City & PD v. PBA, 73 OCB 22 (BCB 2004) [Decision No. B-22-04 (Arbitrability)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioners,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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Decision No. B-22-2004
Docket No. BCB-2403-04
(A-10528-04)

DECISION AND ORDER

On May 11, 2004, the City of New York and the Police Department of the City of New York ("City," "NYPD" or "Department") filed a verified petition challenging the arbitrability of a grievance filed by the Patrolmen's Benevolent Association ("Union" or "PBA"). The grievance asserts that comments made by Police Commissioner Raymond Kelly ("Commissioner") violated NYPD's Patrol Guide Procedure No. 212-29 ("Procedure"). The City argues that arbitration of this grievance would violate public policy and that the Union, even if this is not the case, has failed to establish a nexus between the subject of the grievance and the Procedure. We find that although public policy does not prohibit arbitration of the grievance, there is no nexus between the Commissioner's comments and the Procedure. Accordingly, the petition is granted.

BACKGROUND

On January 24, 2004, Police Officers Richard Neri and Jason Hallick were assigned to the Louis Armstrong Housing complex, located in the Bedford-Stuyvesant section of Brooklyn. While patrolling the rooftops of this housing complex, Officer Neri discharged his firearm and fatally shot a civilian. Later that day, the Commissioner publicly stated: "At this point, based on the facts we have gathered, there appears to be no justification for this shooting, but again, we have not had the opportunity to interview the officer who fired the shot."

Pursuant to the Procedure, Officer Neri, who had never been subject to a departmental disciplinary complaint or action, was immediately placed on modified duty. Further in accordance with the Procedure, the District Attorney's Office was contacted and a subsequent investigation occurred. Brooklyn District Attorney Charles Hynes, seeking an indictment of Officer Neri on state criminal charges, presented to a Grand Jury testimony from witnesses, the officers involved, a forensic expert and the medical examiner. However, on February 17, 2004, the Grand Jury declined to indict Officer Neri, thereby clearing him of all state criminal charges.

The Procedure, entitled "Firearms Discharge by Uniformed Members of the Service," was promulgated "to record and evaluate incidents in which uniformed members of the service discharged firearms." The Procedure sets forth a 25-step investigatory process, which occurs after a uniformed member of NYPD discharges a firearm. The Procedure requires that various Department personnel, including the investigating officer, be notified. In addition, the scene must be secured and, if necessary, medical assistance contacted. Furthermore, the police officer who discharged the firearm must be temporarily reassigned, have the firearm inspected, and prepare a firearms discharge/assault report. The investigating officer is required to interview the police officer involved and other witnesses, as well as examine all pertinent evidence. The

investigating officer prepares a report for the Chief of Department concerning whether the firearm discharge was within NYPD guidelines and make any instructive and/or disciplinary recommendations.[1]

Pursuant to the Procedure, the findings and recommendations of the investigating officer are presented to the Chief of Department's Firearm Discharge Review Board, with copies sent to various Department officials, including the commanding officer of the Borough Investigation Unit of the borough where the shooting occurred. Within 90 days of the incident, the commanding officer of the Borough Investigation Unit prepares a final report, which is submitted to the Chief of Department and his Investigation Review Section. This report contains: the finding and recommendations of the investigating officer; reports from the medical examiners, the ballistic unit, and the gunsmith; a synopsis of the police officer's statements; and any findings by the District Attorney and/or the Department's Internal Affairs Bureau.

Pursuant to the Procedure, the Patrol Borough Commander convenes a meeting of the Borough Firearms Discharge Review Board to inspect the shooting incidents that occurred since the previous meeting. After examining the reports of the investigating officer and the commanding officer of the Borough Investigation Unit, the Borough Firearms Discharge Review Board submits its report to the Chief of Department's Firearms Discharge Review Board. This report contains findings and recommendations similar to those of the investigating officer and is endorsed by the Patrol Borough Commander at the conclusion of the investigatory process.

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[1]The report by the investigating officer can make the following findings: (a) No Violation of Department firearms guidelines; (b) Violation of Department firearms guidelines; (c) Accidental discharge-violation; or (d) Accidental discharge-no violation. Based upon these findings, the investigating officer can recommend the following: (a) No corrective action to be taken; (b) Member concerned to review the law and instructions; (c) Member concerned to have additional firearms instructions; (d) Retraining in tactics; (e) Current assignment of member be reviewed; or (f) Other (Command Discipline, Charges and Specifications, etc.).

On February 5, 2004, the Union filed a Step III grievance alleging that the Commissioner, in his remarks, labeled the January 24, 2004, shooting as having "no justification," and thus violated the Procedure by tainting an ongoing investigation. On March 8, 2004, NYPD denied the grievance on the grounds that statements by the Commissioner are not grievable. The Union filed a Step IV grievance, and this too was denied. On April 28, 2004, the Union filed a Request for Arbitration ("RFA"), stating the grievance as: "whether the Police Commissioner violated Patrol Guide Procedure No. 212-29, by publicly labeling a recent police-involved shooting as having 'no justification' before all facts were known and investigation was completed?" The Union seeks an order directing the Commissioner "to refrain from making premature public statements" regarding police-involved shootings, in order to permit investigations of these incidents to proceed unimpeded by outside influences.

POSITION OF THE PARTIES

City's Position

Procedurally, the City alleges that the grievance is not arbitrable because the Union failed to properly complete the RFA form promulgated by the Office of Collective Bargaining ("OCB"). The Union's failure to cite a contractual provision from the Agreement, which authorizes the parties to proceed to arbitration, renders the Union's request invalid. Moreover, the Procedure does not grant a party the right to proceed to arbitration.

Assuming that the Union is relying on Article XXII, § 1(a)(2), of the Agreement, the City contends that the Union failed to satisfy its burden to establish a nexus between the

Commissioner's ability to comment on NYPD matters and the Procedure.[2] It never mentions the Commissioner, and, thus, does not restrain him from commenting on a firearm discharge by a police officer before the conclusion of the investigatory process.

The City also contends that the Procedure cannot be construed to limit the Commissioner because such a restraint would violate statutory and contractual law, as well as public policy. Specifically, New York City Charter ("Charter") Chapter 18, § 434, states: "The commissioner shall have the cognizance and control of the government, administration, disposition and discipline of the department . . . [,] shall be the chief executive officer of the police force [and] shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department." Since no provision in the Charter limits the Commissioner's ability to comment publicly on a firearm discharge, arbitration on this issue would jeopardize the Commissioner's administrative and authoritative role in NYPD. Furthermore, Article XXII, § 9, of the Agreement would be violated if an arbitrator's award determined that the Procedure applied to the Commissioner because it would create a new rule and materially alter the Agreement.[3]

Union's Position

The Union argues that its failure to designate a contractual provision in the RFA is not a fatal flaw. An earlier version of the RFA provided a space for the citing of the contractual

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[2]Article XXII, § 1(a)(2), of the Agreement provides that the term "grievance" shall mean: a claimed violation, misinterpretation or misapplication of the written rules, regulations or procedures of the Police Department affecting terms and conditions of employment . . . .

[3]Article XXII, § 9, states, in pertinent part: "the Arbitrator shall not add to, subtract from or modify any such Agreement, rule, regulation, procedure, order or job title specification."

provision. However, this form was revised by OCB, and the new version no longer requires such a reference. Thus, the elimination of this section underscores the fact that the party requesting arbitration need not cite to specific authority and implicitly diminishes the importance of this formalistic requirement.

The Union also argues that it has established a reasonable relationship between the act complained of in the grievance and the Procedure invoked therein. The Procedure creates a 25-step process that is designed to record and evaluate incidents in which uniformed members of the service have discharged their firearms, in order to make objective findings and recommendations regarding the shooting. Since, the ultimate responsibility of evaluating firearm discharges resides with the Chief of Department's Firearms Discharge Review Board, which reports to the Commissioner, any deviation from the investigatory process violates the Procedure and compromises the objectivity of the ultimate determination because, depending upon the findings and recommendations, the police officer involved may be adversely affected. Thus, the Commissioner's public condemnation of the instant shooting, made without the benefit of the objective evaluation of the investigation, nullifies the entire process.

Further, the Union contends that allowing this grievance to proceed to arbitration would not violate any statutory or contractual law. The arguments averred by the City raise issues of fact that should be resolved by the arbitrator. Alternatively, the Board should find that the Procedure applies to the Commissioner, due to a recent court decision, which held that the Commissioner is bound by promulgated rules and procedures. *See Boss v. Kelly*, 3 Misc.3d 936 (Sup. Ct. N.Y.Co. 2004). Finally, the Union claims that the arbitrator would not be altering the Agreement because the Union is merely requesting an interpretation of the Procedure as it

applies to the Commissioner, a ruling that is within the contractually-bestowed authority of the arbitrator.

DISCUSSION

As a preliminary matter, we reject the City's argument that the RFA must be dismissed for the Union's failure to complete OCB's form properly. The Board has stated that issues concerning notice are suited for adjudication by an arbitrator. *New York State Nurses Ass'n*, Decision No. B-21-2002. Moreover, the petition demonstrates that the City was fully cognizant that the Union intended to invoke Article XXII, § 1, of the Agreement, which provides for arbitration of a misapplication of a NYPD procedure. Accordingly, this ground for the City's challenge is dismissed.

It is the public policy of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") to promote and encourage impartial arbitration as the selected means for the resolution of grievances. NYCCBL § 12-302; *New York State Nurses Ass'n*, Decision No. B-21-2002, *citing In re Board of Educ. of Watertown City Sch. Dist. (Watertown Educ. Ass'n)*, 93 N.Y. 2d. 132 (1999). However, the Board cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 4.

To determine arbitrability, we must first decide whether the parties are contractually obligated to arbitrate a controversy absent statutory, contractual or court-enunciated public policy restrictions, and, if so, whether the contractual obligation is broad enough in its scope to include the particular controversy presented. *District Council 37, AFSCME*, Decision No. B-47-99 at 8-9; *Social Service Employment Union*, Decision No. B-2-69 at 2. In other words, we must

decide whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement. *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7.

First, under Article XXII, § 1, the parties have agreed to arbitrate disputes arising out of misinterpretations and misapplications of any rules, regulations or procedures. Since the Procedure falls within the meaning of this definition, we turn to whether § 434 of the Charter, which grants broad authority to the Commissioner, provides a public policy exception that precludes arbitration of the Commissioner's public comment on a police-involved shooting.

Although arbitration is encouraged in resolution of matters involving labor relations disputes, the Court of Appeals has "recognized limited instances where arbitration is prohibited on public policy grounds alone." *City of New York v. Unif. Fire Officers Ass'n, Local 854*, 95 N.Y.2d 273, 281 (2000). However, the scope of the public policy exception is extremely narrow. *United Fed'n of Teachers, Local 2 v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 1 N.Y.3d 72, 80 (2003). In fact, "restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements." *Id.* This exception to arbitration applies "only in cases in which public policy considerations, embodied in statutory or decisional law, prohibit, *in an absolute sense*, particular matters being decided." *New York City Transit Auth. v. Transp. Workers Union of America, Local 100*, 99 N.Y.2d 1, 7 (2002) (emphasis in original). Thus, exceptions are formed only where courts can so conclude that a public policy exists without engaging in extended fact finding or legal analysis. *Id.* Laws which bestow general powers and do not relate to specific delegations of duties, "in an absolute sense," need not be construed to prohibit arbitration on public policy grounds. *United Fed'n of Teachers*, 1 N.Y.3d at 80.

In *New York City Dep't of Sanitation v. MacDonald*, 87 N.Y.2d 650, 656 (1996), the Court of Appeals upheld the Board's decision to grant arbitration and rejected the City's argument for the application of the public policy exception. Claiming that arbitration would undermine the fundamental public policy of NYCCBL § 12-307(b), the management rights clause, the City sought to prevent the arbitration of a grievance challenging the Department of Sanitation's right to transfer employees. The Court determined that since the language of § 12-307 did not specifically state that transferring employees was an exclusive management right, the public policy argument was without merit. Furthermore, the Court held that the public policy enunciated in § 12-302 of the NYCCBL to favor arbitration, took precedence over the exception relied upon by the City. *Id.* at 657.

In contrast, the Court of Appeals, in *Uniformed Fire Officers Ass'n,* 95 N.Y.2d at 281, found that § 1128(a) of the Charter precluded arbitration on public policy grounds. The union sought to arbitrate a grievance alleging that the Department of Investigation ("DOI") violated the interrogation provision of the collective bargaining agreement during an investigation of fraudulent pension claims. In the Court's view, the express grant of authority in § 1128(a), which states that no person shall prevent, obstruct, interfere or prevent an investigation performed by DOI, created a compelling public policy designed to provide DOI with an unfettered ability to conduct investigations. Moreover, inhibiting DOI's investigatory authority would prevent it from maintaining integrity and honesty in the government. *See also City of New York v. MacDonald*, 201 A.D.2d 258, 259 (1st Dep't 1994) (applicable statutes including § 434 of the Charter discloses a public policy that gives the Police Commissioner discretion to discipline police officers, and prohibits arbitration of this subject).

In the instant case, we reject the City's contention that a public policy consideration, based upon § 434 of the Charter, bars the instant matter from arbitration. Even though the Charter bestows broad authority upon the Commissioner to govern and administer the Department, the City fails to articulate how this power insulates actions of the Commissioner from alleged contractual limitations. Since § 434 does not prohibit arbitration in "an absolute sense," we reject the City's claim that arbitration of this grievance would violate public policy. *See Transp. Workers Union of America*, 99 N.Y.2d at 7. Therefore, the first prong of the arbitrability test has been satisfied.

We now turn to whether a reasonable relationship exists between the grievance concerning the Commissioner's comments regarding the shooting and the Procedure. While Patrol Guide procedures are arbitrable under the Agreement, the Board has sustained challenges to arbitration when the subject of the grievance has no nexus to the Patrol Guide provision invoked. *District Council 37, Local 1549*, Decision No. B-20-90 at 7.

In *Patrolmen's Benevolent Ass'n*, Decision No. B-8-88, the Board granted the City's petition challenging the arbitrability of a grievance where a police officer sought reimbursement for the destruction of her pistol by NYPD under § 120-21 of the Patrol Guide. The Board held that there was no nexus to § 120-21, which provides for reimbursement when property of an officer is lost or damaged in the performance of police duty, because the grievant was not working for NYPD at the time of the pistol's destruction. The Board found no basis to read the cited rule as even arguably including the destruction of a pistol that had been vouchered upon the grievant's prior resignation. *Id.* at 8.

In *Patrolmen's Benevolent Ass'n*, Decision No. B-25-83, the union, relying upon § 140-1.1 of the Patrol Guide, grieved the transfer of an officer from the precinct where he resided to

an outside precinct. The Board denied the arbitration request because the provision relied upon by the union addressed residency requirements and not transfers. *See also District Council 37, Local 1549*, Decision No. B-20-90 at 7 (union's grievance regarding the shortening of the employees' break periods was not reasonably related to § 104-1 of the Patrol Guide, which addressed conduct that is prejudicial to good order, efficiency or discipline in the department).

Here, the Union does not argue that the 25 steps of the Procedure have not been followed. Neither does it contend that any of the officials for whom the Procedure envisions an investigatory role failed in their duty. The sole claim concerns the statement made by the Commissioner.

In seeking an order that the Commissioner remain silent following a police-involved shooting, including any that may occur in the future, the Union necessarily argues that the Procedure itself commands that silence. However, the Procedure contains nothing that limits or constrains any comments that Commissioner might make. Indeed, it does not even mention the Commissioner or envisions any role for the Commissioner during the investigative process. There would therefore appear to be no nexus between the statement made by the Commissioner and the Procedure as written.

The Unions asserts, however, that the particular comments the Commissioner made in this instance violated the Procedure by undermining the objective investigation of the shooting. The argument is that the Commissioner nullified the process; that, in the Union's words, he made a "finding" tantamount to an order or directive to the investigators. Such an assertion plainly misreads what was said. The Commissioner was careful to point out that interviews were yet to occur and that, as a consequence, the requisite investigation would go forward. Moreover,

the Union offers no evidence in support of its assertion. In fact, any such claim of nullification is belied by the fact, as the Union knows, that a Grand Jury declined to return an indictment.

No matter how individuals might have reacted to what the Commissioner said, the Procedure, in our estimation, cannot reasonably be read as barring the Commissioner from public comments of the kind made here. Given the Commissioner's recognized authority, to rule otherwise would require an explicitness not here present.

Having found no nexus between the acts complained of and Patrol Guide Procedure No. 212-29, we 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 challenging arbitrability docketed as BCB-2403-04, filed by the City of New York be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration docketed as A-10528-04, filed by the Patrolmen's Benevolent Association be, and the same hereby is, denied.

Dated: New York, New York
December 13, 2004

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

ERNEST F. HART
MEMBER