City v. Patrolmen's Benevolent Assoc., 41 OCB 15 (BCB 1988) [Decision No. B-15-88]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

DECISION NO. B-15-88

THE CITY OF NEW YORK,

DOCKET NO. BCB-1000-87

Petitioner, (A-2638-87)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.
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DECISION AND ORDER

On October 23, 1987, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Patrolmen's Benevolent Association ("the Union" or "PBA") on or about July 21, 1987. The Union filed its answer on November 4, 1987, to which the City replied on December 14, 1987.

BACKGROUND

On or about February 19, 1987, the Union filed an informal grievance, claiming that from December 22, 1986 through January 7, 1987 all of the new recruits assigned to Neighborhood Stabilization Unit ("NSU") #18, Squads 1, 2, 3 were ordered to work out of chart for non-emergency purposes in violation of

the collective bargaining agreement. The Police Department ("Department") assigned Lieutenant Milton Strack, Personnel Officer I Patrol Borough Queens, to investigate the grievance. In a report to the Commanding Officer, Office of Labor Policy, dated April 16, 1987, Lieutenant Strack stated that:

> A review of the particulars discloses:
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> a. Effective 12/22/86 all newly assigned N.S.U. personnel were directed to work tours 0800x1635 and 1430x2305 hours under the police officer 'Scooter Chart'. The purpose of these starting times was to standardize N.S.U. tours throughout the City for possible use in a coordinated anti-peddler program in Manhattan.
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> b. The above starting times applied to the newly assigned probationary officers. The previously assigned probationary officers starting times remained the same as in the past which is 0700x1535 and 1530xOOO5 hours.
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> c. Research of available data discloses:
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> 1. The current PBA/City Labor Contract does not stipulate starting times for tours.
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> 2. The police officer Duty Charts used for scheduling under the 9 Squad Chart, Steady Late Tours and Scooter Charts (the one in use in the N.S.U.'s) utilize numbers to indicate platoon scheduling, but do not stipulate starting times.
>
> 3. 'Finest' Message #009239 dated 3/18/87 entitled 'Arcs Charts Deletions' which is used for payroll purposes lists numerous starting times, however none of the times coincide with the original N.S.U. starting times nor with the starting times being grieved.

Based upon his investigation, Lieutenant Strack concluded that:

> An initial review of the grievance would appear to indicate that the starting times were changed and therefore would support the grievance. However, it is obvious from the above data that the original N.S.U. personnel kept the same starting times while the newly assigned non-designated officers were assigned the new starting times. Therefore, lacking any official guidelines which designate specific starting times for N.S.U. personnel and aware of the fact that they had never been assigned another starting time it would seem reasonable and appropriate for the Department to designate a starting time commensurate with the Department's needs. Consequently, recommend Disapproval of the Grievance.

The informal grievance was thereafter denied and, on or about June 24, 1987, the Union filed a grievance at Step IV of the grievance procedure. On or about July 13, 1987, the Step IV grievance also was denied. No satisfactory resolution of the dispute having been reached, on or about July 21, 1987, the Union filed a request for arbitration in which it claimed that the Department violated Article III, Section lb [1] of the

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[1] Article III - Hours and Overtime

Section 1.

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 thirty-five

collective bargaining agreement and Temporary Operating Procedure No. 336 ("TOP #336")[2] by improperly rescheduling all members assigned to NSU #18, Squads 1,2,3 from December 22, 1986 through January 7, 1987. As a remedy, the Union requested "overtime compensation at the rate of time and one half for all hours worked outside the regularly scheduled tours of duty."

(Footnote 1 continued)

(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. 3363, 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 on the following occasions the Department may reschedule an employee's tours of duty by not more than three hours before or after normal starting for such tours, without payment of pre-tour or post-tour overtime provided that the Department gives at least seven 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.

[2]TOP #336 pertains to the assignment of members of the force and states, in relevant part, as follows: "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."

