Patrolmen's Benevolent Ass'n, 29 OCB 8 (BCB 1982) [Decision No. B-8-82], aff'd, Caruso v. Anderson, No. 05411/82 (Sup. Ct. N.Y. Co., July 29, 1982).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

---------------------------------------X

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

---------------------------------------X

DECISION NO. B-8-82

DOCKET NO. BCB-486-61
(A-1240-81)

DECISION AND ORDER

The Patrolmen's Benevolent Association (hereinafter "PBA") submitted a request for arbitration on March 25, 1981 in which it sought to arbitrate a dispute which it described as:

> "Denial of portal to portal allowance on May 3, 1980, improper issuance of complaint against Police Officer, and harassment of grievant after he filed a grievance concerning denial of portal to portal allowance."

The City, by its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of the above dispute on April 20, 1981. The PBA's answer to the petition was

submitted on May 28, 1981. A letter in reply was received from the City on June 30, 1981.[1]

Background

The grievant, Police Officer John McEniry, was assigned to the Restricted Duty Unit at the Police Property Clerk's Whitestone Pound office. On may 30, 1980, he was informed by his supervisor that he would be reassigned to the 215th Street Pound on June 1, 1980. The grievant worked his normally assigned tour of duty at the Whitestone Pound from 4:00 P.M. to 12:00 midnight on May 31, 1980, and then reported to the 215th Street Pound, in full uniform,[2] and performed a tour of duty from 6:30 A.M. to 3:00 P.M. on June 1, 1980. Subsequently, the grievant applied for "portal to portal" pay, pursuant to the overtime travel guarantee provisions found in Article XXII of the collective bargaining agreement. The Police Department's denial of this request for compensation constitutes one ground for the PBA's request for arbitration herein.

---

[1] As is apparent from this chronology, each party's time to file responsive pleadings was extended, by mutual consent.

[2] It appears that the grievant ordinarily performed his tours of duty at the Whitestone Pound in civilian clothes. It is disputed whether grievant should have reported to the 215th Street Pound in full uniform. This issue may be relevant to the merits of the grievance, but it is not contended that it has any bearing on the arbitrability of this matter.

Thereafter, on June 28, 1980, petitioner made a request, via telephone, for emergency excusal from his scheduled tour of duty that day. The parties dispute whether or not the request for excusal was granted. In any event, the grievant took the day off. When he returned to work, his supervisor told him that he had taken the day off without permission and the PBA alleges that his supervisor told him he was "annoyed with him". The supervisor reported the incident on a form entitled "Report of Violation of the Rules and Procedures". It is the PBA's challenge to the filing of this report which forms the second ground for the request for arbitration in this matter.

Positions of the Parties

City's Position

While denying the factual allegations relating to the PBA's claim for "portal to portal" pay, pursuant to Article XXII of the contract, the City concedes that this claim is arbitrable under the contractual definition of a grievance.

However, the City asserts that the PBA has failed to establish any basis to arbitrate its claims under Article XIX of the contract (no discrimination because of union activity) and Section 118-3 of the Patrol Guide (command discipline procedures). The City contends that a supervisor's alleged "annoyance", and his filing of a report of an incident unrelated

to the request for "portal to portal" pay, do not constitute evidence of discrimination because of union activity, nor do they demonstrate any violation or misapplication of the Patrol Guide command discipline procedures.

The City alleges that the report filed by the grievant's supervisor did not result in command discipline or the issuance of disciplinary charges, and thus is wholly outside the purview of the cited section of the Patrol Guide. Moreover, the City notes that Article XXIII of the collective bargaining agreement expressly excludes discipline from the ambit of grievable subjects.

The City submits that the PBA has failed to make a _prima facie_ showing of a relationship between the acts complained of and the source of the alleged right, arbitration of which is sought. For these reasons, the City asks that the part of the request for arbitration based upon Article XIX of the contract and Section 118-3 of the Patrol Guide be barred from proceeding to arbitration.

PBA's Position

The PBA's arguments in support of its claim for "portal to portal" pay need not be set forth herein, inasmuch as the City has conceded that this claim is arbitrable.

With respect to its other claims, the PBA contends that the report filed by the grievant's supervisor constituted

charges against the grievant. It is alleged by the PEA that the filing of these charges was:

> "... directly attributable to the grievant's persistence and attempt to secure a contractual benefit, to wit, portal to portal payment ..."

