12-307a.(2).

The law expressly provides, however, that analogous bargaining of these subjects for employees in certain uniformed services, including uniformed correction service employees, shall be negotiated at the unit level. Thus, even if the OLR Memo, which directs the unilateral implementation of Citywide contract provisions as to meal allowances pending formal execution of the Citywide agreement, is deemed to constitute a written policy, it would nevertheless be a written policy that patently does not apply to COBA members and cannot be invoked on their behalf. Offered as proof only that "the granting of meal allowances has always been much more than a mere past practice," COBA begs the question of whether the Memo demonstrates that the City had any such written policy applicable to COBA members. For these reasons, we find that COBA has not established a nexus between this document and its alleged right to receive meal compensation.

We emphasize that no general relaxation of the OCB Rules regarding pleadings is effected by our consideration of the sur-reply filed by the grievant in the instant matter. On the contrary, and as is indicated above, our action here is prompted by the extraordinary circumstances of the case and would have application only to an identical or equally unique matter.

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 herein, be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration be, and the same hereby is, granted.

DATED: New York, NY
August 28, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE BENJAMIN DANIELS
MEMBER