

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration	:	
	:	
- between -	:	
	:	
THE DEPARTMENT OF CORRECTION	:	
and THE CITY OF NEW YORK,	:	
	:	
Petitioners,	:	
	:	Decision No. B-20-98
	:	Docket No. BCB-1806-96
- and -	:	(A-6153-95)
	:	
THE CORRECTION OFFICERS	:	
BENEVOLENT ASSOCIATION,	:	
	:	
Respondent.	:	
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DECISION AND ORDER

On January 16, 1996, the New York Department of Correction (“DOC”) filed a petition challenging the arbitrability of a grievance filed by the Correction Officers’ Benevolent Association (“COBA” or “Union”). The grievance alleged that DOC improperly transferred a Correction Officer arbitrarily and in violation of past practice.

On March 25, 1996, the Union filed a Brief in Opposition to The Petition Challenging Arbitrability. Because the Union’s papers were not in compliance with the Rules of the Office of Collective Bargaining (“OCB”), the Union was required to submit an answer in proper form by December 31, 1997. On December 18, 1997, the Union filed another pleading which it characterized as an answer, but which again failed to comply with the OCB’s rules regarding pleadings. The Union was granted until January 7, 1998 to submit an amended answer that

would completely accord with the OCB Rules. On January 2, 1998, the Union filed its amended answer. DOC filed its reply on February 11, 1998.

BACKGROUND

Louis Campisi was employed as a Correction Officer by DOC. Correction Officers are represented by COBA in collective bargaining matters, and a Collective Bargaining Agreement (“CBA”) between New York City (“City”) and the Union was in effect from October 1, 1991 through March 31, 1995.

On April 19, 1992, Campisi received a memorandum notifying him that he was being reassigned from his designated post, Court Entrance 2, Post 357 (“Post 357”), to the office of the Executive Officer Bronx Court Division. The memorandum informed him that his new post might be temporary, and, should that be the case, he could be reassigned to Post 357.¹ Campisi remained at his new post for approximately three years.

On April 18, 1995, Campisi was informed that the post was to be filled by a civilian, and he would return to Post 357 as of April 24, 1995. Campisi subsequently filed a grievance to Hector Eugui, Warden of the Bronx House of Detention for Men, on May 8, 1995. In his grievance, Campisi alleged that a Correction Officer had been seated at his post for at least 12 years. Further, he claimed that several other Correction Officers, all with less seniority than

¹ The memorandum reads, in relevant part, as follows:

This assignment may be temporary based on future request for a civilian replacement. If in the future your services are no longer needed you shall be reassigned to your designated awarded post (Court Entrance 2, Post 357) or a post with the same pass days and tour as previously awarded.

Campisi, remained in non-uniformed posts. Finally, he averred that he was replaced by a Correction Officer rather than a civilian. For these reasons, Campisi contended that, since his reassignment was for spurious reasons rather than because his post was designated in the Non-Uniformed Table of Organization, a contractual violation had occurred.

On May 10, 1995, Eugui responded in writing to Campisi's May 8 grievance by outlining the actions he would be taking in response to the grievance. Unsatisfied with Eugui's response, Campisi again filed a grievance with Eugui on July 11, 1995. In addition to complaining that Eugui had not satisfactorily dealt with the initial grievance, Campisi detailed an incident that had occurred the previous day, July 10: Campisi phoned his COBA delegate, Miguel Maldonado, who said he would visit Campisi later in the day to discuss matters; when Maldonado arrived, he was not allowed entry to the facility, despite explaining that Campisi had requested to speak with him. Campisi claimed this to be an outright violation of COBA contract with the City.

Eugui wrote, responding to Campisi's second grievance, on July 14, 1995. He explained that management has the latitude to modify and redeploy staff as necessary to ensure efficiency and cost-effectiveness. He also maintained that, because of the management rights provision of the New York City Collective Bargaining Law ("NYCCBL"), the issue of who is assigned to perform certain duties is not subject to the grievance procedure.²

On July 20, 1995, COBA filed a Step II grievance on Campisi's behalf. In the grievance,

² Section 12-307(b) of the New York City Collective Bargaining Law (NYCCBL), in relevant part, grants management the right to:

...direct its employees;...maintain the efficiency of governmental operations;
determine the methods, means and personnel by which government operations are to
be conducted....

the Union alleged that Campisi was denied the right to speak with a union delegate in violation of Article XVII of the CBA and that he was removed from his post arbitrarily in violation of longstanding practice.

On November 21, 1995, the grievance was decided at a Step III hearing. At this hearing, the Union withdrew its contractual claims (including the Article XVII claim) and left the claim of an improper transfer as the only issue to be decided. The Review Officer found that, because the complaint alleged no violation of contract or written policy and procedure that affects the terms and conditions of employment, it did not constitute a grievance within the contractual definition.³ Therefore, the complaint was dismissed for failure to constitute an issue which may be adjudicated by the contractual grievance procedure.

On December 5, 1995, the Union submitted a Request for Arbitration under Article XXI, Section 2 of the CBA⁴ alleging a violation of Section 12-307⁵ of the NYCCBL and of Article XV

³Article XXI - Grievance and Arbitration Procedure, Section 1 of the CBA provides, in relevant part:

For the purposes of this Agreement the term “grievance” shall mean:

- a. A claimed violation, misinterpretation or misapplication 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...
- e. A claimed assignment of the grievant to duties substantially different from those states in the employee’s job title specification.

⁴Article XXI, Section 2 provides, in relevant part:

Step IV An appeal from an unsatisfactory decision at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of receipt of the Step III decision.

⁵In relevant part, NYCCBL §12-307(b) provides:

...notwithstanding the above, questions concerning the practical impact that decisions

of the CBA.⁶ On January 16, 1996, DOC filed a petition challenging the arbitrability of this matter. In its answer, COBA, for the first time in the proceedings, charges that DOC violated Rule 2.10.030 of the Rules and Regulations of DOC of the City of New York.⁷

POSITIONS OF THE PARTIES

City's Position:

Because the contractual violation claims were withdrawn at the Step III hearing, the City asserts that the only claim to be dealt with is that of an improper transfer. The City further argues that §12-307(b) protects the type of management activity in question.⁸ It maintains that DOC

of the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

⁶Article XV - Seniority of the CBA, in relevant part, states:

The Department recognizes the importance of seniority in filling vacancies within a command and shall make every effort to adhere to this policy...While consultation on such matters is permissible, the final decision of the Department shall not be subject to the grievance procedure.

⁷Rule 2.10.030 says:

Each head of an institution shall submit in writing to the Commissioner a plan of organization for the Operation of his institution accompanied by an organization chart and such descriptive material as is necessary to define fully the functions of the various units and employees. This plan of organization shall not be placed in effect until approved by the Commissioner. Amendments to the plan shall be made in like manner. Once approved it shall be the responsibility of the head of the institution to make sure that his or her subordinates understand and follow the plan.

⁸*See, note 2, supra.*

exercised its statutory right “to determine the...personnel by which [its] operations are to be conducted” when transferring Campisi to another post.

Furthermore, relying on Board precedent⁹, the City contends that transferring employees to promote efficient and effective management of city government is within the City’s managerial rights. It cites City of New York v. Patrolmen’s Benevolent Association, Decision No. B-25-83, in which, it maintains, a grievance was found not to be arbitrable where a police officer was transferred due to a policy of disallowing officers from being assigned to the precinct in which they reside. The present matter is analogous to this case, the City argues, for the Union has failed to present any claim of discriminatory conduct by DOC. Accordingly, the City argues that the Request for Arbitration be dismissed because the management’s actions fall within its statutorily-given authority.

The City also maintains that the Union’s Request for Arbitration alleges that the City violated Sections 12-307(3) and (5) of the NYCCBL. It contends that the Board has held that violations of the NYCCBL do not constitute allegations of contractual violations and are not appropriate subjects of arbitration.¹⁰ As such, claims concerning the NYCCBL create no basis for arbitration.

Next, the City asserts that claims raised for the first time in the Answer cannot proceed to arbitration. In its Answer, the Union alleges a violation of Rule 2.10.030 of the Rules and

⁹The City cites Decision Nos. B-20-91; B-57-90; B-25-83; B-8-81.

¹⁰The City cites Decision Nos. B-50-89; B-27-84.

Regulations of DOC of the City of New York. The City contends there was no claim that the City violated Rule 2.10.030 at any previous time in the grievance procedure. Referring to Board precedent that a new claim may not be raised at the time of the Request for Arbitration¹¹, the City maintains that this claim cannot be raised at this stage in the proceedings. Similarly, the City argues that the Board has held that claims raised for the first time after the Request for Arbitration has been filed will not be permitted to proceed to arbitration.¹² Likewise, the City maintains that, should its petition be denied, this claim should not be heard at an arbitration hearing.

The City argues that the Union amended its claim in the Request for Arbitration to include, for the first time, an out-of-title claim: that the duties to which the grievant was assigned differ from those in his job description. The City again insists that claims raised for the first time in the Request for Arbitration cannot be brought to arbitration.¹³

Finally, the City believes the Union has failed to establish a nexus between the disputed action and a provision of the CBA. Article XXI, Section 1(b) of the CBA requires there to be a “violation, misinterpretation or misapplication of the rules, regulations or procedures of this agency...” to constitute a grievance. The Union claims a violation of Rule 2.10.030.¹⁴ The City argues that Rule 2.10.030 neither has any relation to the transfer of correction officers to different

¹¹The City cites Decision Nos. B-20-90; B-55-89; B-10-88; B-35-87; B-14-84; B-6-80; B-12-77; B-3-76; B-27-75; B-22-74; B-20-74.

¹²The City cites Decision Nos. B-30-94; B-12-92; B-20-90; B-44-88; B-40-88; B-31-86; B-1-86; B-11-81.

¹³The City cites Decision Nos. B-29-91; B-40-86; B-11-81 at p. 13; B-6-80; B-20-74.

¹⁴*See, note 7, supra.*

posts nor provides any substantive rights to the grievant; rather, the rule merely indicates the manner in which the Department will operate its institutions. The City contends that the Union has not demonstrated a nexus between the act complained of and any specific contract provision that has been violated.¹⁵ Consequently, the Request for Arbitration should be dismissed because the Union has failed to state a claim grievable under the CBA between the parties.

The City believes the Union alleges a violation of past-practice regarding reassignment of correction officers. According to the City, for a violation of past practice to go to arbitration, it must be shown that the violation is within the definition of the term “grievance” in the CBA.¹⁶ The City contends that an alleged violation of past practices is not encompassed within this definition.

According to the City, the Request for Arbitration alleges that officers with less seniority than Campisi were not transferred to non-civilian positions. Although the Union cites Article XV of the CBA to claim that seniority should have been used to determine which officers would be transferred¹⁷, the City argues that Article XV clearly indicates that the final decision of the Department may not be grieved. Therefore, the City believes Article XV cannot serve as a basis for the grievance here at issue.

¹⁵The City cites Decision Nos. B-5-95; B-4-95; B-9-92.

¹⁶The City cites Decision Nos. B-30-94; B-13-93; B-24-92; B-20-90; B-35-89.

¹⁷Article XV of the CBA provides, in relevant part:

The Department recognizes the importance of seniority in filling vacancies within a command and shall make every effort to adhere to this policy...While consultation on such matters is permissible, the final decision of the Department shall not be subject to the grievance procedure.

Union's Position:

According to the Union, although the general nature of the complaint against DOC refers to the arbitrary conduct taken by the Department against Campisi, the particular act for which arbitration is being sought is a violation of Rule 2.10.030. It is the Union's claim that the transfer was inconsistent with the Table of Organization and was, thus, not allowed under Rule 2.10.030. The Union says the City's challenge to arbitrability based on out-of-title or past practice claims should be disregarded. The Union asserts that neither is the focus of this grievance. Rather, the nature of the grievance can be seen by looking at the progress of the dispute through Steps 1 through 3 of the grievance procedure. It has always been the case, according to the Union, that the Table of Organization has been at the center of controversy. Furthermore, the Union contends that no "new" issues have been raised in the Request for Arbitration, but rather the arbitrary and capricious transfer of Campisi remains the grounds upon which arbitration is requested.

The Union asserts that a ruling that the transfer is within management's statutory rights, as the City argues, would be too broad.¹⁸ Such a ruling, it contends, would confer upon management virtually unlimited power. According to DOC's own Rule 2.10.030, the Union maintains Correction Officers are to be assigned according to DOC's Table of Organization. The Union maintains that the City disregarded the Table of Organization in transferring Campisi and gave a

¹⁸Likewise, the Union argues that the City's challenge focusing on the non-arbitrability of claims based on the NYCCBL should be dismissed. The Request for Arbitration refers to the portions of the NYCCBL dealing with management rights merely to highlight the position that management does not have unlimited rights. The Union is not seeking to arbitrate on any violations of the NYCCBL, so a challenge on such grounds should be denied.

spurious reason for his transfer. Therefore, the Union believes it is entitled to show that the City exceeded its legitimate management rights in this situation.

In response to the City's argument that Article XV of the CBA places the present dispute outside the scope of the grievance procedure, the Union suggests that Article XV deals only with the awarding of vacant posts. This grievance is a matter of involuntary transfer rather than one of the awarding of a vacant post. It is therefore argued by the Union that the Article XV seniority language is inapplicable and the grievance procedure is not withheld from the present matter.

Next, the Union argues that there is, indeed, the required nexus between conduct and provisions of the CBA. In particular, the transfer of Campisi represents a violation of DOC Rule 2.10.030 according to the Union. Because this involves the "...violation...of a rule...affecting the terms and conditions of employment..." under Article XXI, Section 1(b), it constitutes a grievance, which is then subject to the procedures outlined in Article XXI, Section 2. Therefore, the Union contends that the necessary nexus exists and that arbitration should proceed.

DISCUSSION

When a Request for Arbitration is challenged, the burden is on the Union to establish a nexus between the grievance and a specific contractual right that it claims has been violated.¹⁹ In the Request for Arbitration, the Union asserts that the City violated the "Management Rights provision of Code 3 12-307 and 307(5)"²⁰ as well as Article XV of the CBA. The Union later

¹⁹Decision Nos. B-4-95; B-27-93; B-47-92; B-44-91; B-29-91.

²⁰Although it appears that the Union intends to refer to sections of the NYCCBL, there is no statutory provision of the NYCCBL entitled "307(5)" and section 12-307(a)(5) is not

asserts, in its Answer to the City's Petition Challenging Arbitrability, that these provisions are not the basis for the grievance, but rather that Rule 2.10.030 of the Rules and Regulations of DOC of the City of New York is the basis for the grievance. Nevertheless, we will address Section 12-307 of the NYCCBL and Article XV of the CBA because the Request for Arbitration lists them as the grounds for the grievance.

The Union cites NYCCBL Section 12-307 to demonstrate that the City does not have unlimited management rights and argues that the transfer was not within the City's discretion. However, we have held that a violation of the NYCCBL alone cannot stand as a contractual violation and is, thus, an inappropriate basis for arbitration.²¹ For an exercise of alleged management rights to be in question in this type of dispute, the Union must claim that it conflicts with provisions of the CBA.²² Therefore, we must examine Article XV of the CBA to determine whether it can serve as the basis of a Request for Arbitration.

Article XV deals with seniority.²³ The Union contends that other Correction Officers with less seniority than Campisi have remained in positions designated in the Non-Uniform Table of Organization. Campisi was, it maintains, inappropriately transferred contrary to the dictates of Article XV. However, as the City contends, the contract provision explicitly states that "the final decision of the Department shall not be subject to the grievance procedure." If

applicable. Thus, we can only assume that "307(5)" is meant to refer to section 12-307(b).

²¹Decision Nos. B-50-89; B-27-84.

²²Decision No. B-35-89.

²³*See*, note 6, *supra*.

Article XV is alleged to apply to the post held by Campisi, there can be no arbitration in the present matter. However, in its Answer to the Petition Challenging Arbitrability, the Union asserts that Article XV of the CBA applies only to the filling of vacancies, not transfers. Thus, the Union asserts, it does not apply to Campisi. If that is the case, then no contractual provision has been asserted in the Request for Arbitration which can serve as an arguable basis for a grievance. Regardless of whether Article XV covers a transfer such as Campisi's, a successful Request for Arbitration cannot be founded upon it.

In the Union's Answer, it raises, for the first time, Rule 2.10.030 of the Rules and Regulations of DOC as the grounds for the grievance. At no earlier point in the grievance procedure has Rule 2.10.030 been raised. The Union suggests that because Rule 2.10.030 is consistent with the "nature of the dispute", it should be allowed as the grounds for the Request for Arbitration, despite the fact that it was not raised at any point before the Answer to the Petition Challenging Arbitrability. We have in the past denied arbitration of claims raised after the Request for Arbitration was filed, as arbitration of such claims would frustrate the purpose of a multi-step grievance procedure, which is designed to encourage discussion at each step.²⁴ We are not persuaded that the record of the lower steps of the grievance procedure shows that DOC or the City knew the grievance concerned Rule 2.10.30. Therefore, we cannot permit the assertion of Rule 2.10.030 a basis for arbitration at this late stage in the proceedings.

Accordingly, the instant petition challenging arbitrability is granted.

²⁴Decision Nos. B-2-95; B-30-94; B-27-93; B-44-91; B-29-91; B-40-86.

DECISION AND 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, docketed as BCB-1806-96 be, and the same hereby is, granted, and it is further,

ORDERED, that the Union's Request for Arbitration be, and the same hereby is, denied.

Dated: New York, New York
June 30, 1998

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Robert H. Bogucki
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER
