City v. PBA, 43 OCB 64 (BCB 1989) [Decision No. B-64-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of
THE CITY OF NEW YORK,
Petitioner,

-and-

THE PATROLMEN'S BENEVOLENT ASSOCIATION,
Respondent.
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Decision No. B-64-89
Docket No. BCB-1194-89
(A-3099-89)

DECISION AND ORDER

On August 11, 1989, 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 on or about May 23, 1989. The Patrolmen's Benevolent Association ("the Union") filed an answer on August 21, 1989. The City filed a reply on August 24, 1989.

BACKGROUND

On or about December 15, 1988, the Union filed an informal grievance protesting the "forced transfer" of Police Officer Barry Burns ("the grievant") from the Street Crime Unit back to "patrol". The grievance was denied on or about March 13, 1989, on the ground that there had been no "violation, misinterpretation, or misapplication" of the collective

bargaining agreement ("the Agreement") or the Departmental rules, regulations or procedures. The grievance was thereafter submitted at Step IV of the grievance procedure on or about March 15, 1989. The grievance was denied at Step IV on or about May 11, 1989.

No satisfactory resolution of the dispute having been reached, the Union filed a request for arbitration on or about May 23, 1989. In its request for arbitration, the Union alleges that the "forced transfer" of the grievant back to "patrol" constitutes a violation of Interim Order No. 60, dated September 26, 1986.[1] As a remedy it seeks "reinstatement of the grievant

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[1]The Order provides in relevant part as follows

1. Effective October 1, 1986, to reflect the current department policy and further enhance the personnel management and career choice opportunities, the former Career Path Program is hereby
updated, revised and renamed " Career Program for Police Officers."

2. The goal of the program is to provide a comprehensive personnel management system that:

a. Allows the department to place and promote qualified, experienced officers.
b. Permits police personnel on their own initiative to be come qualified for their own assignment and career preference . . .

3 The objectives of this program include the assignment and advancement of personnel based on job experience, job performance and personal development. A point system to reflect these accomplishments has been formulated . . . . After compiling a minimum of fifteen (15) points, a police officer becomes eligible to request a Career Program Transfer to either:

a. Precinct of choice
b. A non-precinct assignment
c. An investigative assignment . . . .

5. CAREER PROGRAM APPLICATIONS FOR TRANSFER will receive priority when assigning personnel to f ill vacancies. All Career Program transfers will be made commensurate with the needs of the department. . . .

15. It must be clearly understood by all that there are NO AUTOMATIC OR BUILT-IN GUARANTEES in this program. Fulfilling the Career Program requirements for an assignment or promotion will not automatically guarantee that an assignment or promotion will be made. Fulfilling the requirements establishes eligibility and subsequent consideration for assignment and/or promotion. . . .

16. Neither will the Career Program prevent the department from making transfers to fill special needs or utilizing special talents of individual members for specific assignments. The department absolutely retains its managerial prerogatives. This Career Program does not limit or change the department's rights or managerial prerogatives to assign and promote personnel . . . .(emphasis in original)

to the Career Program."

Interim Order No. 60 establishes a point system whereby police officers, after accumulating a sufficient number of points, become eligible to request a preferential "Career Program Transfer" to a precinct of choice, a non precinct assignment or to an investigative assignment. The order, in effect, establishes the qualifications necessary to attain eligibility for desired promotions within the Department.

POSITIONS OF THE PARTIES

City's Position

The City maintains that an alleged violation of Interim Order No. 60 does not constitute a "grievance" as defined by the parties in their Agreement. It notes that Article XXIII, §1(a)(2) of the Agreement defines the term "grievance" to encompass "[a] claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department ("the Department") affecting terms and conditions of employment", and asserts that the Board has held the implementation of Interim Order No. 60 to be a non-mandatory subject of bargaining.[2] Consequently, the City argues that an alleged violation of Interim Order No. 60 does not affect the terms and conditions of employment, and is not arbitrable within the contractual arbitration clause agreed upon by these parties.

The City also contends that the Union has not established a nexus between Interim Order No. 60 and the transfer of the grievant back to patrol. It notes that although the Order establishes the requirements necessary for members to be assigned to the unit of their choice, it does not guarantee that such assignments will be made. Thus, the City maintains that the Union has not demonstrated that the forced transfer of the grievant constitutes an arguable violation of the order.

[2] The City refers to Decision No. B-24-87 as support for its contention.

Union's Position

The Union argues that the scope of the grievance/ arbitration procedure to which these parties have agreed is not limited to mandatory subjects of bargaining. It maintains that even if, as the City alleges, Interim Order No. 60 involves a mandatory subject of bargaining, the instant grievance is arbitrable pursuant to the express provision of Article XXII, Section 1(a)(2) of the Agreement.

Moreover, the Union contends that it has established a nexus between the instant grievance and the Order. It maintains that the Order directly addresses the subject of the instant dispute.

Discussion

In considering challenges to arbitrability, this Board has long held that where challenged to do so, the proponent of arbitration must demonstrate a prima facie relationship between the act complained of, and the source of the right being invoked, and that the parties have agreed to arbitrate the type of dispute set forth in the challenged request for arbitration.[3] Although it is well established that the interpretation and applicability of contract terms are determinations for an arbitrator,[4] when the arbitrability of a particular dispute is at issue, we will

[3]Decision Nos. B-52-88; B-13-87; B-35-86; B-31-85.

[4]Decision Nos. B-27-89; B-2-89; B-71-88; B-27-86; B-4-85.

examine the terms of a collective bargaining agreement to determine whether compliance with our threshold arbitrability test has been established.[5]

The City argues that the involuntary transfer of the grievant is not arbitrable because the Union has failed to address both elements of our threshold arbitrability test. It maintains that an alleged violation of Interim Order No. 60 is not a grievance within the meaning of the Agreement, and that the Union has not demonstrated a nexus between the Order and the transfer of the grievant.

We initially turn our attention to the question of whether an alleged violation of Interim Order No. 60 arguably constitutes a grievance within the meaning of Article XXIII, §1(a)(2) of the Agreement. We note that the establishment of qualifications for career advancement is not within the scope of mandatory collective bargaining. we have, on several occasions, determined that this subject is within those powers reserved to the city in Section 12-307b. (formerly §1173-4.3(b).) of the New York City Collective Bargaining Law ("the NYCCBL").[6] Moreover, in Decision

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[5]Decision Nos. B-5-89; B-15-79.

[6]Section 12-307b. of the NYCCBL provides in relevant part as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards and services to be offered by its agencies; 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 governmental operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work . . . . (emphasis added).
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> See also, Decision Nos. B-24-87; B-38-86; B-37-80; B-10-71.

No. B-24-87 affm'd, Caruso v. Anderson, Index No. 17123/87 (1st Dept., December 22, 1988), we specifically determined that the implementation of Interim order No. 60 was a non-mandatory subject of bargaining.

However, it is well established that parties to a collective bargaining agreement may voluntarily agree to restrict a matter that falls within an area of management prerogative.[7] A dispute arising in a non-mandatory area will proceed to arbitration if the parties have agreed to arbitrate disputes of that nature.[8] It is clear that a non-mandatory subject remains within the managerial prerogative if it is not limited by an agreement.[9]

The parties in this case have contractually defined an arbitrable grievance to include alleged violations of Police Department rules, regulations or procedure which affect the terms

[7] Decision Nos. B-67-88; B-53-88; B-31-87; B-14-87; B-29-82.

[8] See, Decision No. B-3-83.

[9] See, Decision Nos. B-4-89; B-62-88; B-5-80.

and conditions of employment. After carefully reviewing the provisions of Interim Order No. 60 and the relevant precedent on this issue, we have determined that an alleged violation of the Order does not constitute a grievance within the meaning of this definition. We note that the Order specifically preserves the Police Department's managerial prerogative to assign personnel within its discretion by providing as follows:

> It must be clearly understood by all that there are NO AUTOMATIC OR BUILT IN GUARANTEES in this program. . . . This Career Program does not limit or change the department's rights or managerial prerogatives to assign and promote personnel. . . . (emphasis in original).

The Union has failed to convince us that the Department, in implementing Interim Order No. 60, relinquished any of its managerial authority to assign and promote personnel within its discretion.

Consequently, we find that the specifications set forth in Interim Order No. 60 are not terms and conditions of the employment of unit members. Since the instant grievance, involving an alleged violation of the Order, does not state a claim which affects the terms and conditions of employment, we hold that it is not arbitrable within the meaning of the contractual arbitration clause agreed upon by these parties.[10]

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[10] We also note that PERB has defined qualifications for employment as:

> preconditions, not conditions of employment. They define a level of achievement or a special status deemed necessary (by the employer) for optimum on-the-job performance. West Irondecruoit Board of Education, 4 PERB §4511 at p. 4610, aff'd, 4 PERB §3070 (1971).

See also, Board of Education of the City School District of New York and United Federation of School Teachers. Local 2. AFL-CIO, 12 PERB §4553 (1979).

Furthermore, even if we deemed an alleged violation of Interim Order No. 60 to constitute an arbitrable grievance within the meaning of the Agreement, we hold that the Union has not established a nexus between the Order and the forced transfer of the grievant in the instant case. Since the Order expressly preserves the Department's managerial prerogative to transfer personnel, the Department's authority in this area remains unrestricted. Therefore, the Order was not arguably violated when the grievant was involuntarily transferred.

For the foregoing reasons, we dismiss the Union's request for arbitration.

0 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

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is granted; and it is further

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

Dated: New York, N.Y.
October 23, 1989

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Frederick P. Schaffer
MEMBER