POSITION OF THE PARTIES

City's Position

The City claims that the scheduling of the NSU members' tours is within its statutory management prerogatives as set forth in section 12-307b [3] of the New York City Collective Bargaining Law ("NYCCBL"); and that contrary to the Union's assertion, Article III, Section 1b and TOP #336 "in no way limit the Department's managerial prerogative to assign its employees as it sees fit." The City notes that grievants were probationary Police Officers who had just graduated from the Police Academy. It maintains that they were assigned directly from the Police Academy to the Manhattan Peddlers detail and were given the duty chart for that assignment. Article III, Section 1b and TOP #336, the City asserts, prohibit only the rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation. Since grievants had not

[3] Section 12-307b of the NYCCBL states as follows:

> 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; ....

previously been assigned to any tour of duty, the City contends that their tours could not have been rescheduled. Therefore, it argues that the Union has failed to state a claim which is arbitrable under the agreement between the parties, and the request for arbitration must be denied.

Furthermore, the City asserts that since Article III, Section 1b clearly pertains to the rescheduling of officers from one tour of duty to another, and grievants were scheduled on their first assignment, it is "impossible" that this provision could be relevant to the instant dispute. Therefore, the City also argues that the Union has failed to establish the required nexus between the act complained of and the source of the alleged right sought to be remedied at arbitration.

In addition, the City claims that in two recent decisions[4] the Board of Collective Bargaining ("Board") determined that Article III, Section 1b does not guarantee employees the right to work overtime. Rather, it requires only that employees be compensated when overtime work is "ordered and/or authorized" by the Department. Since the Union presented no facts which show that grievants were ordered or authorized to work overtime in their assignment to the Manhattan Peddlers detail, the City maintains that it failed to

[4]Decision Nos. B-16-87; B-35-86.

establish a violation of Article III, Section 1b.

Finally, the City notes that the Union has not alleged that Officers who are assigned or detailed to the Manhattan Peddlers Unit work any tour other than the 0800x1635 hours to which grievants were scheduled. As a result, it claims that the Union has failed to show, as a threshold matter, that grievants ever performed overtime work.

Union's Position

The Union argues that the instant grievance concerns the temporary rescheduling of the NSU members' tours; not their assignment to a particular type of duty. Although the right to assign its employees is within the Department's statutory managerial prerogatives, the Union asserts that where, as in the instant case, the assignment results in the temporary rescheduling of Officers' tours of duty, the Department's right is limited by Article III, Section 1b and TOP #336. Therefore, the Union claims that contrary to the City's contention, it has stated a claim which is arbitrable under the agreement between the parties.

The Union further claims that every Police Officer must be assigned to a permanent, not temporary, duty chart regardless of whether or not they are probationary employees. According to the Union, however, the Department admits that it assigned grievants to work tours of duty which were different from their

permanent tours in order to standardize NSU tours throughout the City for possible use in a coordinated anti-peddler program in Manhattan. The Union submits that the fact that grievants were placed back in the permanent NSU duty chart on January 7, 1987 supports its contention that from December 22, 1986 to January 7, 1987 they were temporarily rescheduled. The Union asserts that while the Department is permitted to make permanent changes in Officers' tours of duty, Article III, Section 1b and TOP #336, as well as past practice, strictly prohibit temporary assignments in which the hours to be worked vary from the hours of the Officer's regular tours of duty, unless they are paid overtime compensation for all hours worked outside their regularly scheduled tours of duty. Therefore, the Union argues that it has established a nexus between the act complained and the contractual provision and directives cited as the basis for its grievance.

The Union also claims that "there is no question [in the instant case] regarding the authorization or the ordering of overtime work but, rather, only the rescheduling of tours [without the payment of overtime compensation]." As such, the Union maintains that the recent Board decisions cited by the City, which concern the alleged denial of the right to be assigned overtime work, have no bearing on whether the instant grievance is arbitrable.

Finally, the Union disputes the City's assertion that it must show that grievants worked more than the number of hours in their regularly scheduled tours of duty to establish a violation of Article III, Section 1b. The Union claims that Article III, Section 1b and TOP #336 define overtime as hours worked outside grievants' regularly, or permanently, scheduled tours. Therefore, the Union asserts that "it is sufficient to show that grievants were temporarily rather than permanently assigned, and such temporary rescheduling is strictly prohibited by Article III, Section 1b of the contract and TOP #336 and must be compensated by overtime for all hours outside the regularly, which means permanently, scheduled tours."

DISCUSSION

In considering challenges to arbitrability, this Board has a responsibility to ascertain 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.[5]

[5] Decision Nos. B-5-88; B-16-87; B-35-86; B-8-82; B-15-79.

It is clear that the City and PBA have agreed to arbitrate grievances, as defined in Article XXIII of their Agreement, and that the obligation encompasses claimed violations of the provisions of that Agreement as well as the rules, regulations and procedures of the Department. In the present case, however, the City contends, and we agree, that the provisions upon which the PBA relies as the source of the right which it asserts do not limit the City's statutory management right to assign its employees.

Article III, Section 1b and TOP #336 provide that in order to preserve the intent and spirit of Article III, Section 1a, which guarantees overtime compensation for all "ordered and/or authorized overtime," there shall be no rescheduling of days off and/or tours of duty. We find, however, that grievants' tours could not have been rescheduled because they were not previously assigned to any duty chart. In reaching this conclusion, we note that the Union has presented no facts which contradict the City's claim that grievants were assigned directly from the Police Academy to the Manhattan Peddlers detail and were given the duty chart for that assignment. Moreover, we find that contrary to the Union's claim, the City did not admit that it temporarily assigned grievants to work tours of duty different from their permanent tours in order to standardize NSU tours throughout the City for possible use in a

coordinated anti-peddler program in Manhattan. Rather, as noted by Lieutenant Strack in his report to the Commanding Officer, Office of Labor Policy,

> the original NSU personnel kept the same starting times while the newly assigned non-designated officers [grievants] were assigned the new starting times. Therefore, lacking any official guidelines which desig nate specific starting times for N.S.U. personnel and aware of the fact that they had never been assigned another starting time it would seem reasonable and appropriate for the Department to designate a starting time commensurate with the Department's needs.

In addition, we are not persuaded by the Union's assertion that since grievants worked tours of duty from December 22, 1986 to January 7, 1987 which were different from the regular NSU duty chart to which they were thereafter assigned, it is evident that they were temporarily rescheduled during that two week period of time. Instead, we find that based upon the facts presented, it is reasonable to conclude that on January 7, 1987, the Department exercised its management right to permanently change grievants' tours of duty.

As to the City's argument that Decision Nos. B-16-87 and B-35-86 require that the Union present facts which show that grievants were ordered and/or authorized to perform overtime work in order to establish a violation of Article III, Section 1b, we find, as the Union asserts, that those decisions have no

bearing on the instant matter. Unlike Decision Nos. B-16-87 and B-35-86, in the present case there is no question regarding the authorization or ordering of overtime work. Moreover, we note that in Decision Nos. B-16-87 and B-35-86, the Union did not allege a violation of Article III, Section lb and TOP #336 (rescheduling of days off and/or tours of duty); but rather, a violation of Article III, Section la (assignment of overtime work).

Since we find that the Union's claim based upon the alleged violation of Article III, Section lb and TOP #336 is not arbitrable, it is unnecessary to determine whether the Union has failed to show, as a threshold matter, that overtime work was ever performed by grievants. In any event, we note that this question would involve the merits of the grievance which we have held is a function for the arbitrator and not the forum dealing with the arbitrability of the dispute.[6]

Accordingly, for all the reasons stated above, the City's petition challenging arbitrability shall be granted.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

[6] See e.g., Decision Nos. B-7-81; B-4-81; B-17-80

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted; and it is further

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

DATED: New York, N.Y.
May 26, 1988

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

PATRICK F.X. MULHEARN
MEMBER

EDWARD SILVER
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER