

City & NYPD v. PBA, 61 OCB 15 (BCB 1998) [Decision No. B-15-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

between

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

Petitioners,

and

PATROLMEN’S BENEVOLENT ASSOCIATION,

Respondents.

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Decision No. B-15-98
Docket No. BCB-1888-97
(A-6430-96)

DECISION AND ORDER

On January 21, 1997, the New York City Police Department (“NYPD”) and the City of New York (hereinafter collectively referred to as "City"), appearing by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Patrolmen’s Benevolent Association (“PBA" or "Union") asserting that the NYPD improperly transferred the Grievant, Police Officer Jorge Rivera, and failed to process his performance evaluation in accordance with Departmental procedures. The Grievant seeks to have the appeal of his evaluation processed in accordance with the NYPD Administrative Guide and to be reinstated as a precinct Warrant Officer. The Union filed an answer on June 20, 1997, and on January 30, 1998, the City filed its reply.

Background

On May 16, 1996, the City issued its performance evaluation for the Grievant for December 10, 1994 - December 15, 1995. The Grievant allegedly appealed this evaluation prior to June 28, 1996, on which date the Grievant was reassigned from his position as the 41st Precinct's warrant officer for the second platoon (8:00 a.m. to 4:00 p.m), to the third platoon (4:00 p.m. to 12:00 midnight).

On June 29, 1996, an informal grievance was filed by Officer Rivera, claiming a violation of Article XXII, §3 of the parties collective bargaining agreement.¹ The grievance stated that Rivera was transferred to the third platoon because of his activities as a PBA delegate, and in retaliation for appealing his annual performance evaluation. This grievance was denied on July 10, 1996. On July 24, the Union filed a Step IV grievance,² and on August 8, 1996, the Grievant filed what is claimed to be the second appeal of his evaluation. The Step IV grievance was

¹ Article XXII, §3 states,

- a. Every grievant shall have the right to present a grievance in accord with the procedure provided herein free from coercion, interference, restraint or reprisal.
- b. The informal resolution of differences or grievances is urged and encouraged at all levels of supervision.
- c. Commanding Officers and Reviewing Officers shall promptly consider grievances presented to them and, within the scope of their authority take such necessary action as is required herein.
- d. Commanding Officers and Reviewing Officers and members of the Personnel Grievance Board shall consider objectively the merits of grievances with due consideration to the harmonious interrelationship that is sought to be achieved among all members of the force and for the good of the Police Department.
- e. Any employee may present the employee's own grievance through the first four steps of the grievance procedure either individually (with the aid of the employee's own counsel if the employee so chooses), or through the Union, provided, however, that the Union shall have the right to have a representative present at each step of the grievance procedure.

² The pleadings do not indicate whether a Step II or III grievance was filed in this matter.

denied on August 27, 1996. The Union filed a request for arbitration on September 16, 1996, alleging violations of Administrative Guide Procedure 303-20³ and Articles XVIII⁴ and XXII, §3(a) of the October 1, 1991 - March 31, 1995 collective bargaining agreement. Subsequent to this, he requested, and received, a steady day tour. He remains at the 41st Precinct, continuing to serve as the PBA delegate.

Positions of the Parties

City's Position

The City states that the Union has not established a nexus between the alleged wrongful acts and the cited provision of the Agreement or Administrative Guide Procedure 303-20. The

³ Administrative Guide Procedure 303-20 states, in pertinent part,

When a member wants to appeal performance evaluation:

- | | |
|--|--|
| Rater
Commanding
Officer | 1. Inform Commanding Officer. |
| | 2. Schedule interview with member concerned (rater and ratee). |
| <u>NOTE</u> | If the commanding officer is also the rating officer, his immediate supervisor will schedule the interview and serve as the reviewer. |
| Ratee | 3. Attempt to resolve the appeal. |
| | 4. Submit a report on Typed Letterhead, IF appeal is NOT RESOLVED at rater - reviewer level, as follows: |
| | a. Uniformed members below rank of captain - Personnel Officer concerned; |
| | b. Captains and ALL Management Services Personnel - Chief of Personnel; |
| | c. Sub-Managerial civilian personnel - Personnel Officer concerned. |
| Personnel
Officer/Chief
of Personnel | 5. Review the matter by interviewing appropriate parties and examining pertinent records. |
| | 6. Report findings in triplicate, as follows: |
| | a. ORIGINAL - to reviewer who will inform rater and ratee of findings; |
| | b. DUPLICATE - to member appealing; |
| | c. TRIPLICATE - forward to Performance Analysis Section for inclusion in ratee's Personal Folder. |
| <u>NOTE</u> | A member of the service (uniformed or civilian) has the right to appeal the contents, recommendations or overall rating of his/her performance evaluation, if cause for appeal stems from: |
| | a. Factual error; |
| | b. Rater's misinterpretation of instructions; |
| | c. Bias or prejudice on the part of the rater; |
| | d. Evaluation is based upon OTHER THAN performance factors. |

⁴ Article XVIII of the relevant Collective Bargaining Agreement states that "...there shall be no discrimination by the City against any employee because of Union activity."

City claims that the Union has alleged nothing more than an improper transfer and has failed to cite any rule, regulation or contractual provision which has been violated in that regard. The City further claims that the Grievant failed to comply with provisions of Administrative Guide Procedure 303-20 by not forwarding his appeal to the Personnel Officer as required; that procedure does not place an affirmative responsibility on the NYPD to forward the Grievant's appeal of his evaluation to the proper party.

The City also argues that its actions are governed by the management rights provisions of the New York City Collective Bargaining Law (NYCCBL)§12-307(b).⁵ It states that, in the instant matter, the NYPD merely exercised its right to determine the means and personnel with which to staff its operations when it transferred the Grievant.⁶

The City states that an arbitration hearing is the wrong forum in which to adjudicate allegations of disparate treatment as retaliation for engaging in protected activities. The City argues that the provisions of the collective bargaining agreement alleged to have been violated, Articles XVIII & XXII, §(3)(a), state that claims of retaliation and discrimination shall be dealt with in accordance with applicable law. The applicable law in this case, asserts the City, dictates

⁵ NYCCBL Sec. 12-307(b) states, in relevant part:
(b) 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.. . .

⁶ The City cites Decision No. B-31-79.

that a claim of discrimination based on union status be resolved by the Office of Collective Bargaining, and not by an arbitrator.

Union's Position

The Union claims that the City violated Administrative Guideline Procedure 303-20 when it failed to review Officer Rivera's appeal of his performance evaluation in retaliation for his having filed a grievance. The Union denies the City's allegations that Rivera did not comply with that procedure, and asserts that the City's refusal to act on the Grievant's initial request for review and the later August 8, 1996 re-filing of his appeal constitute a valid grievance under Article XXII(1)(a)(2).⁷ It is further asserted that the NYPD's transfer of the Grievant, his poor performance evaluation, and the refusal to review his evaluation was retaliation for his representation of union members, in violation of Article XVIII of the parties' collective bargaining agreement.

In its answer, the Union recognizes the City's management right to schedule and transfer its employees, but denies the applicability of that defense in the instant matter. The Union also acknowledges that, while the current issue may also be appropriate for consideration as an improper practice, it is also a valid contractual dispute under Article XVIII and Article XXII of the Collective Bargaining Agreement. The Union maintains the existence of an improper

⁷ Article XXII, §1(a)(2) states:

Section 1. Definitions

- a. For the purposes of this Agreement, the term "grievance" shall mean:
2. a claimed violation, misinterpretation or misapplication of the written rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters

practice claim does not take precedence over a bona fide contractual claim and that the Union has merely chosen to adjudicate this matter in the arbitral forum.

Discussion

When a request for arbitration is challenged by the City, initially, this Board must determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related the cited provision of the parties' agreement.⁸

The Union alleges that the City issued a poor performance evaluation, altered Rivera's shift, and denied his request for a review of his performance evaluation, in retaliation for his union activities as a PBA representative. While in an improper practice case, the mere coincidence between the happening of otherwise protected activity and an employer's action, alone, is not enough to raise a claim of retaliation, in an arbitrability case, a union need only establish an arguable nexus. We therefore find that the transfer and alleged failure of the NYPD to process the appeal of Rivera's evaluation, in conjunction with the Rivera's alleged Union activity, establish an arguable nexus between those alleged acts and the cited contractual provisions. Those discrepancies between the parties pertaining to the reasons and motivations of the NYPD in this matter, as well as any violation of Administrative Guideline Procedure 303-20, are factual issues, the merits of which are to be decided by an arbitrator.

⁸ Decision Nos. B-19-89; B-65-88; B-28-82.

We further find that the question of whether the grievance could have been brought as an improper practice is irrelevant to the instant challenge. The Grievant has an independent contractual right under Articles XVIII & XXII to proceed through the grievance procedure, and, if the Union so chooses, to seek an arbitral resolution of the dispute. The Grievant is not prevented from exercising those rights by the existence of other, independent means of advancing his claim. We therefore find the instant matter raised herein to be arbitrable, and deny the instant 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 herein by the City of New York be, and the same hereby is denied, and it is further ,

ORDERED, that the request for arbitration filed herein by the Union be, and the same hereby is, granted.

Dated: June 10, 1998
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Thomas J. Giblin
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER