City v. COBA, 53 OCB 12 (BCB 1994) [Decision No. B-12-94 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

City of New York,

Petitioner,

Decision No. B-12-94

- and-

Docket No. BCB-1611-93
(A-4997-93)

Correction Officers Benevolent:
Association,

Respondent.
---------- X

DECISION AND ORDER

On October 21, 1993, the City of New York, by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance brought by the Correction Officers Benevolent Association ("the Union"). The issue sought to be arbitrated is whether the Department of Corrections ("the Department") is violating "the existing procedure of interpreting a 1977 Order, Rule or Regulation" by requiring some correction Officers at the Correctional Institute for Men to split their earned vacation time into two vacation periods. The Union filed an answer on November 10, 1993. The City filed a reply on November 15, 1993.

Background

The Union is the certified bargaining representative of Correction Officers employed by the Department. Department Rule No. 3.10.80, issued in February 1977, provides:

> The following rules shall govern annual leave allowances for all employees, except per diem, per hour, per session and prevailing rate employees:
> . . .
> c. Earned annual leave allowances shall be taken by the employees at the time convenient to the department. A vacation may be split into not more than two periods. Vacations shall be so scheduled as to equalize, as far as possible, the number on vacation over the entire year to permit the proper and efficient handling of departmental work.

By letter to OLR dated July 15, 1993, the Union instituted a grievance at Step III of the grievance and arbitration procedure.[1] The Union claimed that, in the past, the Department interpreted Rule No. 3.10.80 so that officers entitled to three weeks of vacation time were not required to split their vacation time into two periods. It asserted that, at the Correctional Institute for Men, the Department now requires officers earning

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[1] Section XXI of the collective bargaining agreement, entitled "Grievance and Arbitration Procedure, provides, in relevant part:

> Section 1. Definition
>
> 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;
>
> b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment....
>
> Section 4.
>
> Any grievance of a general nature affecting a large group of employees and which concerns the claimed misrepresentation, inequitable application, violation or failure to comply with the provisions of this Agreement shall be filed at the option of the Union at Step III of the grievance procedure, without resort to previous steps.

three weeks' vacation to split their vacation time into two equal periods.

In a Step III decision dated August 2, 1993, the OLR hearing officer denied the grievance. The Union filed a request for arbitration on August 23, 1993. As a remedy, it seeks "restoration of [the] existing procedure in accordance with [the] February 1977 Order, Rule or Regulation."

Positions of the Parties

City's Position

The City notes that, while it is the policy of the Board to favor arbitration, it can neither create a duty to arbitrate where none exists nor enlarge a duty to arbitrate beyond the scope established by the parties. It maintains that the agreement between the parties to the instant dispute only permits arbitration of alleged violations of rules, regulations or procedures pertaining to mandatory subjects of bargaining.

The instant dispute, the City argues, is not arbitrable because it does not concern a mandatory subject of bargaining. The City asserts that a requirement for an undivided, three-week block of annual leave concerns scheduling, which is a non-mandatory subject of bargaining. Accordingly, it argues, a provision containing such a requirement would not concern a term or condition of employment and would not fall within the contractual definition of a grievance.

In order to proceed to arbitration, the City notes, the party seeking arbitration must establish a nexus between the complained of act and the contractual provision which it cites as the basis for its claim. The City states that, although the Board is not charged with interpreting the parties' collective bargaining agreement, it is often required to do so in the performance of its statutory duty to determine substantive arbitrability. The City cites several cases[2] as evidence that the Board must interpret a provision cited as the basis of a claim in order to determine whether a nexus exists. Further, the City states, in cases concerning management rights, the Union must establish that a substantial issue under the contract exists.

The City cites Decision No. B-4-89, at 94-95, for the proposition that the right of employees to negotiate procedures to obtain vacation and leave time must be reconciled with the employer's right to determine and maintain its staffing requirements, pursuant to § 12-307b of the New York City Collective Bargaining Law ("NYCCBL").[3] The Department's right, the City

[2] Decision Nos. B-19-90; B-41-82; B-11-81; B-7-81.

[3] Section 12-307(b) of the NYCCBL provides, in relevant part:

> 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 its organization and the technology of performing its work....

argues, would be severely restricted if it were prevented from determining the amount of leave that an employee may take at one time.

The City asserts that, under the NYCCBL, management has an "absolute right" to determine and maintain its staffing requirements and to determine scheduling. Inherent in this right, it maintains, is the right to determine when and for how long employees may take vacations. The City argues that the 1977 rule does not permit Correction Offers to take all of their annual leave at one time. Indeed, the City claims, the language of the rule emphasizes the Department's control over vacation time by stating that it must be taken at the Department's convenience. For this reason, the City asserts, there is "no nexus between Article XVIII, COBA's claim that the Department has refused certain of its members the opportunity to take their annual leave in one three-week period, and the 1977 rule...."[4]

In its reply, the City argues that a "procedure" is a multi-step approach to performance in furtherance of the employer's mission and asserts that the subject of the instant grievance is

[4] Article XVIII of the collective bargaining agreement was apparently cited by the City in error. It addresses discrimination against Correction Officers because of union activity, and was not relied upon by the Union in the instant case.

unrelated to a method, plan or course of action. It cites Decision Nos. B-12-87 and B-25-83 for the proposition that a past practice is not a procedure, and does not become a procedure merely as a result of the passage of time. The City also maintains that a procedure must be in writing in order to be the subject of a grievance.

The City asserts that the Union inappropriately attempts to amend its grievance by invoking Article XI, § 2[5] of the collective bargaining agreement in its answer. It maintains that, throughout the grievance process, the Union claimed arbitration under § 1(b) of the contract, although § 1(a) is the section appropriately invoked for violations of contractual provisions.

Union's Position

The Union states that when the grievance concerns the scheduling of vacations, "the contract between the parties expands the definition of grievance at Article XI, Section 2...." According to the Union, "when the grievance relates to the scheduling of vacations not in accordance with existing procedures, Article XXI, Section lb of the COBA contract is broadened by Article XI, Section 2 and grievances relating thereto are not limited to affecting terms and conditions of employment."

[5] Article XI, § 2 of the collective bargaining agreement, entitled "Vacations", provides, "[v]acations shall be scheduled in accordance with existing procedures."

The Union asserts that, previously, Correction Officers employed at the Correctional Institute for Men who were entitled to three weeks' annual leave were allowed to choose to take the three weeks at one time. It claims that the procedure has been changed so that these employees are required to split their vacation time into two periods.

The Union maintains that vacation time is a term and condition of employment negotiated between the parties. The manner in which the Department schedules vacations, it argues, is an existing procedure as set forth in Article XI, § 2. The Union asserts that the subject of the grievance in the instant dispute is the alleged violation of existing procedure concerning scheduling of vacations.

Further, the Union argues, there is no requirement that an existing procedure be written, only that it be a course of action unilaterally instituted by the employer to further the mission of the agency. The Union claims that the Department relinquished its right unilaterally to change existing procedures regarding vacations by agreeing to the inclusion of Article XI, § 2 in the contract.

The Union cites previous decisions in which the Board has found arbitrable disputes which it says concern existing procedures regarding increasing caseloads,[6] terminating parking priv-

[6] Decision No. B-7-68.

ileges,[7] and changing work schedules.[8] These cases, the Union argues, are analogous to the instant dispute.

Discussion

At the outset, we will consider the Union's claim, raised for the first time in its answer, that a nexus exists between the disputed action and Article XI, § 2 of the contract. We have consistently denied arbitration of claims alleged after the request for arbitration has been filed. Permitting arbitration of such a claim would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure. Since the Union deprived the City of an opportunity to respond to this theory at the appropriate time, we will not consider its argument now.[9] However, our ruling regarding that part of the Union's claim that is based on Article XI, § 2 of the contract does not preclude submission of that claim at the appropriate step of the grievance procedure.

This Board is invested, by the New York City Collective Bargaining Law, with the power to determine the arbitrability of disputes arising from collective bargaining agreements under its jurisdiction. Our duty is to inquire whether the parties are

[7] Decision No. B-5-69.

[8] Decision No. B-9-75.

[9] Decision Nos. B-40-88; B-1-86; B-14-84; B-11-81; B-12-77; B-20-74.

obligated to arbitrate their controversies. If they are, we must then determine whether a claim, on its face, demonstrates an arguable relationship between the act complained of and the source of the right alleged to have been violated.[10] If an arguable relationship is shown, the Board will not consider the merits of a case; it is for an arbitrator to decide whether the cited provision applies.[11]

Our national labor policy protects the arbitration process and preserves the right of the proponent of arbitration to have the merits of the case heard by an arbitrator, once its right to arbitration has been established.[12] The United States Supreme Court held in United Steelworkers v. American Manufacturing Co.:

> In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party

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[10] See. e.g., Decision Nos. B-27-93; B-29-92; B-19-89; B-65-88; B-28-82. See also Howard v. Daley, 27 N.Y.2d 285, 317 N.Y.S.2d 326 (1970); Board of Education of Lakeland Central School District of Shrub Oak v. Barni, 49 N.Y.2d 311, 425 N.Y.S.2d 554 (1980).

[11] Decision Nos. B-27-93; B-24-92; B-59-90.

[12] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960) ; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); John Wiley & Sons. Inc. v. Livingston, 376 U.S. 543 (1964).

> is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not part of a plant environment may be quite unaware.

Again, in AT&T Technologies,[13] the Supreme Court held, "even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration but, as the parties have agreed, by the arbitrator."

It is the Board's long-held position that, in conformity with the statutory policy of the NYCCBL favoring and encouraging the arbitration of grievances,[14] doubtful issues of arbitrabi lity are to be resolved in favor of arbitration.[15] The New York Court of Appeals has held, "[t]hat the substantive provisions of

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[13] AT&T Technologies. Inc. v. Communication Workers of America, 475 U.S. 643 (1986).

[14] NYCCBL § 12-302.

[15] See, e.g., Decision Nos. B-52-91; B-58-90; B-65-88; B-16-80; see also Warrior & Gulf, supra, wherein the Court held, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

the contract which are the subject of the grievance may be ambiguous does not serve to bar arbitration. It is a function of the arbitrator, and not the courts, to resolve any uncertainty as to those substantive rights and obligations of the parties[16]" and that:

> [t]he fact that the substantive clauses of the contract might not support the grievances put forth by the union is irrelevant on the threshold question of arbitrability. It is for the arbitrator, and not the courts, to resolve any uncertainty concerning the substantive rights and obligations of these parties (citations omitted].[17]

Again, in Board of Education of the City of New York v. Glaubman[18] the Court of Appeals cautioned, "[a]lthough we noted [in Liverpool][19] that the choice of the arbitration forum should be 'express' and 'unequivocal' we did not mean to suggest that hairsplitting analysis should be used to discourage or delay demands for arbitration in public sector contracts."

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[16] Education of the Watertown City School District v. Watertown Education Ass'n, 74 N.Y.2d 912, 549 N.Y.S.2d 652 (1989); Board of Education. Mt. Sinai Union Free School District v. New York State United Teachers, 51 N.Y.2d 994, 435 N.Y.S.2d 977 (1980).

[17] Wyandanch Union Free School District v. Wyandanch Teachers Ass'n, 48 N.Y.2d 669, 421 N.Y.S.2d 873 (1979) ; see also Board of Board of Education of Deer Park Union Free School District v. Deer Park Teachers Ass'n,50 N.Y.2d 1011, 431 N.Y.S.2d 682 (1980).

[18] 53 N.Y.2d 781, 439 N.Y.S.2d 907 (1981).

[19] Acting Superintendent of Liverpool Central School District
v. United Liverpool Faculty Ass'n. 42 N.Y.2d 509, 399 N.Y.S.2d 189 (1977).

In Associated Brick Mason Contractors,[20] the court held that it will order arbitration "if the party seeking arbitration has made a claim that on its face is governed by the contract, even if the claim appears to be frivolous." In the instant case, the contract provides for arbitration of "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment...." The City asserts, without citation, that, "[a]s the Board has made evident, a procedure must be in writing to be grievable. However, in Decision No. B-27-86 we held that it was not necessary that a grievance allege a violation of a written policy because the contract did not specify that the policy in question be in writing.[21] The City has not demonstrated that the agreement between the parties stipulates that a procedure must be written in order to be the basis of an arbitrable dispute. Where, as here, the contract provides for arbitration of an alleged violation of a procedure without specifying that it must be written, we will not bar arbitration on the grounds that the procedure was not in writing.

The City members issued a dissent in the instant proceeding on April 22, 1994. The dissenting members state, "[it] is clear on the face of the Union's claim that it is grieving a past practice and not a procedure." We disagree. It is the City, not

[20] Associated Brick Mason Contractors. Inc. v. Harrington, 820 F.2d 31, 125 LRRM 2648 (2d Cir. 1987).

[21] See also Decision No. B-36-88.

the Union, that characterizes the claim as one based upon a past practice. The Union only claims that a departmental procedure has existed relating to the contract provision which it claims has been violated.

Citing Decision No. B-12-87, the dissenting members argue that a procedure is a "multi-step approach to performance in furtherance of the employer's mission" and assert that the subject of the instant grievance is unrelated to a method, plan or course of action. Further, they argue:

> [t]he majority contends that as long as the grieved action is arguably a procedure, the grievance is a suitable factual issue for an arbitrator to resolve. That contention is in direct opposition to the Board's previous holdings that the mere substitution of the word "procedure" or "policy" for the term "past practice" is insufficient to create a factual issue. [Decision Nos.] B-15-79; B-12-77. Thus, the mere recitation of the word "procedure" cannot transform a practice into a procedure.

In Decision No. B-15-79, the union attempted to arbitrate a grievance concerning an alleged "manipulation" of night shift differential. We denied arbitration because the union had not shown how the city violated the article of the contract which provided for arbitration of departmental procedures. Other than referring to "long standing Police Department policy," the Union failed to identify a rule, regulation or procedure of the Department that had been violated. We stated, "[b]esides the hearsay, statements made in the handwritten document authored by [the grievant], there is no documentation or identification of this alleged 'rule or regulation.' An order to arbitrate a grievance

alleging violation of a departmental rule, regulation or procedure presupposes that the rule, regulation or procedure does exist. . . .” In the instant case, the Union has identified a Department rule and has alleged that a procedure has existed since 1977 to implement that rule.

Decision No. B-12-77, also cited in the dissent, is inapposite. In that case, we found a grievance not arbitrable; in the absence of a collective bargaining agreement, the grievant did not have standing under Executive Order 83 because he did not show that he had been assigned out-of-title work. We stated:

> [t]he Board is troubled by this matter and by the ruling which, in the circumstances of this case, it is constrained to make. . . . [I]n finding the instant grievance not arbitrable we are not holding that such grievances are not proper and appropriate subjects for submission to arbitration generally, but that in the absence of any agreement to arbitrate disputes and relying solely upon Executive Order 83, which consents only to arbitration within a limited group of grievances and complaints, the Union in this case is bound by such limitations and has not established the right to arbitrate the instant grievance. . . .

In the instant case, there is no question that the parties have agreed to arbitrate grievances concerning alleged violations of Department procedures. The question is whether the Union has demonstrated an arguable nexus between the alleged violative act and the section of the contract which provides for such arbitration. We caution the parties, however, that the definition of a grievance set forth in the parties' contract does not authorize the arbitration of a violation of a claimed past practice.[22]

[22] Decision Nos. B-13-93; B-24-92; B-20-90; B-11-90.

our submission to arbitration of a claimed violation of an alleged procedure should not be construed as support for the contention that a past practice is the equivalent of a procedure.

The Union claims that the Department violated its "existing procedure of interpreting a 1977 Order, Rule or Regulation," which it claims allowed some Correction officers to take their vacations in one block of time. The City makes several arguments concerning the 1977 Department order cited by the Union. It maintains that the Board must interpret the rule in order to determine whether a nexus exists and that the Union must establish a substantial issue under the contract. It argues that the 1977 rule does not permit Correction Officers to take all of their annual leave at one time and that the rule emphasizes the Department's control over vacation time by stating that it must be taken at the Department's convenience. Thus, the City asserts, there is no nexus between the cited rule and the issue in dispute. Moreover, in their dissent, the City members state:

> What the language contained in the Union's grievance makes apparent is that the Union is, in reality, seeking to arbitrate the very exercise of discretion that the 1977 Rule confers upon the Agency. The Rule states, "Earned annual leave allowance shall be taken by the employees at the time convenient to the department. A vacation may be split into no more than two periods. Vacations shall be so scheduled as to equalize, as far as possible, the number on vacation over the entire year to permit the proper and efficient handling of department work." [Emphasis added.] A cursory examination of the Rule demonstrates that the Rule grants the Department discretion to determine whether a vacation is to be split, with a limitation upon the number of periods. The substance of the Union's claim is precisely the exercise of discretion as permitted by the rule.

The question of whether the Union's allegation concerns a violation of a procedure requires an interpretation of the contract between the parties, which is properly left to an arbitrator.[23] As the court held in International Brotherhood of Electrical Workers. L. 1228 v. WNEV-TV New England Television Corp.:

> [o]nce the district court made the threshold finding that plaintiff's claims "appeared to create an issue sufficiently substantial to require submission to an arbitrator," its judicial function was at an end. When it proceeded to find that the contract provisions themselves did not support plaintiff's interpretation . . . it entered the proscribed area of determining whether there is particular language which will support the claim.[24]

Furthermore, any examination of the 1977 rule would require an examination of the Union's claim. If we chose to undertake such an examination, as the City urges us to do, we would stray beyond the mandate of this Board and would be in contradiction of established case law and labor relations practice.

The grievance herein concerns the Union's claim that the Department has violated an existing procedure which affects a term or condition of employment. The collective bargaining agreement provides for arbitration of such a claim. The City maintains that the scheduling of vacations does not constitute a

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[23]Decision Nos. B-40-93; B-27-93; B-49-92; B-30-92; B-8-92; B-62-91; B-55-91; B-52-91; B-46-91; B-45-91; B-24-91; B-76-90; B-69-90; B-58-90; B-25-90; B-10-90; B-73-89; B-71-89; B-69-89; B-64-89; B-27-89; B-20-89; B-19-89; B-13-89; B-2-89; B-71-88; B-65-88; B-6-88; B-4-85; B-37-80; B-3-78; B-19-75; B-8-68.

[24]778 F.2d 46, 120 LRRM 3469 (lst Cir. 1985).

"term or condition of employment," since that phrase refers only to mandatory subjects of bargaining. Section 201(4) of the Civil Service Law provides that "[t]he term 'terms and conditions of employment' means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment...."

We have held previously that time and leave benefits are within the general subject of hours.[25] While the scheduling of leave is otherwise a management prerogative, the Department has arguably limited its prerogative by adopting the 1977 rule and, allegedly, by adopting procedures which interpret and apply that rule. Under these circumstances, the questions of whether the parties intended the expression "affecting terms and conditions of employment" to have the meaning offered by the City, and whether scheduling of vacations affects a term and condition of employment, are matters of contract interpretation, which are for an arbitrator to decide.[26]

The issue of whether a claimed procedure for the implementation of Rule No. 3.10.80 exists, and if so, whether the Department violated a provision of the contract, are matters for an arbitrator to determine.[27] To hold otherwise would involve this Board in interpretations of the rule and the collective bargaining agreement. Such an exercise is clearly contrary to the body

[25] Decision Nos. B-45-92; B-59-89; B-4-89.

[26] See Decision No. B-9-75.

[27] Decision Nos. B-27-89; B-36-88; B-30-86; B-29-85.

of law beginning with Lincoln Mills and the Steelworkers Trilogy and continuing until today.[28] Accordingly, the instant petition challenging arbitrability is dismissed.

[28] See, e.g., Long Island Univ. Faculty Federation, L. 3998, NYSUT v. Board of Trustees of Long Island Univ., 91 A.D. 2d 686, 457 N.Y.S. 2d 325 (1982); Bechtel Construction Inc. v. Laborer's Int'l. Union of North America, AFL-CIO, 812 F.2d 750, 124 LRRM 2785 (1st Cir. 1987); Strathmore Paper Co. v. United Paperworkers Int'l Union, 900 F.2d 423, 134 LRRM 2012 (1st Cir. 1990); Truck Drivers Local Union No. 807 v. Regional Import & Export Trucking Co., Inc. 944 F.2d 1037, 138 LRRM 2486 (2d Cir. 1991); Trustees of Columbia Univ. v. Local 1199 Drug. Hospital and Health Care Employees Union, 805 F.Supp 216 (2d Cir. 1991).

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 instant petition challenging arbitrability docketed as BCB-1611-93 be, and the same hereby is, dismissed; and it is further,

ORDERED, that the instant Request for Arbitration by the Correction Officers Benevolent Association be, and the same hereby is, granted.

Dated: New York, New York
May 19, 1994

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

I dissent. DENNISON YOUNG, JR.
MEMBER

I dissent. ANTHONY COLES
MEMBER

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK,

Petitioner,

Decision No. B-12-94

- and -

Docket No. BCB-1611-93
(A-4997-93)

CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

Respondent.

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DISSENT OF CITY MEMBERS YOUNG AND COLES

We respectfully dissent from the majority's opinion that the Union's claim represents an arbitrable grievance. While we are mindful of the statutory policy of the NYCCBL favoring the arbitration of grievances, the majority's decision creates a right to arbitration where none exists. Ile Union's claim, on its face, fails to state a grievance as defined by Article XXI, Section 1(b) of the parties' collective bargaining agreement. Section l(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 . . . . " Under Section I(b) the union must identify a particular "rule, regulation or procedure" that it claims has been violated. The Union's claimed grievance fails to meet the definition since it involves neither a rule, regulation or procedure.

It is clear on the face of the Union's claim that it is grieving a past practice and not a procedure. Ile Board has always held, and upholds today, that past practices are not arbitrable under Section 1(b). BCB Decision Nos. B-13-93; B-24-92; B-20-92; B-11-90. The Board has previously defined a procedure as "generally consist[ing] of a course of action or a method or

plan, unilaterally instituted by the employer to further the mission of the agency." BCB Decision No. B-12-87. The Union invokes the word "Procedure" in its claim that the City violated its "existing procedure of interpreting 1977 Order, Rule or Regulation by requiring Officers at said Institute entitled to three weeks vacation to equally split such vacation into two periods instead of taking all three weeks at the same time as in the procedure." The majority contends that as long as the grieved action is arguably a procedure, the grievance is a suitable factual issue for an arbitrator to resolve. That contention is in direct opposition to the Board's previous holdings that the mere substitution of the word "procedure" or "policy" for the term "past practice" is insufficient to create a factual issue. B-15-79; B-12-77. Thus, the mere recitation of the word "procedure" cannot transform a practice into a procedure.

The Union, in its Answer to the City's Challenge to Arbitrability, describes the "procedure" allegedly violated as follows: "The existing procedure. at CIFM was to follow [the 1977] Rule in a [particular] manner." It is apparent from the Union's own language that the Union's "grievance" does not involve a procedure, but rather the Agency's exercise of management discretion as provided for under the 1977 Rule. Exercising discretion is neither a "course of action", "method" or "plan". Thus, by the Board's own definition, the Union's claim fails to meet the definition of a procedure.

What the language contained in the Union's grievance makes apparent is that the Union is, in reality, seeking to arbitrate the very exercise of discretion that the 1977 Rule confers upon the Agency. The Rule states, "Earned annual leave allowance shall be taken by the employees <u>at the time convenient to the department</u>. A vacation <u>may</u> be split into no more than two periods. Vacations shall be so scheduled as to equalize, as far as possible, the number on vacation over the entire year to permit the proper and efficient handling of departmental work."

(Emphasis added.) A cursory examination of the Rule demonstrates that the Rule grants the Department discretion to determine whether a vacation is to be split, with a limitation upon the number of periods. The substance of the Union's claim is precisely the exercise of discretion as permitted by the rule.

Moreover, the fact that the Department chose in the past to exercise its discretion by allowing Correction Officers to take three weeks of annual leave in only one segment does not constitute a waiver of the Department's right, under the 1977 Rule, to require Correction Officers to split their leave. Article XXVI of the parties' collective bargaining agreement states, in pertinent part: "Except as otherwise provided in this Agreement, the failure to enforce any provision of this Agreement shall not be deemed a waiver thereof. . . ." Article XXVI applies to the 1977 Rule, as the 1977 Rule is a grievable rule, regulation or procedure. The Department's election in the past to exercise its designated discretion in a certain manner within the parameters of the 1977 Rule does not preclude the Department from later electing to exercise its discretion in another manner also within the parameters of the Rule. When the Department did not require certain Correction Officers to split their annual leave, the Department did not waive its right under the 1977 Rule to exercise its discretion to require those same Correction Officers to split annual leave in subsequent years.

By finding the Union's claim arbitrable under Section I (b), the majority has gone beyond the parties' agreement as to the definition of a grievance. The majority has opened the door for a party to force arbitration of non-grievable claims simply by creatively invoking the term used in the definition of a grievance, in this case by using the word "procedure". The decision disregards the collective bargaining agreement's definition, which requires that the grievance be limited to procedures, rules or regulations. Thus, the majority's decision today may be read to

have impermissibly expanded the definition of a grievance as defined by the parties in Article XXI, Section I(b) of the collective bargaining agreement.

For all the above reasons, we respectfully dissent.

DATED: New York, New York
April 22, 1994

DENNISON YOUNG, JR.
City Member

ANTHONY COLES
City Member