OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration
between
CITY OF NEW YORK and the
DEPARTMENT OF CORRECTION,

Petitioners,

Decision No. B-28-97
Docket No. BCB-1861-96
-and- (A-6404-9)

CORRECTION OFFICER'S BENEVOLENT
ASSOCIATION,

Respondent.
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DECISION AND ORDER

On October 1, 1996, the Department of Correction ("DOC") and the City of New York (hereinafter collectively referred to as "City") , appearing by its Of f ice of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Correction Officer's Benevolent Association ("Union").

By letter dated November 20, 1996, the Trial Examiner advised the Union that the time within which to file an answer, pursuant to §1-07(h) of the Revised Consolidated Rules of Practice and Procedure of the Office of Collective Bargaining, had lapsed. The letter also advised that, notwithstanding the foregoing, and with the prior consent of the City, an answer could still be submitted. The Union failed to file an answer or otherwise respond to the Trial Examiner's letter. By letter dated January 23, 1997, the Trial Examiner notified the Union that it could submit an answer, no later than February 6, 1997, conditional upon obtaining the consent of the

City; otherwise, a decision would be rendered based on the existing record. The Union submitted its answer on February 3, 1997.

The answer was returned to the Union on February 6, 1997, because it was neither verified nor did it contain proof of service. The Union submitted proof of service on February 24, 1997, but failed to include its answer, therefore, the proof of service was returned. The Union was given until March 12, 1997 to re-submit its answer. On March 3, 1997, the Union re-submitted an unverified answer.

By letter dated March 7, 1997, the City requested that the Union's answer not be accepted because of its untimeliness. Pursuant to a conference on March 10, 1997, the parties agreed that the Union would have until April 4, 1997 to submit its answer, which the Union did. The City requested, and was granted, an extension until May 1, 1997 to submit a reply, which was summarily filed on April 29, 1997.

Background

On or about January 17, 1996, the grievant, Corrections Officer ("CO") Adrian Guerra, filed a Step II grievance.[1] The grievance states that, as it is now mandatory that Cos participate in jury duty, Cos working a 4x2 shift (four days on, two days off) who are summoned for jury duty Monday through Friday should be given Saturday and Sunday as pass days.

[1] In its petition, the City claimed a grievance was filed at Step I on or about January 17, 1996. However, submitted as Exhibit "A" by the City was a copy of a Step II grievance filed on January 17, 1996.

> If an officer must work as a juror Monday through Friday, then N.Y.C. D.O.C. should not be allowed to force officers to work on Saturday and Sunday. Officers should be entitled to their days off and should not be penalized by the department because they are summoned for jury duty. I am sure there are labor laws that forbid "Slave - Labor."

The grievance seeks that Cos summoned to jury duty be placed on a 5x2 shift, with Saturdays and Sundays off. This grievance was denied and appealed to Step III, which was filed on or about July 17, 1996, and denied that same day. The Union then filed a request for arbitration on August 20, 1996.

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City contends that the Union has failed to allege a nexus between the act complained of and any applicable provision of the parties' collective bargaining agreement. The City states that the Union has not cited any violation of the provisions of the parties' collective bargaining agreement, but has merely alleged a violation of McKinney's Consolidated Laws of New York, Judiciary Law §519 ("Judiciary Law §519"), which provides, in part, that an employee summoned to jury duty shall not be subject to discharge or penalty as a result of their ensuing absence. The City asserts that the parties' collective bargaining agreement has no provisions that incorporate violations of Federal or State statutes as being within the range of arbitrable issues.

The City further contends that the Union has failed to allege an arbitrable claim, maintaining that the right to schedule work days and days off constitutes management prerogative and thus falls under the purview of the New York City Collective Bargaining Law ("NYCCBL") §12-307(b).[2] Hence, the City views this as an exercise of its right to establish and modify work schedules, and that it did not affect the number of hours worked, wages, terms and conditions of employment or any other mandatory subject of bargaining.

The City also argues that the Union has advanced, for the first time in its answer, asserted violations of DOC Directive 4250 [3] and Article XXI, §1(b) of the parties' collective bargaining

[2]NYCCBL §12-307(b) states, in pertinent 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 f or 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.

[3]DOC Directive 4250 states, in pertinent part, that: " ... The Department fully recognizes that its officers require sufficient periods of rest and off-duty leisure time in order to function at maximum productivity and efficiency...."

agreement.[4] The City maintains that these claims should be denied because they were not raised in the previous steps of the grievance procedure. Alternatively, the city contends that DOC Directive 4250 is subject to managerial prerogative because it does not limit the City's right to schedule a pass day on the same day a CO has served a day of jury duty. Since the grievance seeks to change work schedules to accommodate employees serving on jury duty, and thus involves a management right, one which in no way has been limited by the parties' collective bargaining agreement, the City maintains that that claim should be dismissed.

Union's Position

In its request for arbitration, the Union claims a violation of Judiciary Law §519, which requires that COs serve jury duty and not be "subject to discharge or penalty" as a result of their ensuing absence.

In its answer, the Union states that the DOC has violated DOC Directive 4250, which acknowledges that COs require sufficient

[4]The Union claims Article XXI, Section 1(b) of the CBA as the basis for the grievance or demand for arbitration, which provides, in pertinent part, as follows:

> 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 affecting terms and conditions of employment, provided that, except as otherwise provided in this Section la, the term "grievance" shall not include disciplinary matters.

periods of rest to ensure maximum productivity and efficiency in the performance of their duties; rest needed as a result of the high levels of tension and stress experienced on the job. Insofar as the aforementioned directive has allegedly been violated, the Union states that, in turn, the violation qualifies as a grievance pursuant to Article XXI, §1(b) of the parties, collective bargaining agreement. The Union further states that the DOC's treatment of COs summoned for jury duty is arbitrary and capricious in that the DOC will permit the COs to be absent from work Monday through Friday, but will make them work Saturday and Sunday if their rotation calls for it.

Discussion

In determining the question of arbitrability, the Board has a responsibility to ascertain whether an arguable relationship exists between the act complained of and the source of the alleged right in the parties' collective bargaining agreement.[5] The Union must show that the contract provision invoked is arguably related to the grievance to be arbitrated.[6] Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the parties' collective bargaining agreement.

[5]Decision Nos. B-9-89; B-35-86.

[6]Decision Nos. B-53-96; B-10-90; B-35-89; B-19-89; B-9-89; B-4-88; B-35-86.

The grievance stated in the request for arbitration does not state that a contract provision has been violated. Instead, the Union cites Judiciary Law §519, which requires (CO's) to serve jury duty and not be "subject to discharge or penalty" as a result thereof. However, violations of McKinney's Consolidated Laws of New York have not been included by the parties in the parties' collective bargaining agreement as within the range of matters they have agreed to arbitrate. We therefore dismiss that portion of the claim as it fails to establish an arguable nexus with any provision of the parties' collective bargaining agreement.

We also find that to allow the Union to re-arrange the schedules of the (CO's) to comport with jury duty would contravene the DOC's managerial prerogative in this area, and is therefore not an arbitrable issue. Under NYCCBL §12-307, the determination of work schedules is a management prerogative.[7] This prerogative may be limited by voluntary collective bargaining and if so, "must be supported by reference to an express statement of such limitation in the collective bargaining agreement." [8] However, the Union has not cited any provisions of the parties, collective bargaining agreement that contain an "express statement" limiting the DOC's right to set

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[7] The City cites Decision No. B-1-95 (INJ)

> "It is a management right to determine and to change work schedules, provided the change does not affect the number of hours worked, the number of appearances, or other mandatory subjects of bargaining."

[8] Decision Nos. B-33-96; B-50-92; B-23-92. See also Decision Nos. B-24-75; B-10-75; B-5-75; B-6-74; and B-4-69 cited by the City.

work schedules for its employees.

We next turn to the Union's claimed violation of DOC Directive 4250. The Union claims that the DOC has violated this directive by denying Cos adequate periods of rest by requiring Cos summoned to jury duty during their scheduled 4x2 shift to work Saturday and Sunday. The Union claims that this practice constitutes a grievance within the meaning of Article XXI, §1(b) of the parties, collective bargaining agreement. The City states that issues relating to DOC Directive 4250 and Article XXI, §1(b) of the parties' collective bargaining agreement should not be addressed because they were not raised in the grievance procedure or request for arbitration, but were first advanced in the Union's answer. We agree with the City's position. Any alleged violation of the parties' collective bargaining agreement should have been raised at the time of, or prior to, the filing of the Union's request for arbitration, which the Union failed to do. We have "consistently denied the arbitration of claims raised for the first time after the request for arbitration has been filed. Permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure." [9] Thus, to permit the Union to raise these issues in its answer would be antithetical to the collective bargaining process over which we preside, subverting the overall goal of amicable

[9] Decision No. B-2-95. See also, Decision Nos. B-12-94, B-44-91, B-29-91 and B-55-89.

resolution of disputes through dialogue and discussion.

There is nothing in the Union's request for arbitration, or in its answer to the city's petition challenging arbitrability, that raises any issue relating to an alleged impropriety or failure by the City to adhere to procedural guidelines promulgated under the parties' collective bargaining agreement.

For the reasons stated above, we find that the Union has failed to establish a nexus between the alleged violation and the parties' collective bargaining agreement. Accordingly, the petition challenging arbitrability is granted.

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 challenge to arbitrability raised herein by the petitioners be, and the same is hereby, granted in all respects, and it is further

ORDERED, that the Request for Arbitration filed herein by the Union in all respects be, and same is hereby, denied.

Dated: June 26, 1997
New York, New York

STEVEN C. DECOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

ROBERT H. BOGUCKI
MEMBER

CAROLYN GENTILE
MEMBER