

NYPD & City v. PBA, 63 OCB 6 (BCB 1999) [Decision No. B-6-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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 In the Matter of the Arbitration :
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 -between- :
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 NEW YORK CITY POLICE DEPARTMENT AND : Decision No. B-6-1999
 THE CITY OF NEW YORK, : Docket No. BCB-1978-98
 : (A-7174-98)
 :
 Petitioners, :
 :
 -and- :
 :
 PATROLMEN’S BENEVOLENT ASSOCIATION, :
 :
 Respondent. :
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 In the Matter of Arbitration :
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 -between- :
 :
 THE CITY OF NEW YORK, AND :
 THE NEW YORK CITY POLICE DEPARTMENT, :
 : Docket No. BCB-1979-98
 : (A-7191-98)
 :
 Petitioners, :
 :
 -and- :
 :
 PATROLMEN’S BENEVOLENT ASSOCIATION, :
 :
 Respondent. :
 -----X

DECISION AND ORDER

On April 24, 1998, the City of New York (“City”), appearing by its Office of Labor Relations, and the New York City Police Department (“Department”) filed a petition, Docket No.

BCB-1978-98, challenging the arbitrability of a grievance and a request for arbitration filed by the Patrolmen's Benevolent Association ("Union" or "PBA") on February 20, 1998. On the same date, April 24, 1998, the City and the Police Department filed another petition, Docket No. BCB-1979-98, challenging the arbitrability of a request for arbitration filed by the PBA on March 5, 1998. The grievances concerned the involuntary transfer of police officers. The Union filed answers to both petitions on June 17, 1998, to which the City filed replies on July 24, 1998.

Background

On December 12, 1997, the Union filed a grievance on behalf of eleven (11) Police Officers protesting their involuntary transfers from the 50th and 52nd Precincts to the Bronx Uniform Drug Initiative. The Department denied the grievance on December 15, 1997, stating that there had been "no violation, misinterpretation, or misapplication of the current collective bargaining agreement nor has there been any violation, misinterpretation, or misapplication of the rules or procedures of this Department." On December 30, 1997, the PBA submitted a Step IV grievance to the Department. Subsequently, the grievance was denied by Police Commissioner Safir on January 21, 1998. The Union, dissatisfied with the outcome, filed a request for arbitration on February 20, 1998, alleging violations of Article III §§1(a) and (b) of the 1995-2000 Collective Bargaining Agreement ("Agreement"),¹ T.O.P. #336² and Patrol Borough Bronx

¹Article III of the Agreement provides in relevant part:

§1.

a. All ordered and/or authorized overtime in excess of forty (40) 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

Directive (“PBBX”) #1684.³ As a remedy, the Union seeks the “transfer of officers back to

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...

b. In order to preserve the intent and spirit of this Section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. Notwithstanding anything to the contrary contained herein, tours rescheduled for court appearances may begin at 8:00 A.M. and shall continue for eight (8) hours and thirty-five (35) minutes. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory reassignment of personnel to different days off and/or tours of duty. In interpreting this Section, T.O.P. 336, promulgated on October 13, 1969, shall be applicable. Notwithstanding anything to the contrary contained herein, the Department shall not have the right to reschedule employees’ tours of duty, except that the Department shall have the right to reschedule employees tours of duty, on ten occasions without payment of pre-tour or post-tour overtime provided that the Department gives at least 24 hours notice to the employees whose tours are to be rescheduled, and on the following occasions the Department may reschedule employees’ tours of duty by not more that three (3) hours before or after normal starting time for such tours, without payment of the pre-tour or post-tour overtime provided that the Department gives at least seven (7) days advance notice to the employee whose tours are to be so rescheduled: New Year’s Eve, St. Patrick’s Day, Thanksgiving Day, Puerto Rican Day, West Indies Day, and Christopher Street Liberation Day.

²T.O.P. #336, dated October 13, 1969, pertains to the assignment of members of the force and provides in relevant part:

Subject: Assignment of Member of the Force

1. Members of the force shall perform their assigned duties in accordance with their regularly assigned duty charts. No member of the force shall be rescheduled to perform any tour of duty other than the tour to which he is assigned unless otherwise specified herein.

³Although the request for arbitration alleges a violation of PBBX #1684, the PBA attached copies of PBBX #1664 and PBBX #1683-4.

PBBX #1664, a memorandum from the Commanding Officer, Patrol Borough Bronx, to the Commanding Officers of all Bronx Commands, provides in relevant part:

Subject: VOLUNTEERS FOR UNIFORM CONTINGENT FOR BRONX DRUG INITIATIVE

1. Commanding Officers, all Bronx Commands, will survey their members

their prior commands and payment of overtime compensation for all hours worked outside of the tours the officers were assigned to prior to the transfer.”

On January 14, 1998, the Union filed a grievance on behalf of Police Officer Anthony Presto protesting his transfer to the Bronx Uniform Drug Initiative. The Department denied the grievance on January 20, 1998 stating that there had been “no violation, misinterpretation, or misapplication of the current collective bargaining agreement nor has there been any violation ... of the rules or procedures of this Department.” On January 27, 1998, the PBA submitted a Step IV grievance to the Department which was subsequently denied by the Commissioner on February 5, 1998. The Union then filed a request for arbitration on March 5, 1998 alleging violations of Article III of the collective bargaining agreement, T.O.P. #336, and PBBX #1684.⁴ As a remedy, the Union seeks the “transfer of Police Officer Anthony Presto back to his prior command and payment of overtime compensation for all hours worked outside of the tours the officer was assigned to prior to the transfer.”⁵

(Lieutenants, Sergeants, Police Officers) for volunteers for possible assignment to the uniform detail of the Bronx Drug Initiative... The configuration of the uniform detail will require each command to submit names, volunteers first, as per the following numbers...

PBBX #1683-4, a list of the service members who were transferred to staff the Bronx Uniform Drug Initiative, provides in relevant part:

2. Above members of the service are to report 0930 hours, November 3, 1997, to their respective commands in uniform. There is NO Overtime authorized.

⁴Although the request for arbitration alleges a violation of PBBX #1684, the PBA attached copies of PBBX #1664 and PBBX #1683-4. See footnote 3, *supra*.

⁵Inasmuch as the petitions in BCB-1978-98 and BCB-1979-98 both present challenges to arbitrability which involve identical factual allegations as well as raise common questions of law,

Positions of the Parties

City's Position

The city contends that both grievances fall within the scope of management's statutory rights pursuant to §12-307(b) of the New York City Collective Bargaining Law, which provides:

It is the right of the city... to 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 reasons; maintain the efficiency of governmental operation; determine the methods, means, and personnel by which government operations are to be conducted...

The City claims that the right to assign employees is clearly within its statutory management prerogative because the ability to assign and transfer employees helps facilitate the effective and efficient management of city government. The City argues that pursuant to the NYCCBL, managerial rights are unfettered unless limited by the collective bargaining agreement. Since there is no provision in the Agreement limiting management's power to assign its employees, the City contends that the Union's request for arbitration must fail.

The City further contends that the grievances must be dismissed because the Union has failed to establish the required nexus between the alleged violations and Article III of the Agreement in conjunction with T.O.P. #336. The City contends that Article III §§1(a) and (b) of the Agreement and T.O.P. #336, the contractual provisions and procedure upon which the PBA bases its claim, relate specifically to prohibiting the rescheduling of tours of duty. Article III, §1(b) states that its purpose is to preserve the spirit of Article III, §1(a), the section that guarantees overtime compensation. The City maintains that while the Union protests the

the proceedings are hereby consolidated for determination by this Board.

reassignment of eleven (11) officers, as well as Officer Presto, the collective bargaining agreement does not preclude management from reassigning its employees. Furthermore, the City argues that the Union has not alleged any facts indicating that the grievants' tours were rescheduled in order to avoid compensation for overtime. The City thus concludes that the Union's request for arbitration must be denied.

As for the PBA's claim that PBBX #1664 provides a basis to arbitrate this dispute, the City alleges that the Commanding Officers complied with PBBX #1664 and that initially volunteers were solicited to be transferred from the 50th and 52nd Precincts to the Bronx Drug Initiative. The City explains that "Since a sufficient number of Police Officers did not volunteer, Police Officers were involuntarily reassigned to the Bronx Drug Initiative."

Union's Position

The Union argues that management's right to transfer its employees is not an unfettered right and that according to PBBX #1664, the Department was supposed to first assign volunteers to the Bronx Uniform Drug Initiative. The Union argues that the directive in PBBX #1664 to solicit "volunteers first" constitutes a limitation on the Department's ability to transfer officers. The Union contends that the grievants were involuntarily transferred and that the grievants' Commanding Officer did not comply with the directive that volunteers should be assigned first.

The Union further argues that Article III §1(b) and T.O.P. #336 prohibit the rescheduling of employees without the payment of overtime compensation. The Union alleges that by transferring the grievants, the Department avoided paying overtime to the employees at their original locations as well as avoided paying overtime to the officers originally assigned to the

Bronx Uniform Drug Initiative.

Furthermore, the Union argues that since the officers were transferred involuntarily and contrary to the PBBX directive, their transfer should be viewed as an improper “rescheduling of a tour of duty” in violation of Article III §1(b) and T.O.P. # 336. The Union thus contends that it has established the required nexus between the act complained of and the source of the alleged right sought to be remedied at arbitration. Therefore, the Union argues, its request for arbitration must be granted.

Discussion

In considering challenges to arbitrability, this Board has a responsibility to ascertain whether the parties are in any way obligated to arbitrate their dispute and, if so, whether a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.⁶

In the present cases, it is clear that the parties have agreed to arbitrate their disputes as defined in Article XXII of the collective bargaining agreement.⁷ The City maintains, however,

⁶*The City of New York v. District Council 37 et al.*, Decision No. B-2-98 at 11; *The City of New York v. District Council 37 et al.*, Decision No. B-19-90 at 5; and *The City of New York v. Patrolmen’s Benevolent Assoc.*, Decision No. B-51-89 at 7.