The PBA asserts that the filing of charges against grievant by his supervisor constitutes a prima facie showing of discrimination because of union activity, in violation of Article XIX of the contract.

The PBA also alleges that a claimed violation of the Patrol Guide's command discipline procedures is within the scope of the contractual definition of a grievance, and may be determined only by an arbitrator and not the Board of Collective Bargaining.

For these reasons, the PBA submits that all of its claims should proceed to arbitration.

Discussion

Initially, we find that there exists no dispute as to the arbitrability of the PBA's claim for "portal to portal" payment under Article XXII of the collective bargaining agreement, and we shall order that this part of the PBA's grievance be submitted to arbitration.

In considering the other claims presented by the PBA, we observe that this Board has a responsibility to inquire as to the *prima facie* relationship between the acts complained of and the source of the alleged right, redress of which is sought through arbitration. In circumstances such as these, we have held that a grievant, where challenged to do so, has a duty to show that the contract provisions invoked are arguably related to the grievance to be arbitrated.[3] The City has challenged the arbitrability of the PBA's claims by asserting that the facts alleged provide no basis for a grievance under the provisions of the agreement and the Patrol Guide relied upon by the PBA. Thus, we must determine whether the provisions cited by the PBA are arguably related to the acts alleged as the basis of the PBA's grievance.

We find that the PBA has failed to establish a sufficient nexus between its claim of discrimination because of union activity, in violation of Article XIX of the agreement, and the filing of a report by the grievant's supervisor concerning the grievant's emergency excusal from duty on June 28, 1980. The pleadings in this matter, as well as the supervisor's report, attached as an exhibit to the PBA's answer, demonstrate to us that this dispute concerns solely a question of whether

---

[3] *See*, *e.g.*, Decision No. B-7-81, and cases cited therein at note 4.

the grievant was or was not granted permission to be absent from duty on June 28, 1980. No facts have been alleged to substantiate the conclusory assertion that the filing of a report documenting this June 28, 1980 incident was "directly attributable" to the grievant's attempt to obtain "portal to portal" payment for his June 1, 1980 reassignment. In our view, no facts have been alleged which tend to establish any connection between the filing of the report concerning the June 28, 1980 incident and the request for payment arising out of the June 1, 1980 reassignment. Therefore, we find that the PBA's claim under Article XIX of the agreement is not arbitrable.

We also find that, on its face, the supervisor's report, submitted by the PBA, supports the City's contention that it is merely a report and does not constitute a disciplinary charge against the grievant. The report contains a statement of the details of the incident, but the boxes on the form used, which would reflect any warnings, admonitions, instructions, imposition of command discipline, or referral for formal charges and specifications, are all left blank. Similarly, the space provided for the Commanding Officer's follow-up and report of final disposition is left blank. We are not convinced that the mere filing of such a report, upon which no disciplinary or other action is taken, is sufficient

evidence of discrimination because of union activity.

Finally, we find that the PBA's reliance upon the command discipline procedures of the Patrol Guide is misplaced. While it is true that we have held the Patrol Guide to be a rule, regulation or procedure of the Police Department which is subject to the parties' contractual grievance procedure,[4] the union is still required to show, prima facie, some nexus between the cited provision of the Patrol Guide and the facts which are the subject of the grievance. It is not sufficient to argue, as the PBA has done herein, that a claimed violation of the Patrol Guide is prima facie arbitrable. What is required is that the union show that the subject of the grievance is arguably related to the cited provision of the Patrol Guide. With respect to its claim under the Patrol Guide, the PBA has failed to establish any arguable relationship between the command discipline procedures set forth in the Patrol Guide and the filing of a report which, on its face, indicates that no command discipline was imposed. Accordingly, we find that this claim is not arbitrable.[5]

---

[4] Decision Nos. B-4-81, B-15-80, B-8-78.

[5] In view of our disposition of this claim, we do not reach the question of whether arbitration of a claim found to actually arise under the command discipline procedures of the Patrol Guide, would be barred as a consequence of the contract's express exclusion of disciplinary matters from the definition of a grievance, under Article XXIII, Section l.a.2 of the contract.

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 City's petition challenging arbitrability be, and the same hereby is, granted, and the PBA's request for arbitration be, and the same hereby is, denied, except as to the claim based on Article XXII of the collective bargaining agreement, and as to such claim only, it is granted.

DATED: New York, N.Y.
January 11, 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER