City & DOC v. COBA, 65 OCB 23 (BCB 2000) [Decision No. B-23-2000 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration -between- THE CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF CORRECTION, Petitioners, -and- CORRECTION OFFICER'S BENEVOLENT ASSOCIATION, Respondent.	:	Decision No. B-23-2000 Docket No. BCB-2041-99 (A-7467-98)

DECISION AND ORDER

On February 12, 1999, the City of New York ("City") and the New York City Department of Correction ("DOC" or "Department"), appearing by the Office of Labor Relations, filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Correction Officer's Benevolent Association ("Union" or "COBA"). The Union filed an Answer on March 31, 1999. The City filed a Reply on April 13, 1999.

BACKGROUND

On May 1, 1998, Correction Officer Robin Walker ("grievant") and 13 other correction officers were transferred from the Queens Court Division to Queens House of Detention for Men. On May 27, 1998, the Union filed a Step I grievance on behalf of Robin Walker alleging that the DOC violated Directive 2257RR[1] and Rule 3.20.220[2] by "engaging in favoritism and

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[1] The DOC's Directive 2257RR entitled "Transfer Requests-Uniformed

(continued...)

preferential treatment" when effectuating the transfers of correction officers. On June 2, 1998, the Step I grievance was amended to include the allegation that a fellow correction officer was transferred to a less hostile environment with no inmate contact because of "her connection." On June 3, 1998, a Step I decision was issued. In his response to the grievance, Warden Robertson stated, "that in-house seniority does not take precedence over one's date of appointment. Therefore, the Correction Officers who had the least amount of seniority were transferred from the Queens Court Division into the main facility."[3] The grievance was appealed to Step II on June 3, 1998, but no response was received. Later, On July 2, 1998, the grievance was appealed to Step III. A Step III determination was issued on September 18, 1998. It denied the grievance on the grounds that the grievant was shown not to have submitted a copy of Form 15A as required by Directive 2257RR.[4]

On October 9, 1998, the Union filed the instant Request for Arbitration. The Union

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[1](...continued)
Employees" provides in relevant part:

> The purpose of this Directive is to establish a standard operating procedure for the efficient and equitable processing of requests for a change of command made by members of the uniformed force...

[2] Rule 3.20.220 of the Department's Code of Conduct provides in relevant part:

> Members of the Department shall not directly or indirectly permit any person to make a request or recommendation on the employee's behalf, pertaining to promotion, transfer, designation, . . . or any other matter which would affect the employee's duties within the Department...

[3] Warden Robertson did not address the grievant's allegations that two other correction officers with less seniority were not forced to transfer because, he stated, "all issues pertaining to their current status [did] not fall under the jurisdiction of this writer."

[4] The decision in response to the Step III appeal states that "form [15A] is necessary for uniformed members of the Department to request a transfer."

stated the grievance to be arbitrated in the following manner:

> Seniority by date of appointment governs the manner in which officers are chosen for involuntary transfers, as confirmed in Warden Robertson's Step I decision. On May 1, 1998, by teletype order 1899-0, Grievant Walker along with 13 other correction officers were transferred from Queens Court to Queens House. Grievant Walker's transfer was improper because DOC deliberately skipped over [O]fficer Nicholson, who has less seniority than Walker. Accordingly, DOC failed to conduct the May 1, 1998 transfer according to seniority and grievant is entitled to be transferred back to Queens Court as a remedy. Furthermore, DOC has retaliated against grievant Walker for filing her May 27, 1998 grievance in that DOC has refused to process two separate requests to transfer, Form 15A, submitted by grievant which requests transfer back to the Queens Courts. This retaliation is a violation of Article XVIII of the collective bargaining agreement.[5]

As the contract provision, rule or regulation it claims was violated, the Union lists the Department's Directive 2257RR and Rule 3.20.220. It cites Directive 2257RR and Rule 3.20.220 as the section of the contract under which the demand for arbitration is made. Later, in the Union's answer to the City's Petition Challenging Arbitrability, the Union acknowledged that "Directive 2257R[R] and Rule 3.20.220 do not specifically address procedures for involuntary transfer." The Union asserted its claim that Warden Robertson's Step I response - stating that involuntary transfers are conducted by transferring the officer with the least amount of seniority first - was procedure that the Department of Corrections failed to follow. As a remedy, the grievant seeks to be transferred back to the Queens Court Division.

POSITIONS OF THE PARTIES

[5] The City's petition does not challenge the arbitrability of the claim of retaliation in violation of Article XVIII of the agreement.

City's Position

The City, in its Petition Challenging Arbitrability, contends that the grievance must be dismissed because it fails to allege a nexus between the act complained of and the provision of the agreement cited in the Request for Arbitration. The City argues that the Union is seeking to declare Warden Robertson's Step I response as procedure and mistakenly relies on Directive 2257RR and Rule 3.20.220 as its right to do so. The City argues that both the Directive and the Rule have nothing to do with involuntary transfers.[6] Thus, the City argues that the request for arbitration must be dismissed because the Union has failed to meet its burden of proving a connection between the act complained of and the source of the alleged right.

