City & DOC v. COBA, 53 OCB 14 (BCB 1994) [Decision No. B-14-94 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----------x

In the Matter of the Arbitration

-between-

DECISION NO. B-14-94

NEW YORK CITY DEPARTMENT OF CORRECTION and CITY OF NEW YORK,

DOCKET NO. BCB-1593-93 (A-4903-93)

Petitioners,

-and-

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Respondent.

----------x

DECISION AND ORDER

On July 19, 1993, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging a request for arbitration of a grievance that was submitted by the Correction Officers Benevolent Association ("COBA" or the "Union"). The request for arbitration was filed on July 1, 1993. The grievance concerns a Department of Correction requirement that Correction Officers working in the Queens House of Detention must make vacation picks in blocks of 18 days instead of 21 days. The Union filed its answer on August 13, 1993. The City filed a reply on August 30, 1993.

BACKGROUND

By letter dated April 7, 1993, the Union, on behalf of its unit members assigned to the Queens House of Detention, filed a

grievance at the Step III level of the contractual grievance procedure claiming that:

> In requiring vacation picks at the Queens House of Detention to be for 18 days instead of 21 days the Department of Correction is violating exist-ing procedures. As a remedy, it is respectfully requested that the Department be ordered to cease and desist from the above violation of procedures and be required to offer vacation picks of 21 days.

There is no record of any response by the City to Union's Step III grievance submission.

On July 1, 1993, the Union filed a request for arbitration, claiming that the Department's vacation scheduling practice at the Queens House of Detention was a violation of Article XXI, Section 1.b. of the parties' collective bargaining agreement. Article XXI, Section 1.b. reads, in pertinent part, as follows:

> Section 1. Definition
> For the purpose of this Agreement, the term "grievance" shall mean:
> * * *
> b. a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the agency effecting terms and conditions of employment . . .

Positions of the Parties

City's Position

The City affirms its obligation to arbitrate those disputes that are defined in the parties' collective bargaining agreement. It points out, however, that COBA acknowledges basing this grievance upon an unwritten policy, and it argues that unwritten policies are not part of the contractual definition of a grievance. According to the City, there is a long line of decisions in which this Board held that unless the contractual definition of a grievance includes the right to grieve unwritten policies or past practices, a

grievance based upon such a claim is not within the scope of arbitration. It is the City's contention that COBA has no right to grieve unwritten policies or past practices when the definition of a grievance is limited to written rules and regulations of the employer.

Moreover, the City argues that even if a past practice does qualify as a procedure, this case assertedly does not state an arbitrable claim because the Union does not allege that the contract precludes the Department from amending its existing procedures. In the City's view, if the Union does not have the contractual right to preserve a departmental rule, regulation or procedure, a claim that the amendment or revocation of the procedure is itself a violation of the procedure is not sustainable. In other words, according to the City, just as there is nothing in the agreement that would preclude the amendment or revocation of any written Department of Correction rule or regulation, there is no contractual preclusion to the

amendment or revocation of an unwritten procedure of the Department.

Union's Position

According to the Union, the procedure for Correction Officers taking vacations in 21 day periods, although unwritten, allegedly is well-established and has been followed by the Department for many years. The Union explains that the advantage of this is that added pass days and holidays can be incorporated into the vacation period. In support of its position, COBA contends that Correction Officers assigned to the Queens Criminal Court, across the street, continue to have vacations scheduled in 21 day intervals, consistent with the asserted procedure.

Quoting from an earlier Board decision, COBA notes that a procedure "generally consists of a course of action or a method or plan, unilaterally instituted by the employer to further the mission of the agency."[1] According to the Union, vacations are a term and condition of employment negotiated in the parties' collective bargaining agreement. Thus, it concludes that the manner in which the Department schedules vacations is a "procedure" that falls within the contractual definition of a grievance.

Finally, the Union cites three previous cases in which this Board found that existing procedures were arbitrable. The first concerned a work practice change at the Amsterdam Center of the Department of Social Services that resulted in certain unit members having to "handle a greater share of 'pending cases' than was customary";[2] the second involved the unilateral removal of employees' parking privileges at Coney Island Hospital;[3] and the third concerned the changing of work schedules at a City water pollution control

---

[1] Decision No. B-12-87 at p.3.

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

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

plant.[4] According to the Union, the change in scheduling of vacations clearly falls within this category of cases holding that existing procedures can be arbitrable.

Discussion

It is public policy, expressed in the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[5] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[6] Here, we must decide whether a nexus exists between the act complained of, a restriction on the scheduling of vacations for Correction Officers working in the Queens House of Detention, and the definition of a grievance as it appears in the parties' collective bargaining agreement, which is the source of the Union's asserted right to arbitration.

Superficially, this case seems remarkably similar to a dispute between these same parties over vacation scheduling at the Correctional Institution for Men, also located in Queens.[7] In that case, the Union based its claimed entitlement to arbitration both on the contractual definition of a grievance, which includes agency rules and regulations, and on Department Rule No. 3.10.80, which governs annual leave allowances. We held that once the nexus between the definition of a grievance and the rule was established, alleged violations of the existing procedures concerning the implementation of the

---

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

[5] E.g. Decision Nos. B-5-94; B-33-93; B-24-91; B-76-90; B-73-90; B-52-90; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[6] Decision Nos. B-5-94; B-33-93; B-24-91; B-76-90; B-73-90; B-52-90; B-31-90; B-11-90; B-41-82; and B-15-82.

[7] See Decision No. B-12-94, issued May 19, 1994.

rule become matters of contract interpretation that are for an arbitrator to resolve. This is not very different from a hypothetical situation where the exact text of the rule appears, not as a departmental rule, but rather as a provision in the parties' collective bargaining agreement. In such case, the Union likely would claim that the contractual annual leave allowance provisions were being violated because management had changed the way in which vacations could be selected. We would have little trouble recognizing the nexus between the contractual provision and the dispute to be arbitrated, and we would leave it for the arbitrator to decide how the parties intended their contractual provision to be implemented.

In the instant case, however, COBA cites no departmental rule, regulation or procedure that would provide it with the basis for arbitration that it availed itself of in Decision No. B-12-94. Here, the Union only makes reference to an existing "unwritten procedure," and supports its position on the basis of three earlier Board decisions where we found that existing procedures were arbitrable.

There is a crucial difference in each of those cases that distinguish them from this one. The contractual definition of a grievance in Decision No. B-7-68, concerning increased caseloads, included " . . . a violation, misinterpretation or inequitable application of **existing policy**, orders, rules and regulations, or **then existing practice** . . ." Likewise, the definition of a grievance in Decision No. B-5-69, concerning employees' parking privileges, included "A claimed violation, misinterpretation or misapplication of . . . **existing policy** or orders applicable to the agency by whom the grievant is employed . . ." The third case, Decision No. B-9-75 concerning changed work schedules, involved a similarly worded grievance definition: "A claimed violation . . . [of] **existing policy**, or orders applicable to the agency which employs the grievant . . ." [Emphases added.] In the instant case, the parties' contractual definition of a grievance does not include an "existing policy clause," which could have made the vacation scheduling change

arbitrable.

As we have said, although the policy of the NYCCBL is to promote and encourage arbitration as the selected means for adjudicating and resolving grievances, we cannot create a duty to arbitrate where none exists. Accordingly, we find that no arbitrable issue exists in this case, and we shall grant the City's petition challenging arbitrability.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York, and docketed as BCB-1593-93 be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the

Correction Officers Benevolent Association's in Docket No. BCB-1593-93 be, and the same hereby is, denied.

DATED: New York, N.Y.
June 28, 1994

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

DENNISON YOUNG, JR.
MEMBER

ANTHONY COLES
MEMBER