City, NYPD v. SBA, 49 OCB 23 (BCB 1992) [Decision No. B-23-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

DECISION NO. B-23-92

THE CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,

DOCKET NO. BCB-1488-92 (A-4167-91)

Petitioner,

-and-

SERGEANT'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On April 14, 1992, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance brought by the Sergeant's Benevolent Association ("the SBA"). The SBA had filed a request for arbitration on April 6, 1992. In its request, the Union stated that its grievance stemmed from the Department's alleged violation of the "Radio Motor Patrol" article in the parties collective bargaining agreement.

By letter to the Director of the Office of Collective Bargaining ("OCB") dated April 14, 1992, the City asked that the SBA's time to answer be shortened and that the matter be decided in an expedited fashion due to special circumstances alleged to exist.[1] By letter dated April 22, 1992, the Deputy Chairman/
General Counsel of the OCB advised the City that its request had been granted in part and denied in part. He reported that the OCB Chairman had determined that, in view of other pending proceedings between the parties concerning solo supervisory patrols and in view of the number of issues raised in the petition, it was neither justifiable nor equitable to shorten the SBA's time to answer. The Deputy Chairman/General Counsel also confirmed, however, that

[1] Explaining the special circumstances, the City noted that a court had enjoined the Police Department from implementing the solo supervisory patrol program for sergeants pending resolution of the instant arbitration. It asked that the time for the SBA to file its answer be shortened to five days.

the Union's time to answer would not be extended beyond the time provided in the OCB Rules, and that upon submission of all pleadings, the case would be expedited for presentation to the Board for final determination.

The Union filed an answer to the City's petition on April 22, 1992. The City filed a reply on May 4, 1992.

BACKGROUND

This case is one in a series of recent actions involving the SBA and another union, the Lieutenant's Benevolent Association ("LBA"), in an attempt to prevent or forestall the Police Department from instituting solo supervisory patrols for its lieutenants and sergeants.[2] The issue of solo patrols for supervisors has historical roots tracing back thirteen years.

In April of 1979, the Department issued an order that would have caused sergeants and lieutenants in specified precincts under certain "triggering" conditions to operate patrol vehicles

[2] See Decision Nos. B-13-92; B-14-92; and B-15-92.

by themselves.[3] As soon as the order was issued, the SBA filed an improper practice petition alleging that the plan would have a practical impact upon the safety of police sergeants. The LBA intervened on behalf of lieutenants, making the same claim.

Following an evidentiary hearing, this Board, in Decision No. B-6-79, held that the implementation of solo patrols for sergeants and lieutenants would have a practical impact upon their safety because of three specific deficiencies in the provisions of the order. The decision ordered the parties to attempt to alleviate these three areas of safety impact through prompt negotiations.

The negotiations did not produce an agreement, and a three-member impasse panel was appointed to take evidence and to issue a report and make recommendations for alleviating the safety impact. The panel issued its Report and Recommendations on October 3, 1980. On November 13, 1980, the SBA filed a new petition requesting clarification of certain of the panel's recommendations. The parties held settlement discussions during the next several months while the new petition was pending.

On April 15, 1981, the SBA and the City agreed to modify several of the panel's recommendations.[4] The Sergeants'

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[3] Operations Order Number 40, dated April 6, 1979.

[4] See the "Memorandum of Agreement, On the Subject of Radio Motor Patrol, Between the Sergeants' Benevolent Association and the City of New York" [referred to hereinafter as "the Sergeants' Memorandum of Agreement."]

Memorandum of Agreement also provided that its text be incorporated into the parties' collective bargaining agreement for the period July 1, 1980 through June 30, 1982.

The text of the Memorandum of Agreement was, and has continued to be incorporated into a series of collective bargaining agreements between the parties, including the most recent one, with two differences: In the "Radio Motor Patrol" article of the contract, the word "and" was added to the last clause in the preamble paragraph, with no apparent contextual change; and paragraph 10. and the concluding paragraph of the Sergeants' Memorandum of Agreement are not included in the contract's Radio Motor Patrol article. The latter two paragraphs provide for the incorporation into the contract of the Memorandum, and for the prior review of any solo patrol operations order by the SBA. Aside from these two differences, the wording in Memorandum of Agreement and that in the contract is verbatim. In summary, the provisions of the Radio Motor Patrol article establish the following controls and restrictions:

1. Trigger points contingent upon a certain number of two-officer radio cars first must be reached;

2. Radio and shotgun training must be provided and the equipment must be available;

3. Solo patrols first must be filled by volunteers;

4. Solo patrol supervisors may not be used as primary response units;

5. Supervisors unfamiliar with a precinct or area must be provided with a driver;

6. Supervisors who are covering more than one precinct must be provided with a driver;

7. Solo patrols may be suspended by the commanding officer if unusual conditions occur;

8. A joint Labor-Management Safety Committee is established and must meet at either parties' request to consider and recommend changes in the solo supervisory patrol program, including trigger numbers. The Department must provide the Union with relevant reports and statistical information as they become available.

9. Supervisors who volunteer for solo patrols receive certain

retirement and assumption of risk indemnifications.

There is no evidence that solo supervisory patrols were instituted during the ensuing decade. By letter dated November 7, 1990, however, the Department informed the SBA that it intended to commence the solo supervisory patrol program beginning in April of 1991. By letter dated March 25, 1991, the Union filed a Step III grievance with the Department's Office of Labor Relations, contending that the solo supervisory patrol plan was a violation of the contractual "Radio Motor Patrol" article, of the 1980 Report of the Impasse Panel, and of the 1981 Sergeants' Memorandum of Agreement. By letter dated April 2, 1991, the Department's Office of Labor Relations asked the Union to provide specific information as to how these provisions had been violated. By letter dated October 2, 1991, the SBA's counsel made the following reply:

I am writing to you in response to your request for specific information as to how the SBA contract has been violated as per the [solo supervisory patrol grievance].

There are three (3) documents that, in part, provide the basis of the terms and conditions of employment for the Solo Supervisory Patrol Program (hereinafter "Program"). These documents are the Impasse Panel decision BCB Case No. I-145-79, the April 15, 1981 Memorandum of Agreement and Article XXIX of the SBA contract ["Radio Motor Patrol"].

The unilateral implementation of the Program violates the provisions of the above documents as follows:

1. The basis for establishing trigger numbers of two-men RMP's has never been reviewed and updated.

2. The training curriculum and equipment has never been reviewed and updated. There has been no consultation prior to implementation.

3. Sergeants have not been informed that the Program is voluntary and involuntary assignments shall be made only if no volunteers are available.

4. The procedure of how a Sergeant, assigned to Solo Supervisory Patrol, is to respond to all types of calls for police service has not been reviewed or updated.

5. The protocol as to which assignment and in what order of response a Solo Supervisor is to respond to all calls for police service has not been reviewed or updated.

6. The criteria concerning the familiarity with precinct conditions as relates to the ability to assign a Sergeant to the Program has not been reviewed and updated.

7. Unusual reports regarding the suspension of Solo Patrol for more than one week were never kept.

8. The information that was required to be main-tained and provided to the SBA regarding the Pro-gram and the police officers Solo Patrol Program was either not kept, not available, not developed, or the Police Department does not have the required reports (See page from my September 25, 1991 letter to Mr. Malcolm MacDonald attached).

9. The changed circumstances that has occurred since 1991 relative to policing in the City of New York has not been taken into consideration; i.e. swings, fluctuations, and changes in levels of crime and police activities demonstrate the need for periodic review and evaluation (I-145-79 pp. 15 and 16). Also no consideration has been given for precinct boundary changes that has occurred since 1981 and the effect

> of such changes on policing in the areas of solo patrol.
>
> 10. The unilateral implementation of the Program undermines the union Recognition and Unit Designation clause of the SBA contract. This clause grants the sole and exclusive collective bargaining rights to the Sergeants Benevolent Association. Any modification of a term and condition of employment that is implemented without the agreement of the SBA violates this clause.
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> This Program has been the subject of much discussion in the past months between the parties. Accordingly, [we] request an expeditious response in order that either an agreement can be achieved or the processing of this grievance to its conclusion through the grievance procedure which includes final and binding arbitration.
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> Please do not hesitate to call me if you have any questions.

By letter dated October 18, 1991, the Department's Office of Labor Relations denied the Step III grievance on the ground that "there has been no violation, misinterpretation, or misapplication of the current collective bargaining agreement, nor has there been any violation, misinterpretation, or misapplication of the rules, regulations, or procedures of the department." According to the Department, its planned implementation of the solo supervisory patrol program would be "in accordance" with the parties' collective bargaining agreement. In a subsequent Step IV decision, dated November 18, 1991, the Police Commissioner also denied the grievance, repeating the findings of the Department's Office of Labor Relations.

In its request for arbitration, filed April 6, 1992, the SBA specified that "Article XXVIII - Radio Motor Patrol" was the contractual provision, rule or regulation that it claimed was being violated.

While its request for arbitration was pending, the SBA, on October 30, 1991, brought an Article 78 proceeding against the Police Department, seeking to enjoin implementation of the solo supervisory patrol program pursuant to

Section 7502.(c) of the Civil Practice Law and Rules.[5] In the Article 78 petition, the Union argued that the issue of solo supervisory patrols was an arbitrable dispute, and that police sergeants would be exposed to immediate and irreparable harm if the court did not enjoin the Department from implementing the program. In moving to dismiss the SBA's petition, the City argued that the Union had not shown how any award that an arbitrator might grant would be rendered ineffectual, how the balance of the equities were in the SBA's favor, or how the Union's members would suffer irreparable injury without an injunction.

On November 8, 1991, Supreme Court Justice Stanley Sklar granted the SBA's petition for a preliminary injunction pending completion of the grievance arbitration process, finding that an arbitrator's award "would be

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[5] CPLR §7502.(c) provides a means for obtaining a stay pending arbitration. It reads as follows:

> (c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with **an arbitrable controversy**, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. [Emphasis added.] The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

When a party seeks a provisional remedy under this section and the question of arbitrability is in issue, the court is required to make a finding as to arbitrability, a determination ordinarily within the original jurisdiction of this Board, pursuant to Section 12-309a.(3) of the New York City Collective Bargaining Law ("NYCCBL").

meaningless to any officer who has been injured or killed."[6] Justice Sklar based his decision, in part, upon the City's "[concession] that this dispute is arbitrable."[7]

POSITIONS OF THE PARTIES

City's Position

Dealing first with the impasse panel's 1980 Report and Recommendations and the 1981 Sergeants' Memorandum of Agreement, the City contends that the SBA did not present an arbitrable claim because neither are subject to the parties' contractual grievance procedure. The City acknowledges that the parties have incorporated significant portions of the Memorandum into their contract, but it asserts that the terms, although substantially similar, are not identical. The City points out that the parties' definition of the term "grievance" does not include arbitration awards or impasse panel recommendations. It also notes that the Memorandum itself contains no dispute resolution mechanism. Thus, according to the City, it is under no contractual obligation to arbitrate a controversy involving either of these documents.

As far as the Radio Motor Patrol article is concerned, the City grounded its initial challenge to arbitrability upon the argument that the SBA failed to identify the specific act or acts alleged to be contractual violations. It asserted that the Union's obligation to do so was especially critical in cases where a contractual provision conflicts with a reserved managerial right. The City views the instant case within this context, arguing that the Department's right to implement solo supervisory patrols is a "fundamental" right of management. In its petition, the City maintained that the Union did not satisfy its burden by making a bare allegation that a contract provision has

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[6] Toal v. Brown, Index No. 29831/91 (N.Y. Sup. Ct. Nov. 8, 1991).

[7] Toal, citing a letter brief from the City's Assistant Corporation Counsel dated November 1, 1991.

been violated; to the contrary, according to the City, where a managerial right is involved, the Union assertedly had to show the presence of a substantial contractual issue.

The City's petition conceded that the Radio Motor Patrol article cited by the Union "sets forth the parameters within which the parties have agreed that solo supervisory patrols can occur." It also conceded that the parties "have had many discussions on the topic of the reinstatement of the solo supervisory patrol program, including grievance hearings held in accordance with the [contractual] grievance procedure." The City insisted, however, that it could not determine the issues remaining in dispute because the Union assertedly did not identify the managerial actions that violate these contractual provisions. In the City's view, the SBA is "apparently seeking to arbitrate any and all issues involving solo supervisory patrols." The City speculated that some aspects of the dispute may be beyond contractual limitations, but it maintained that it could not tell, because the Union's claim was too non-specific.

In its reply papers, however, the City took a sharply different tack, revising its theory after acknowledging that the SBA counsel's letter dated October 2, 1991, overcame its initial argument regarding the lack of specificity. Its new position focuses on the content of the letter. It argues that although specific, the allegations spelled out in the letter fall short of establishing a nexus between the acts complained of and the contractual Radio Motor Patrol article. Specifically, the City contends that the collective bargaining agreement does not require the Department to review and update any aspect of the solo supervisory patrol; it does not require the Department to inform sergeants of what is contained in their contract; and it does not require the Department to keep any particular information -- only that it provide the Union with relevant information. In its defense, the City maintains that the SBA never requested any documents in which it might have been interested.

The City also goes to great length, in its reply, to argue that the parties' contractual recognition clause is insufficient to serve as a basis for the arbitration of a solo supervisory patrol grievance.

Union's Position

The SBA maintains that the 1981 Sergeant's Memorandum of Agreement is arbitrable because the substance of the Memorandum is indistinguishable from that of the contractual Radio Motor Patrol article. Their texts are so interrelated, according to the Union, that any deviation in wording between the two documents is of semantic rather than legal significance. The Union also asserts that the parties have incorporated the "prior awards and agreements" referred to by the City in its petition into the Radio Motor Patrol article of the contract. It contends that the alleged incorporation of the Memorandum and the impasse panel's 1980 Report and Recommendations negates the City's argument that the SBA is seeking to expand the scope of the parties' arbitration agreement.

In the alternative, however, the SBA argues that even if this Board does not agree that the Sergeant's Memorandum of Agreement is a basis for arbitration, the parties' contractual obligation to arbitrate is broad enough to cover an allegation that the solo supervisory patrol plan breaches the Radio Motor Patrol article by itself. The Union insists that the nexus is clear, and that it will provide more than sufficient evidence in arbitration to establish that the Department violated a contractual provision alone, without having to rely upon either the Memorandum or the 1980 Report and Recommendations of the impasse panel.

Finally, the SBA rejects both the City's argument that the implementation of the solo supervisory patrol program is a valid exercise of the Department's fundamental managerial rights, and its claim that the Union has not enunciated sufficiently the aspects of the program about which the SBA is concerned. It points out that the lengthy letter from the Union's counsel

to the Department's Office of Labor Relations, dated October 2, 1991, clearly identifies the specific acts that the Union asserts are contractual violations. The Union also points out that it has submitted counsel's letter to the City on at least two occasions: first, as its original response to the request for information made by the Department's Office of Labor Relations; and the second time as an attachment to its request for arbitration. In the Union's view, the City's claim that it cannot determine the issues that are in dispute "cannot be accepted seriously."

DISCUSSION

The City maintained initially that an arbitrator should not hear the SBA's solo supervisory patrol program grievance for two reasons: first, because the Union did not identify exactly the violations of the contract that allegedly had occurred; and second, because the Union did not establish a contractual nexus.

We believe that the City's lack of specificity claim was untenable, given the grievance history and especially in view of the clarity and detail provided in the Union counsel's letter of October 2, 1991 (pp. 6-8, supra). Apparently after considering the Union's answer, the City recast its argument in its reply papers. However, we find that each of the new objections it raised in its reply concerning the allegations in counsel's letter goes to the merits of the dispute. We have long held that it is not our function to decide the merits of a grievance.[8]

The City argues that the contractual recognition clause cannot provide a basis for the instant grievance. We note, however, that the Union has not cited the recognition clause as a basis for arbitration. The only mention of it was in counsel's letter, which was attached to the request for arbitration with the apparent purpose of affording the responding party a clear delineation of the nature of the Union's complaint. Nowhere in any of the grievance documents or request for arbitration was the recognition clause mentioned. The request for arbitration specified that only one contract provision allegedly had been violated: "Article XXVIII - Radio Motor Patrol."

With respect to the issue of nexus, we need not address the City's contention that neither the Sergeant's Memorandum of Agreement nor the Report and Recommendations of the impasse panel forms the basis for an arbitrable

[8] Decision Nos. B-70-90; B-33-90; B-17-90; B-33-87; B-27-84; B-1-84; B-18-83; B-20-79; B-10-77; B-19-74; and B-12-69.

claim. The Radio Motor Patrol article, standing alone, provides a sufficient nexus for the arbitration of the dispute underlying this case. The parties define the term "grievance" in their collective bargaining agreement as being, among other things, "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement."[9] The City's observation that the Memorandum and the contract language is "similar - yet not identical," is irrelevant. The Radio Motor Patrol article, itself, is sufficiently broad to cover the dispute set forth in the SBA's grievance.

Concerning the City's assertion that the solo patrol program is a "fundamental right of management," we have said many times that the City's right to assign its employees, an action which patently falls within an area of managerial prerogative, may, nevertheless, be circumscribed by rights granted employees in a collective bargaining agreement.[10] Limitations on managerial rights, and on other permissive subjects of bargaining, once agreed to and reduced to a term of a collective bargaining agreement, are binding and enforceable for the duration of that agreement[11] (and for any period of status quo thereafter).[12] The Radio Motor Patrol article in the parties' contract arguably constitutes such a limitation. Since there is no dispute that the Police Department has promulgated the solo supervisory patrol program unilaterally, the SBA has shown the presence of a sufficient contractual nexus for an arbitrator to evaluate the merits of the Union's grievance.

ORDER

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[9] Article XXI - GRIEVANCE AND ARBITRATION PROCEDURE, Section 1.a.(1) - Definitions.

[10] Decision Nos. B-20-91; B-33-90; B-19-89; B-47-88; B-4-87; B-5-84; and B-11-68.

[11] Decision Nos. B-20-91; B-2-71; B-7-69 and B-11-68.

[12] Decision No. B-20-91.

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-1488-92, be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Sergeant's Benevolent Association is granted.

DATED: New York, N.Y.
May 19, 1992

MALCOLM D. MACDONALD
CHAIRMAN

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MEMBER

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MEMBER

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