In its Reply, the City argues that the Union's later claim in reliance on the Warden's Step I response is not an arbitrable one because it was cited for the first time in the Union's Answer. Citing Decision No. B-2-97, the City argues that the grievance must be dismissed because all claims included in an answer to a Petition Challenging Arbitrability and raised for the first time after a request for arbitration has been filed are not arbitrable.

The City further argues that any written responses issued by the DOC as part of the grievance process "do not form an independent basis for sending a claim to arbitration." The Union still carries the burden of specifying a contract provision, rule or regulation which it alleges to have been violated. The City cites Decision No. B-74-90 where the Board dismissed a request for arbitration on the grounds that it cited the Step II response as the basis for sending the

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[6] In its Petition Challenging Arbitrability, the City states the "Directive 2257R[R] details the procedure that must be followed when a correction officer makes a request to be transferred to another facility." The City further states that "Rule 3.20.220 is a rule from the Department's Code of Conduct and sets a standard for appropriate conduct."

grievant's claim to arbitration.

The City argues that the Union's request to arbitrate the grievance should be denied because it falls within the scope of management's statutory rights pursuant to § 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL").[7] The City claims that by transferring employees in or out of a particular facility, the DOC is "merely exercising its right to determine the means and personnel by which its operation is to be conducted ...."

Union's Position

The Union argues that the grievant has an arbitrable claim under Article XVIII of the parties' collective bargaining agreement ("Agreement").[8] The Union contends that the grievant submitted two separate requests to be transferred back to the Queens Court Division in addition to filing the instant grievance. As a direct result, the Union alleged in the request for arbitration that the City retaliated against the grievant in violation of Article XVIII of the Agreement because she filed a grievance. This claim is not challenged by the City in its Petition Challenging Arbitrability. Thus, the Union argues that the grievant "is at least entitled to submit this claim before an arbitrator."

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[7] § 12-307 Scope of collective bargaining; management rights.

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(b) It is the right of the city... 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....

[8] Article XVIII states the following:

In accord with applicable law, there shall be no discrimination by the City against any Correction Officer because of Union activity.

Although the Union acknowledges that Directive 2257RR and Rule 3.20.220 do not address procedures for involuntary transfers, the Union contends that the instant claim is arbitrable. The Union maintains that this is so because of Warden Robertson's Step I response to the grievance.[9] The Union argues that the Warden's statement was a "clear, unambiguous statement of policy." As a result, the Union argues that the City's challenge based on management's rights and the lack of nexus must be rejected.

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.[10]

In the present case, it is clear that the parties have agreed to arbitrate their disputes as defined in Article XXI of their collective bargaining agreement.[11] The City maintains, however,

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[9] *Supra*, at p. 2.

[10] *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.

[11] Article XXI provides, in relevant part:
For the purpose of this Agreement, the term "grievance" shall mean:
a. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
b. a claimed violation, misinterpretation or misapplication of the rules, regulations,
(continued...)

that the Union "has failed to demonstrate the requisite nexus between the act complained of and the source of the alleged right." We agree and find that the Union has failed to demonstrate the required nexus between the subject of the grievance and Directive 2257RR and Rule 3.20.220, in that they clearly do not govern this dispute, i.e., involuntary transfers.

The Union's later claim, raised for the first time in its answer, that Warden Robertson's response to the Step I grievance states a procedure of the DOC, is not arbitrable. Neither the original grievance nor the request for arbitration identifies either Warden Robertson's response or any procedure referred to therein as being the source of a right which the Union claims has been violated. The Board has consistently denied arbitration of claims alleged after the request for arbitration has been filed since this would deny the parties an opportunity to fully consider and attempt to resolve the issue at the lower steps of the grievance procedure.[12] Since the Union deprived the City of an opportunity to respond to this theory at the appropriate time, we will not consider its argument now.[13]

Accordingly, the City's petition challenging the arbitrability of the request for arbitration, to the extent the Union alleges a violation of Directive 2257RR and Rule 3.20.220, is granted. The Union's request to the extent it alleges retaliation in violation of Article XVIII, which the

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[11](...continued)

> or procedures of the agency 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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[12] Decision Nos. B-55-89; B-1-86; B-20-74.

[13] Decision Nos. B-40-88; B-1-86; B-14-84; B-11-81; B-12-77; B-20-74.

City did not challenge, shall be submitted to arbitration.

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 City of New York, be and the same hereby is, granted to the extent it challenges the alleged violation of Directive 2257RR and Rule 3.20.220; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers Benevolent Association be, and the same hereby is denied to the extent it challenges the alleged violation of Directive 2257RR and Rule 3.20.220.

ORDERED, that the request for arbitration is granted to the extent that it alleges retaliation in violation of Article XVIII.

Dated: July 24, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

BRUCE H. SIMON
MEMBER