⁷Article XXII provides, in relevant part:

- a. For the purpose of this Agreement, the term “grievance” 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 written rules, regulations

that “there is no relationship between the contractual provisions and procedures cited by the Union and the actions complained of.”

We find that the Union has failed to demonstrate the required nexus between the instant grievance and Article III of the Agreement, in conjunction with T.O.P. #336, which provide that “there shall be no rescheduling of days off and/or tours of duty,” in order to ensure compensation for all “ordered and/or authorized overtime.”⁸ Contrary to the Union’s assertion, we find that the complaints of the eleven grievants from the 50th and 52nd Precincts and Officer Presto concern a change in assignment and not a rescheduling of tours. The Union’s grievances allege that the officers were transferred to the Bronx Uniform Drug Initiative involuntarily. This transfer, however, was a permanent reassignment to a new precinct. It was not a mere rescheduling of duty.

Furthermore, the Board is not persuaded by the Union’s argument that the eleven (11) officers and Officer Presto, were reassigned to another precinct in order to avoid compensating them for overtime work or to avoid compensating the officers already assigned to the Bronx Uniform Drug Initiative for overtime work. We have repeatedly held that Article III § 1(a) mandates that an overtime assignment must be specifically ordered and/or authorized by the Department in order to be compensable at the overtime rate, and that pursuant to its statutory

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...

⁸*The City of New York v. Patrolmen’s Benevolent Assoc.*, Decision No. B-15-88 at 10; and *The City of New York v. Patrolmen’s Benevolent Assoc.*, Decision No. B-5-88 at 8.

managerial authority, the Department is under no obligation to order the performance of such an assignment.⁹ In B-51-89, we said that “in the absence of a limitation in the contract or otherwise, the assignment of overtime is within the City’s statutory management right to determine the methods, means and personnel by which government operations are to be conducted.” The Union has not alleged any facts indicating that the grievants’ tours were rescheduled in order to avoid overtime compensation. In fact, the Union has not alleged any facts indicating that the grievants were even ordered and/or authorized by the Police Department to perform overtime work. Accordingly, we find that the Union has not demonstrated a nexus between its grievance and Article III of the Agreement and T.O.P. #336.

The question remaining for our determination is whether the Union has demonstrated a nexus between its grievances and Article XXII, §(a)(ii) which, defines a grievance as “a claimed violation, misinterpretation or misapplication of the written rules, regulations or procedures of the Police Department affecting terms and conditions of employment.” It is not disputed that PBBX #1664 is a “rule, regulation, or procedure” of the Department. Rather, the parties dispute whether the provisions of PBBX #1664 were violated. PBBX #1664 requires that commanding officers solicit volunteers and submit names, volunteers first, to be transferred to the Bronx Uniform Drug Initiative. While the Union claims that the directive was not followed and that volunteers were not solicited, the City argues that the Department complied with the directive. Since the parties do not dispute that PBBX #1664 is a “rule, regulation, or procedure” for the

⁹*The City of New York v. Patrolmen’s Benevolent Assoc.*, Decision No. B-20-89 at 6; and *The City of New York v. Patrolmen’s Benevolent Assoc.*, Decision No. B-41-88 at 6-7.

purposes of Article XXII (a)(2) of the Agreement, we find that Union has demonstrated an arguable basis for its claim.¹⁰ Once an arguable relationship is shown, the Board will not consider the merits of the grievance, rather, it is for an arbitrator to decide whether there was a violation of the PBBX.¹¹

Accordingly, for all of the reasons stated above, the Board, in BCB-1978-98 and BCB-1979-98, shall grant the City's petition challenging arbitrability as to Article III of the Agreement and T.O.P. #336 and deny it as to PBBX #1664.

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 by the New York City Police Department and the City of New York in BCB-1978-98 be, and the same hereby is, granted as to the claim based on Article III of the Collective Bargaining Agreement and T.O.P. #336 and denied as to the claim based on PBBX #1664, and it is further,

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association in BCB-1978-98 be, and the same hereby is granted only to the extent of the decision

¹⁰Although the PBA also attached a copy of PBBX #1683-4 to its request for arbitration, it fails to make any argument with respect to its provisions. Accordingly, we conclude that it has abandoned any claimed violation of PBBX #1683-4.

¹¹*New York City Health and Hospitals Corp. v. Local 30 et al.*, Decision No. B-16-98 at 6; *City of New York v. Local 300 et al.*, Decision No. B-6-95 at 9; and *City of New York v. Social Service Employees Union Local 371*, Decision No. B-46-91 at 8.

herein, and it is further,

ORDERED, that the petition challenging arbitrability filed by the New York City Police Department and the City of New York in BCB-1979-98 be, and the same hereby is, granted as to the claim based on Article III of the Collective Bargaining Agreement and T.O.P. #336 and denied as to the claim based on PBBX #1664, and it is further,

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association in BCB-1979-98 be, and the same hereby is granted only to the extent of the decision herein.

Dated: February 4, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER