City v. COBA, 47 OCB 44 (BCB 1991) [Decision No. B-44-91 (Arb)]

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

-between-

DECISION NO. B-44-91
DOCKET NO. BCB-1326-90
(A-3559-90)

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 November 2, 1990, COBA filed an answer to the petition, and the City filed a reply on November 13, 1990.

BACKGROUND

On October 19, 1989, COBA filed a Step I grievance objecting to the way in which Correction Officers from the Correction Industries Division and the Graphics Unit were assigned to perform overtime in the “GMDC” and "AMKC” facilities. COBA claimed that pursuant to a recent directive these officers were required to work on cancelled pass days and/or on other than the tour they were normally assigned. COBA charged that the A-Squad Officers normally assigned to these facilities were not scheduled for involuntary overtime in a similar fashion and, therefore, that an inequity existed.

The Commanding officer of the Support Services Division denied the Step I grievance. The Commanding Officer noted that officers in the Correction Industries Division and the Graphics Unit were directed to work overtime in GMDC and AMKC on weekend cancelled pass days pursuant to Memorandum # 2282, dated September 13, 1989. The Commanding Officer explained that the emergency order had been implemented in order to temporarily relieve the officers of larger facilities who had been compelled to work excessive amounts of overtime due to shortages in staff. The Commanding Officer concluded that there had been no violation of the collective bargaining agreement in the scheduling of this emergency overtime.

On October 24, 1989, COBA filed the grievance at Step II. On November 6, 1989, the Assistant Commissioner of Labor Relations at the Department of Correction denied the Step II grievance. The Assistant Commissioner found the matter not grievable because COBA failed to cite a specific contract clause or a rule, regulation or procedure of the Department allegedly violated. The Assistant Commissioner further noted that as of October 27, 1989 involuntary overtime coverage was required only at ARDC. Accordingly, the Assistant Commissioner concluded, this development should have obviated any perceived problems at GMDC and AMKC. Finally, the Assistant Commissioner noted that A-Squad Officers at ARDC had been included in the eligibility pool for lost pass days and/or off-tour

duties resulting in a more equitable distribution of overtime.

On December 12, 1989, COBA filed a Step III grievance. COBA noted that Article XXI, §1(a) defines a grievance as "a claimed violation, misinterpretation or inequitable application of the provisions of this agreement" and that Article XXI, §1(b) defines a grievance as "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency." COBA further noted that Article III, § 1 of the collective bargaining agreement concerned overtime. COBA argued that "(b]y compelling A-Squad Correction officers assigned to Correction Industries Division to work pass days at ARDC and not compelling A-Squad Officers normally assigned to ARDC to the same, forced overtime [was] being inequitably applied." COBA contended that all A-Squad Officers should have been assigned canceled pass days equally, regardless of the facility to which they were normally assigned. A Step III decision was never issued.

In its request for arbitration, COBA contends that

> A-Squad Correction officers assigned to the Correction Industries Division and Graphics were forced to work cancelled pass days in facilities where these same facilities were not subjecting then A-Squad Correction Officers to do the same.

The Union claims a violation of Article 111, §1[1] and Article XXI,

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[1] Article III, §1 states:

> All ordered and/or authorized overtime in excess of forty (40) hours in any week or in excess of the

(....continued)

§1(a).[2] COBA seeks a declaratory ruling prohibiting the Correction Department from inequitably assigning overtime.

POSITIONS OF THE PARTIES

City's Position:

The City argues that there is no nexus between the contract article claimed to have been violated and the subject matter of the grievance. Noting that Article III, §1 details how employees are to receive compensation for working overtime, the City contends that the provision contains no reference to the scheduling of overtime. The City argues that the collective bargaining agreement is silent on the issue raised in COBA's grievance, which concerns the inequitable distribution of overtime.

In addition, the City argues that "there is no other right to the equitable assignment of overtime," as COBA has not cited a

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1(...continued)
hours required of an employee by reason of his regular duty chart if a week's measurement is not appropriate, whether of an emergency nature or of a non-emergency nature, shall be compensated for either by cash payment or compensatory time off, at the rate of time and one-half, at the sole option of the employee. Such cash payments or compensatory time off shall be computed on the basis of fifteen (15) minute segments.

[2] Article XXI, §1(a) states:

For the purpose of this Agreement, the term "grievance" shall mean: a. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement.

policy or regulation to that effect. The City further argues that arbitrating the instant grievance "would be tantamount to granting benefits to the Association it had not acquired [through] collective bargaining," as the "[s]cheduling of overtime is a management prerogative."

In its reply, the City argues that it is prejudiced by COBA's alleging for the first time in its answer "that the claim involves a violation of Directive #4250." The City notes that prior to the submission of its answer COBA had not raised the issue of a violation of Directive #4250. Accordingly, the City argues, at no time during the grievance procedure did it have the opportunity to respond to this claim or prepare for arbitration on this issue. The City notes that "a copy of [Directive #4250]" was not attached "as an exhibit to (COBA's] Answer."

Union's Position:

In its answer, COBA claims a violation of Article XXI, §1(b) of the collective bargaining agreement, 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." COBA contends that the instant controversy concerns the inequitable distribution of overtime at

GMDC, AMKC, and ARDC in violation of Directive #4250[3] of the Correction Department. COBA argues that Directive #4250 is the equivalent of a rule, regulation or procedure of the agency and, therefore, that the City, by inequitably distributing overtime, has violated Article XXI, §1(b). COBA notes that the City stated in its petition challenging arbitrability that "[i]ndependent of the Agreement, there is no other right to the equitable assignment of overtime." COBA contends that Directive #4250 provides such a right.

Furthermore, COBA asserts that a nexus exists between the overtime provision of Article 111, §1 and the instant grievance. COBA notes that Article 111, §2 of the collective bargaining agreement provides as follows:

> In order to preserve the intent and spirit of this Section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory re-assignment of personnel to

[3] COBA alleges that Directive #4250, effective January 25, 1980, states at II.A.3 as follows:

> Facility Administrators and Managers of the Department, or their designees, shall handle the distribution of overtime in a fair, equitable and fiscally responsible manner to avoid disappropriate accumulations that can expose the Department and the City of ~New York to criticism of its monetary and management policies.

In its reply, the City denies this allegation and, further, contends that the Directive may not serve as a basis for arbitration.

different days off and/or tours of duty.

COBA contends that by inequitably distributing overtime the City violated the "intent and spirit" of Article III, §2.

DISCUSSION

Where the parties do not dispute that they have agreed to arbitrate their controversies, 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.[4] When challenged to do so, a party seeking arbitration has the burden of establishing a nexus between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[5] In the instant case, the City argues that COBA has not established a nexus between a provision of the collective bargaining agreement allegedly violated and the subject matter of COBA's grievance. Thus, we must determine whether a nexus exists between the cited contractual violations and COBA's grievance.

In its request for arbitration, COBA alleges a violation of Article III, §1, a provision relating to compensation for overtime, and Article XXI, §1(a), which defines a grievance as an "inequitable application" of the provisions of the collective

[4] Decision Nos. B-18-90; B-15-90; B-6-88.

[5] Decision Nos. B-18-90; B-15-90.

bargaining agreement. The City argues that COBA has not established a nexus between a provision of the collective bargaining agreement and its grievance, since Article III, §1 concerns compensation for overtime and COBA's grievance concerns the scheduling of overtime. We note that CORA did not allege until its answer a violation of Article III, §2, a provision which concerns the scheduling of overtime. Thus, we must decide whether to allow COBA's claim of inequitable assignment of overtime to proceed to arbitration when COBA failed to cite a provision of the collective bargaining agreement relating to the scheduling of overtime during the grievance procedure or in its request for arbitration.

We conclude that COBA's claim of inequitable assignment of overtime may proceed to arbitration. In reaching this conclusion, we note that COBA consistently alleged throughout the grievance procedure that the City was inequitably assigning overtime and that, in its request for arbitration, COBA claimed a violation of Article XXI, §1(a), which defines a grievance as an "inequitable application" of the provisions of the collective bargaining agreement. Thus, as COBA alleged that overtime was being inequitably applied in violation of the collective bargaining agreement, 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].[6]

We next consider whether the alleged violation of Directive #4250 may also serve as a basis to allow COBA's claim to proceed to arbitration. We note that COBA first claimed a violation of this directive in its answer. Neither during the grievance procedure nor in its request for arbitration did COBA allege a violation of Article XXI, §1(b), which defines a grievance as a violation of the rules, regulations or procedures of the agency. Accordingly, we find that the City lacked notice of this claim. We have long stated that the purpose of a multi-level grievance procedure is to encourage discussion of the dispute at each of the lower steps.[7] Accordingly, we will not permit a party to raise an alleged violation for the first time in its answer, which was not

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[6] 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.

[7] Decision Nos. B-29-91; B-44-88; B-31-86; B-6-80; B-22-74; B-20-74.

alleged during the lower steps.[8] Although we find that Directive #4250 does not provide an additional basis to allow COBA's claim to proceed to arbitration, this finding should not be read to preclude COBA f rom introducing the directive as evidence in support of the alleged contractual violations at the arbitration hearing.

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

[8] Decision Nos. B-20-90; B-19-90; B-55-89; B-40-88; B-1-86.

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ORDERED, that the request for arbitration as to the alleged contractual violations be, and the same hereby is, granted.

DATED: New York, NY
September 11, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE BENJAMIN DANIELS
MEMBER