

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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THE NEW YORK CITY POLICE DEPARTMENT :	Decision No. B-7-1999
and THE CITY OF NEW YORK,	Docket No. BCB-1994-98
	(A-7241-98)
Petitioners,	:
	:
-and-	:
	:
THE PATROLMEN’S BENEVOLENT	:
ASSOCIATION,	:
	:
Respondent.	:
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**DECISION AND ORDER**

On June 15, 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 challenging the arbitrability of a grievance and a request for arbitration filed by the Patrolmen’s Benevolent Association (“Union” or “PBA”) on April 2, 1998. The grievance concerned the tour assignments of police officers assigned to the 43<sup>rd</sup> Precinct Tacer Unit.<sup>1</sup> The Union filed an answer on July 27, 1998, to which the City filed a reply on November 2, 1998.

**Background**

On January 30, 1998, the PBA filed a grievance on behalf of all Police Officers assigned

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<sup>1</sup>The parties also refer to the 43<sup>rd</sup> Precinct as the Bronx Uniform Drug Initiative.

to the Bronx Uniform Drug Initiative protesting their being assigned to “non-traditional tours.”<sup>2</sup> The Department denied the grievance on February 9, 1998, stating that “there has 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.”<sup>3</sup> On February 18, 1998, the Union submitted a Step IV grievance to the Department which was denied by Police Commissioner Safir on March 10, 1998. The Union subsequently filed a request for arbitration on April 2, 1998, alleging violations of Operations Order 23 S.94,<sup>4</sup> Article III §§ 1(a) and (b) of the 1995-2000 Collective Bargaining Agreement (“Agreement”),<sup>5</sup> and T.O.P. #336.<sup>6</sup> As a remedy, the Union seeks the “reassignment of officers

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<sup>2</sup>Another grievance was filed on behalf of essentially the same group of Police Officers wherein the Union protested their “involuntary transfer” to the 43<sup>rd</sup> Precinct Tracer Unit (Docket No. BCB-1978, A-7174-98).

<sup>3</sup>While the Union’s grievance states that it is on behalf of all the Police Officers assigned to the Bronx Uniform Drug Initiative, the Department’s letter of February 9, 1998 denying the grievance states:

The grievance submitted by the Association on behalf of Police Officers Ivanhoe Birkbeck, John M. Griesbacker, Jamie Palermo, Arlene P. Patterson, Terrence J. Smith, Karen Ellis, Mario Peri, Thomas F. Petrozza, John Piechowiak, and Richard A. Kavashansky protesting their assignment to rotating 6 x 2 and 9 x 5 tours and steady 6 x 2 tours, in the 43<sup>rd</sup> Precinct Tracer Unit, is denied.

<sup>4</sup>While the Union alleges a violation of Order 23 S.94 and attached Operations Order No. 23 to the request for arbitration, ¶ 11 of the Union’s answer provides: “Respondent withdraws claims made alleging a violation of Operations Order 23 S.94.” Thus, we will not address this allegation.

<sup>5</sup>Article 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 nature or of a non-emergency nature, shall be compensated for either by cash payment or

back to a steady tour assignment,” and “overtime compensation for all hours worked outside of the steady tours the officers should have been assigned to.”

### **Positions of the Parties**

#### **City’s Position**

The City contends that the grievance falls within the scope of management’s statutory rights pursuant to § 12-307(b) of the New York City Collective Bargaining Law, which provides:

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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.

<sup>6</sup>T.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 that the tour to which he is assigned unless otherwise specified herein.

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 officers to the 43<sup>rd</sup> Precinct Tracer Unit falls 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 further argues that it is also within its management prerogative to assign officers to tours during the peak hours of drug activity. The City contends that where the disputed action is within the scope of statutory management rights, the Union must not only prove the allegation, but it must also establish that a substantial issue is presented as to whether the City's discretion has been exercised in a manner inconsistent with the collective bargaining agreement. Since the Union does not allege facts to support its claim that the City violated Article III, T.O.P. # 336 or Operations Order No. 23, the City contends that the Union's request for arbitration must fail.

The City's next allegation is that the grievance must be dismissed because the Union has failed to establish the required nexus between the alleged violation, assigning officers to the 43<sup>rd</sup> Precinct, 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 reassignment of the officers to the 43<sup>rd</sup> Precinct, the Board has held that

Article III 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 on this ground as well.

The City, in its reply, asserts that claims raised for the first time in the answer cannot proceed to arbitration. In its answer, the Union alleges a violation of a Patrol Borough Bronx Directive ("PBBX").<sup>7</sup> The City contends that there was no claim that the City violated the PBBX at any step of the grievance procedure, nor was it raised in the request for arbitration. Thus, the City argues that due to the untimeliness of this allegation the issue is not arbitrable. In addition, the City claims that the PBBX does not constitute a limitation on the Department's ability to transfer officers and that the Commanding Officer complied with the PBBX and requested volunteers to be transferred. The officers were placed in the 43<sup>rd</sup> Precinct because there was an insufficient number of volunteers. The City therefore concludes that the Union's request for arbitration must be denied.

### **Union's Position**

The Union argues that management's right to transfer its employees is not an unfettered right and that the officers were transferred involuntarily and without regard to seniority. In

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<sup>7</sup>The PBBX, 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 (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...

support of this argument, the Union points to an exhibit to the City's petition challenging arbitrability, a PBBX directing Bronx commanding officers to solicit volunteers to the Bronx Uniform Drug Initiative. The Union argues that the PBBX directive 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. Also, the officers were reassigned from traditional steady tours to tours of 9:00 AM to 5:00 PM and 6:00 AM to 2:00 PM.

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.<sup>8</sup>

In the present case, it is clear that the parties have agreed to arbitrate their disputes as defined in Article XXII of the collective bargaining agreement.<sup>9</sup> The City maintains, however, 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.”<sup>10</sup> Contrary to the Union’s assertion, we find that the grievance of the officers assigned to the 43<sup>rd</sup> Precinct concerns a change in assignment and

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<sup>8</sup>*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.

<sup>9</sup>Article 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 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...

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<sup>10</sup>*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.

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, we are not persuaded by the Union's argument that the officers 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 managerial authority, the Department is under no obligation to order the performance of such an assignment.<sup>11</sup> 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.

We do not reach the question of whether the Union's allegation of a violation of the PBBX is an arbitrable claim. In the Union's answer, it raises for the first time a violation of the

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<sup>11</sup>*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.



PBBX as a ground for the grievance. We have consistently denied 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.<sup>12</sup> Therefore, we cannot permit the assertion of a PBBX violation as a basis for arbitration at this late stage in the proceedings.

Accordingly, for all of the above reasons, the Board shall grant the City's 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 of the City of New York be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Patrolmen's Benevolent Association be, and the same hereby is, denied.

Dated: February 4, 1999  
New York, New York

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STEVEN C. DeCOSTA  
CHAIRMAN

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<sup>12</sup>*The Department of Parks and Recreation and The City of New York v. District Council 37, et al.*, Decision No. B-28-98 at 8-9; *The Department of Correction and The City of New York v. The Correction Officers Benevolent Assoc.*, Decision No. B-20-98 at 12; and *The City of New York and New York City Health and Hospitals Corp. v. New York State Nurses Assoc.*, Decision No. B-2-97 at 10.

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MEMBER

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