



arbitration procedure culminating in binding arbitration. The first step is a grievance presented to the Commanding Officer orally or in writing. A grievant may seek review at Step II by filling out a Departmental form in triplicate. A Step III grievance may be filed by filling out another Departmental form, which goes to the Personnel Grievance Board for determination.<sup>1</sup> According to the contract:

Where the grievance is not satisfactorily adjusted at Step III, the grievants may, not later than 30 calendar days after notification of the Board's decision, request that the grievance be referred to the Police Commissioner for determination; and the Police Commissioner shall make a determination within ten working days following receipt of the grievance. This determination shall be made after appropriate consultation with any or all parties to the grievance, including the Chairman of the [Personnel Grievance] Board and/or the Board members; and copies shall be sent to the grievant and the Union.

If a grievance is unresolved at Step IV, the Union may bring it to arbitration.

The Grievant, Det. Arthur Pettus, works in the Bronx Robbery Squad. On May 9, 1997, he was working off-duty delivering a payroll with a retired police officer when they were set upon by robbers. The Grievant announced that he was a police officer and attempted to make an arrest, but was shot and wounded. A Line of Duty Injury Report endorsed by the Commanding Officer of the Grievant's precinct was subsequently denied by the Department's Medical Division.

By letter dated April 1, 1998, the Union filed a grievance, recounting the details of the incident and mentioning that another officer in the same circumstances had previously been found to have been on duty. It asked that the decision be reconsidered by the Medical Division,

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<sup>1</sup>The parties have agreed that some grievances may be initiated at Step III, but do not define these grievances except that they are "of such scope as to make adjustments at Step I or Step II of the grievance procedure impracticable."

to find that the Grievant had suffered line of duty injuries. By letter dated July 7, 1998, the head of the Department's Office of Labor Relations told the Union that the Department's Chief of Personnel had determined that the Grievant's injuries occurred while he was off-duty and privately employed as a payroll guard. It stated, "[a]s a result, [the Grievant's] request has been denied. The Chief of Personnel's decision on this matter is final."

In a letter to the Police Commissioner dated August 4, 1998, which it called "Step IV," the Union again recounted all the details, mentioned the previous incident involving a different officer, and asked the Commissioner to review the decision. By letter dated August 10, 1998, the head of the Department's Office of Labor Relations responded:

The request for administrative review of Detective Arthur Pettus' line of duty injury has been completed. As per established procedures, the request has been denied by the Chief of Personnel. Since his decision is final, any further action by the detective will have to be through the courts.

On September 4, 1998, the Union filed the disputed Request for Arbitration. As its statement of the grievance, the Union wrote, "Failure of City to respond at Step 4 of the grievance procedure. See attachments A 1, 2, 3, 4."<sup>2</sup> It cited Article XXI, § 1a.(2) of the collective bargaining agreement as the contract provision violated and the section of the contract under which the demand for arbitration was made. The attached waiver described the grievance as "failure of City to comply with contract grievance article (XXI) and Police Dept. rules on Line of Duty." With the Request for Arbitration, the Union submitted a copy of a page of the 1992-96

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<sup>2</sup>These attachments were copies of the disapproval of the Grievant's line of duty injury designation and the letters described above.

collective bargaining agreement with the relevant article circled.<sup>3</sup>

## POSITIONS OF THE PARTIES

### *City's Position*

The City argues that the Union cited the definitional section of the collective bargaining agreement as the section alleged to have been violated. It notes that the definition of a grievance does not create substantive rights or an independent basis for a grievance.<sup>4</sup>

In addition, it maintains, the Union failed to show a nexus between the act complained of and the source of any alleged right. According to the City, the Department complied with the contractual grievance procedure when it sent the letter dated August 10, 1998, denying the grievance at Step IV.

The City contends that the Union raises a new claim in its answer: that the Department failed correctly to classify the Grievant's injuries as line-of-duty and thus misinterpreted or misapplied its rules or applied them inequitably. The City contends that the grievance must be dismissed and that a new grievance must be submitted at the lower steps of the contractual procedure.

The City argues, further, that the Union has not shown a nexus between the refusal to

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<sup>3</sup>The circled portion of the contract submitted by the Union with its Request for Arbitration is Article XXI, § 1a(2), which provides that a grievance may be "a claimed violation, misrepresentation 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 Section 1(a), the term 'grievance' shall not include disciplinary matters."

<sup>4</sup>The City cites *City of New York and Communications Workers of America*, Decision No. B-28-82.

designate a line-of-duty injury and any specific rule, regulation or procedure. Even if it had, the City contends, the grievance is not arbitrable because the Department's Patrol Guide states that the decision of the Health Services Division is final.<sup>5</sup> It cites a number of decisions for the proposition that "where, as here, a decision is deemed final, the Board has held that such actions and decisions are not subject to arbitration."<sup>6</sup>

#### *Union's Position*

The Union states that police officers are sworn to take police action whether on or off duty, and that the Department gave line of duty status to an officer who was killed last year under the same circumstances. The Union maintains that the Department originally investigated and endorsed the Grievant's line-of-duty claim in accordance with Departmental rules, which require investigation of an officer's performance on or off duty.<sup>7</sup> It says the contract requires arbitration when there is a claimed "violation, misrepresentation or misapplication of the rules, regulations or procedures of the Police Department, or the inequitable application of the Contract."

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<sup>5</sup>The City cites Patrol Guide Rule No. 120-3, which states, "Health Services Division will make final determination of APPROVAL/DISAPPROVAL of ALL applications for line of duty injury/illness designation and will notify the commanding officer of member concerned of final designation."

<sup>6</sup>The City cites *City of New York and Uniformed Firefighters Ass'n, L. 94*, Decision No. B-10-79; *New York City Health and Hospitals Corp and Committee of Interns and Residents (R. Guzman)*, Decision No. B-2-89; *City of New York v. United Probation Officers Ass'n*, Decision No. B-47-88; *City of New York and Corrections Officers Benevolent Ass'n*, Decision No. B-24-86; *City of New York v. Communications Workers of America*, Decision No. B-19-81.

<sup>7</sup>The Union cites Patrol Guide Procedure No. 120-3, which specifies procedures to "report and record line of duty injuries and deaths occurring within the city" when an officer receives "an injury in the performance of police duty, whether on or off duty..."

Therefore, it argues, the Department violated the contract when it did not follow its own rules concerning line of duty injuries and applied them inequitably. Finally, the Union contends, the Department's failure to comply with Step IV of the grievance procedure should be enough to dismiss the challenge to arbitrability and send the underlying grievance to arbitration.

### DISCUSSION

We will first decide whether the grievance is not arbitrable because, as the City claims, the Union amended or changed the nature of its grievance. Although we have held that a Union may not amend a grievance in its Request for Arbitration, we have also found that a grievance is arbitrable if the City was put on notice of the Union's claims at the lower steps of the grievance and arbitration procedure.<sup>8</sup> It is more accurate to say that we have denied arbitration of claims that were not alleged at the lower steps of the grievance procedure. This is consistent with our long-standing view that permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure: to encourage discussion of the dispute at each step of the procedure.<sup>9</sup>

Looking at the grievance as presented at the lower steps, and at the Request for Arbitra-

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<sup>8</sup>See, e.g., *City of New York and New York City Police Dep't and Dist. Council 37, L. 1549*, Decision No. B-50-98, at 7-8.

<sup>9</sup>*City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-20-74 (finding that a "sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation. Obviously, none of these elements is achievable if easy amendment of the grievance at the ... arbitration step were permitted.")

tion with its attachments, it is clear that the Department was on notice from the beginning that the Grievant was concerned about his line of duty injury rights, that he and the Union believed the Department did not follow the relevant rules, and that they alleged the Department applied the rules inequitably when compared with its treatment of another officer who was killed under the same circumstances. Therefore, we will not dismiss the grievance on these grounds.

The City maintains that it complied with the contractual grievance procedure when the head of the Department's Office of Labor Relations denied the Union's Step IV grievance. If that is the case, the Union has the right to bring the unresolved Step IV grievance to arbitration unless we find that it is not the kind of dispute that the parties have agreed to arbitrate or, if it is, that there is no arguable nexus between the alleged acts and the contract provision the Union claims has been violated.

The City cites a number of cases to support its argument that, because the Patrol Guide states that the decision is final, the Union may not bring a grievance about that decision to arbitration. We find these cases to be instructive in determining arbitrability herein. This Board has long recognized that where a contractual provision sets forth a procedure to be followed, but provides that, as to the determination made at the conclusion of the procedures, management's decision is "final," review of that decision cannot be had in arbitration.<sup>10</sup> We have found that in cases involving such finality clauses, a claimed failure to follow procedures may be arbitrable,

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<sup>10</sup> *City v. Uniformed Firefighters Association*, Decision No. B-10-79 at 7-8; *New York City Health and Hospitals Corporation v. Committee of Interns and Residents*, Decision No. B-2-89 at 8.

even though the final decision is not subject to arbitral review.<sup>11</sup> And, we have applied these same principles where the grievance was alleged to consist of a claimed violation or misapplication of a rule, regulation or written policy of the employer.<sup>12</sup>

*City v. United Probation Officers Association*<sup>13</sup> involved, in part, a situation very similar to that presented in the instant case. The contractual definition of a grievance included claimed violations or misapplications of rules, regulations, and written policies of the employer. The Union asserted that the employer's actions in reassigning certain employees violated the employer's written policy (embodied in an Executive Memorandum) on involuntary transfers. The policy set forth detailed procedural steps on the subject of such transfers, but ended with the words, "[a]ll transfer decisions made by the Assistant Commissioners on behalf of the Department shall be final." In evaluating the City's contention that this finality language precluded arbitration, we stated:

we have consistently held that where contracts provided expressly that certain actions or decisions of management are final, such actions and decisions are not subject to arbitration.<sup>14</sup>

Although that case involved finality language contained in a written policy, not a contract, the same effect was given by this Board.

In the present case, Patrol Guide Rule No. 120-3, upon which the Union relies, sets forth

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<sup>11</sup> *Committee of Interns and Residents, supra.*

<sup>12</sup> *City v. United Probation Officers Association*, Decision No. B-47-88 at 15-16.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



procedures for the reporting and investigation on line-of-duty injuries, and then provides:

Health Services Division will make final determination of APPROVAL/DISAPPROVAL of ALL applications for line of duty injury/illness designation and will notify the commanding officer of member concerned of final designation.

We find that the express language of the Patrol Guide, on its face, precludes the submission to arbitration of the Police Department's decision on applications for line-of-duty injury designations.<sup>15</sup> Consistent with our earlier rulings, an alleged failure to follow procedures under Rule 120-3 would be arbitrable; but that is not the Union's claim herein. The Union's grievance challenges what it contends is an inequitable decision, not a procedural violation. Given the clear language of the Patrol Guide, that decision is not subject to arbitral review. Accordingly, the City's petition challenging arbitrability is granted. Our granting of the City's petition is without prejudice to any rights the Grievant may have in any other forum.

### **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 petition docketed as BCB-2011-98 be, and the same hereby is,

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<sup>15</sup> Although not cited by either party, we take notice of the fact that a claimed violation of Patrol Guide Rule 120-3 was the subject of another arbitrability ruling by this Board, in *City v. Patrolmen's Benevolent Association*, Decision No. B-15-80. That decision, which found the Union's grievance arbitrable, is not dispositive herein because the language of the Rule at that time was quite different and did not contain a finality clause.

granted, and it is further,

ORDERED, that the Request for Arbitration docketed as A-7420-98 be, and the same hereby is, denied.

Dated: New York, New York  
March 2, 1999

STEVEN C. DeCOSTA  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

GEORGE A. NICOLAU  
MEMBER

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RICHARD A. WILSKER  
MEMBER

DENNISON YOUNG, JR.  
MEMBER

I DISSENT.

JEROME E. JOSEPH  
MEMBER

I DISSENT.

ROBERT H. BOGUCKI  
MEMBER