NYC Police Dept. & City v. Detectives Endowment Assoc. 57 OCB 4 (BCB 1996) [Decision No. B-4-96]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
- between -	
New York City Police Department and the City of New York, Petitioners,	
- and -	Decision No. B-4-96 Docket No. BCB-1762-95
Detectives' Endowment Association, Respondent.	

DECISION AND ORDER

On June 23, 1995, the New York City Police Department ("Department") and the City of New York ("City") filed a verified petition challenging the arbitrability of a grievance filed by the Detectives' Endowment Association ("Union"). The grievance claims that the respondents violated Article III,[1] Article XV[2]

[1] Article III of the contract ("Hours and Overtime") provides, in relevant part:

Section 1(a)

(i) Effective July 1, 1984 through December 31, 1985, ordered overtime of an emergency nature, authorized by the Police Commissioner or Chief of Department, which had previously to October 1, 1968 been compensated for in cash at the rate of time and one-half shall be compensated for 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 compensa-tory time off shall be computed on the basis of completed fifteen (15) minute segments.

(ii) All ordered and/or authorized overtime in excess of 40

(continued...)

and Article XXIV[3] of the contract between the parties[4] by their "failure to comply with our contract with respect to employees' right to request, and use, compensatory time ("comp time") in

---

[1](...continued)
hours in any week or in excess of the hours required of an employee by reason of the employee's 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 completed fifteen (15) minute segments.

[2] Article XV, § 11 of the contract ("Lump Sum Payments") provides, in relevant part:

Where an employee has an entitlement to accrued annual leave and/or compensatory time, and the City's fiscal condition requires employees who are terminated, laid off or who choose to retire in lieu of layoff to be removed from the payroll on or before a specific date, or where an employee reaches the mandatory retirement age, the employer shall provide the monetary value of accumulated and unused annual leave and/or compensatory time allowances standing to this credit in a lump sum. Such payments shall be in accordance with the provisions of Executive Order 30, dated June 24, 1975....

[3] Article XXIV ("Optional Work During Vacations") provides, in relevant part:

Section 2.

An employee who so volunteers [to work during a vacation period] shall be compensated at the employee's regular straight-time rate of pay for all work performed during the assigned platoon's regular hours of work. Except as otherwise provided in this Article, all other provisions of this Agreement shall be applicable to work so performed.

[4] The collective bargaining agreement runs from October 1, 1992 until February 21, 1996. It was signed on March 6, 1995.

lieu of cash [and the] City's insistence that the [Fair Labor Standards Act ("FLSA")] bank be used rather than [the] 'contract compensatory time bank'." It was filed on behalf of "Det. James Carey and all detectives similarly situated," and was characterized as an "ongoing class action." As a remedy, the Union requests that the City be directed to "follow [the] contract. Employees have a contractual right 'at the sole option of the employee' to elect cash or compensatory time." The Union filed an answer on July 10, 1995. The City filed a reply on July 20, 1995.

On October 10, 1995, the Union sent by facsimile an article from the December 23, 1994 edition of the Daily Labor Report, with copies to the City and the Department. The article discusses Heaton v. Moore, 43 F.3d 1176 (8th Cir. 1994), a case in which the court found a violation of the FLSA where a public employer forced employees to use compensatory time ("comp time") as it directed. A note that the Union attached to the article stated that the decision in the Eighth Circuit case was dispositive of the instant case. We will not consider the Daily Labor Report article. The cited case, while relevant to the rights of union members under the FLSA, is not relevant to the limited issue of arbitrability before us.

Background

When state and local governments became subject to the provisions of the FLSA, the Department established three comp time banks to satisfy the record-keeping requirements of the statute: (1) comp time for FLSA overtime earned after April 14, 1986; (2) comp time for non-FLSA overtime earned after April 14, 1986; and (3) comp time earned before April 15, 1986. By Operations Order 79, dated July 14, 1989 (as amended by Operations Order 79-1, dated August 17, 1989), the Department directed that if its employees chose to use accrued comp time, they were required to use it in the order listed above.

The Union assumes that it would be to the advantage of its members to be free to choose which comp time bank to use. It has offered no information about the named grievant, Det. James Carey.

Positions of the Parties

City's Position

The City asserts that the Union has failed to show an arguable relationship between the alleged violative act and a provision of the contract. It states that Article III of the contract gives employees who perform overtime work the right to choose between receiving compensation in cash or comp time, but not the right to choose the order in which to use the various comp time banks. Since the grievants were not denied the right to choose between compensation in cash or comp time, the City

asserts, it has fully complied with the terms of Article III.

According to the City, Article XV, § 11 provides that employees will receive a lump sum payment for unused comp time if they are terminated or laid off, or if they reach mandatory retirement age or choose to retire in lieu of payoff. It maintains that, because the grievance does not allege that the Department has failed to pay any employee according to this section of the contract, there can be no nexus between the grievance and Article XV, § 11.

Further, the City asserts, Article XXIV, § 2 provides for compensation of work performed during vacation periods but grants no rights with respect to choosing among comp time banks. For this reason, it argues, there can be no nexus between the grievance and this provision of the contract.

If the Union is alleging a violation of the FLSA, the City maintains, the Board has held that no arbitrable issue is presented unless the parties have included alleged violations of Federal and state statutes within the range of matters to be arbitrated. The City argues that the grievance procedure provided by Article XXI of the contract does not include alleged violations of the FLSA.[5] In addition, the City notes that the

---

[5] Article XXI of the contract ("Grievance and Arbitration Procedure") provides, in relevant part:

Section 1. Definitions

a. For the purposes of this Agreement, the term "grievance"
(continued...)

parties have negotiated three contracts since Operations Order 79 was issued, and could have included this matter in the subsequent agreements.

In its reply, the City argues that the grievance is barred by the doctrine of laches. Citing what it characterizes as the Board's definition of the elements of laches, it argues that Operations Order 79 was issued six years ago, that there is nothing in the record to explain or excuse the Union's delay in filing a grievance, and that the Department assumed that the Union assented to its actions because it remained silent. Further, the City asserts, it has relied on the Union's inaction

---

[5](...continued)
shall mean:

(1) a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;

(2) a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Sec-tion 1(a), the term "grievance" shall not include disci-plinary matters;

(3) a claimed violation, misinterpretation or misapplication of The Guidelines for Interrogation of Members of the Department referred to in Article XVIII of this Agree-ment;

(4) a claimed improper holding of an open-competitive rather than a promotional examination;

(5) a claimed assignment of the grievant to duties substantially different from those stated in the grievant's job title specifications.

in making fiscal projections and would be prejudiced by allowing the grievance to proceed to arbitration.

Union's Position

The Union states that "[t]he nexus is the broad arbitration clause, the violation of contract articles and a clear harm to the hours, wages and working conditions of the grievants." It asserts that the grievants' legally protected rights have been violated, and that such an alleged violation requires a decision on the merits by an arbitrator.

The Union argues that the right to accrue comp time includes a right to use the time as the employee wishes. In addition, it states that "the FLSA permits the use of [its own provisions] or the use of a contract or agreement whichever is more beneficial to the employee." The Union maintains that this constitutes an issue of contract interpretation which must be resolved by an arbitrator. It asserts that the grievance claims a violation of the contract, not of the FLSA, "except insofar as the FLSA impacts upon the collective bargaining agreement." It also claims that the City is attempting to interpret § 2 of Article XXIV, and that this is a question for an arbitrator to decide.

The Union counters the City's argument concerning renegotiation of the contract by stating that the City has never

attempted to renegotiate Article XXVIII of the contract.[6] According to the Union, "this is the 'No Waiver' clause of the contract which is free of any ambiguity and states, inter alia, 'the failure to enforce any provisions of this Agreement shall not be deemed a waiver thereof.'"

Discussion

We will first consider the City's defense of laches. An otherwise arbitrable claim may be barred by laches if the City establishes that the claimant was guilty of significant delay after obtaining knowledge of the claim; that the delay was unexplained or inexcusable; and that it caused injury and/or prejudice to the defendant's ability to present a defense against the claim.

In the instant case, the remedy of laches is unwarranted. Because the City first raised this defense in its reply, the Union had no opportunity to address the issue; therefore, we cannot determine whether the delay was unexplained or inexcusable. Furthermore, Article XXVIII of the contract expressly provides that "the failure to enforce any provision of this Agreement shall not be deemed a waiver thereof." Since the

---

[6] Article XXVIII of the contract ("No Waiver") provides:

Except as otherwise provided in this Agreement, the failure to enforce any provision of this Agreement shall not be deemed a waiver thereof. This Agreement is not intended and shall not be construed as a waiver of any right or benefit to which employees are entitled by law.

Union has identified a grievant who continues to be harmed by the City's alleged actions and Article XVIII provides that the Union's failure to enforce any provision of the contract may not be deemed a waiver thereof, the City's claim of prejudice is without merit.

When the City challenges the arbitrability of a grievance, we must first determine whether the parties are contractually obligated to arbitrate disputes and, if they are, whether the acts alleged in the grievance are covered by that contractual obligation.[7] Here, the contract provides a grievance and arbitration procedure, but the parties disagree as to whether the instant matter is arbitrable within the meaning of the contract. The burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached.[8] If the Union cannot show such a nexus, the grievance will not proceed to arbitration.[9]

The Union argues, essentially, that if it does not agree with the City about whether a contract provision provides the requisite nexus for arbitration, the disagreement constitutes a question of contract interpretation which automatically must be decided by an arbitrator. Under the New York City Collective Bargaining Law, however, this Board is charged with the task of

---

[7] See, e.g., Decision Nos. B-52-91; B-19-89; B-65-88.

[8] Decision Nos. B-28-92; B-55-91; B-58-90; B-1-89.

[9] Decision No. B-10-92.

making threshhold determinations of substantive arbitrability. It is sometimes difficult to determine valid issues of substantive arbitrability without crossing the line separating them from issues which involve the merits of a particular case. It has been our practice in such cases to allow limited incursions upon the realm of the arbitrator which are essential and unavoidable in determining threshhold questions of substantive arbitrability.[10] Here, we find no nexus between the City's acts and the contract provisions alleged to have been violated.

We agree with the City that Article III of the contract gives employees who perform overtime work the right to choose between receiving payment in cash or comp time, but does not address the alleged right to choose the order in which to use the various comp time banks. Since the Union has not claimed that the grievants were denied the right to choose between payment in cash and comp time, we find no nexus between Article III and the acts complained of by the Union.

Article XV, § 11 provides that employees will receive a lump sum payment for unused comp time if they are terminated or laid off, or if they reach mandatory retirement age or choose to retire in lieu of payoff. The City correctly maintains that, because the grievance does not allege that the Department has failed to pay any employee according to this section of the

[10] Decision Nos. B-29-92; B-14-93; B-19-92; B-52-91.

contract, there can be no nexus between the grievance and Article XV, § 11. Similarly, Article XXIV, § 2 provides for compensation of overtime work but grants no rights with respect to choosing among comp time banks. For this reason, we find no nexus between the grievance and that provision of the contract.

The Union maintains that "the FLSA permits the use of [its own provisions] or the use of a contract or agreement, whichever is more beneficial to the employee," and argues that the statutory language presents an issue of contract interpretation. It then claims that the grievance alleges a violation of the contract, not of the FLSA. The question of whether the City and the Department have complied with a Federal statute is inappropriate in this forum. By negotiating the contractual grievance and arbitration procedure, the parties have agreed upon the kinds of disputes to be brought to arbitration. The City is correct in maintaining that disputes based on Federal statutes are not expressly arbitrable under the contract between the parties.

Accordingly, for all of the above reasons, the instant petition challenging arbitrability is granted and the request for arbitration is denied. In making this finding, we have not considered the merits of the Union's arguments concerning the FLSA. Therefore, our determination is made without prejudice to any rights that the Union may have in another forum.

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 in Docket No. BCB-1762-95 be, and the same hereby is, granted; and it is further,

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

Dated: New York, New York
January 31, 1996

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

Saul G. Kramer
MEMBER

George Nicolau
MEMBER

I dissent. Jerome E. Joseph
MEMBER

I dissent. Robert Bogucki
MEMBER