SUPREME COURT : NEW YORK COUNTY
IAS PART 37

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In the Matter of the Application of

PHIL CARUSO, as President of the
Patrolmen's Benevolent Association
of the City of New York, Inc., et al.,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No. 9240/89

-against-

MALCOLM D. MacDONALD, Chairman of the
Board of Collective Bargaining of the
City of New York, et al.,

Respondents.

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Mc COOE, J.;

This is an Article 78 proceeding wherein petitioner-union seeks to annul a determination by respondent-Board of Collective Bargaining ("Board"), Decision No. B-12-89, which denied its request for arbitration of a dispute alleged to arise from a collective bargaining Agreement between it and respondent-New York City Police Department ("NYCPD"). Respondent had determined that the dispute was non-arbitrable.

The issue is whether respondent Board acted arbitrarily and capriciously when, pursuant to the New York City Collective Bargaining law ("NYCCBL"), NYC Admin. Code, Sec. 12-301, et seq.,

it applied a test of arbitrability requiring petitioner, upon a denial of arbitration to demonstrate both the existence of (a) an arbitration agreement and (b) a nexus between the dispute and a contractual overtime provision.

On or about July 9, 1988 the dispute arose when, as a result of overscheduling at the site of a civil service promotional examination administered by respondent-NYCPD, some members of petitioner-union were rescheduled for the examination, two hours later, thereby allegedly losing two hours of their swing time between scheduled tours of duty. In August 1988 petitioner initiated the grievance procedure provided for in its collective bargaining Agreement seeking two hours overtime compensation for the aggrieved union members and respondent-NYCPD denied the grievance on October 17, 1988. Article XXIII, Sec. 1(a) of the Agreement with respondent-NYCPD defines a grievance, inter alia, as an alleged violation, misinterpretation or misapplication either of the Agreement or of NYCPD rules, regulations and procedures. Upon denial of the grievance by NYCPD petitioner on or about October 24, 1989 filed with respondent-Board a request for arbitration of the dispute, alleging a violation of Article III(l)(a) of the Agreement, which governs "all ordered and/or authorized overtime". On or about

December 8, 1988 respondents Linn and Office of Municipal Labor Relations ("OMLR"), acting on behalf of NYCPD, served and filed a petition with respondent -Board challenging the arbitrability of the grievance. On or about March 30, 1989 respondent-Board, acting pursuant to NYCCBL, Sec. 12-309a(3), granted the petition and denied petitioner's request for arbitration. The Board determined that petitioner failed to demonstrate the existence of a nexus between the grievance and Article III, Sec. l(a) which applies only if the overtime has been "ordered and/or authorized."

Petitioner-union argues that the determination of respondent-Board was arbitrary and capricious in that it did not deem the dispute arbitrable since it failed to recognize the existence of a nexus between the grievance and the relevant contractual overtime provision. Petitioner contends further that the Board acted outside the scope of its own statute and rules. NYCCBL Sec. 12-301 et seq.

The application is denied and the petition is dismissed as to all respondents. In reviewing an agency determination the Court examines whether the decision is arbitrary and capricious and whether it accords with -lawful procedure. Matter of Incorp. Village of Lynbrook v. PERB, 48 N.Y.2d 398; Pell v. Board of Educ., 34 N.Y.2d 222.” The construction given statutes

and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." Matter of Howard v. Wyman, 28 N.Y. 2d 434, 438. Respondent-Board has the duty of implementing a complex statue affecting New York City public sector ;labor relations, which statue is analogous to a State labor statue wherein the expertise of the State agency was acknowledged in Matter of Incorp. Village of Lynbrook v. State PERB, supra. Moreover this Court has deferred to the expertise of respondent-Board itself in Caruso v. Anderson, Index No. 05411/82, (Sup. Ct., N.Y. Co. July 29, 1982, Sherman, J.) and Committee of Interns v. NYC-OCB, Index No. 11542/79, (Sup. Ct., N.Y. Co., April 3, 1980, Dontzin, 3.).

In the present case respondent-Board at the cutset applied a test of arbitrability which has been judicially recognized in Caruso v. Anderson, supra, whereby the party seeking arbitration, upon a challenge, must establish both the existence of an agreement to arbitrate and a prima facie relationship between the dispute and the revelant contractual provisions. After enunciating the test respondent-Board thereupon applied it properly to the facts. The Board found that Article III, Sec. 1(a) of the collective bargaining Agreement, which governs overtime compensation, was not applicable to a dispute arising from the

conduct of union members in voluntarily appearing to take a civil service promotional examination in the absence of any order or authorization from respondent-NYCPD. Petitioner's reliance upon Cole v. McGuire, 90 A.D. 2d 703, is unavailing. Cole is distinguishable since it involved a failure to comply with disciplinary regulations of NYCPD.

The petition is also dismissed to the extent it seeks relief against the remaining respondents. The petition fails to allege that the conduct of the Linn and OMLR respondents, which was authorized by Mayor's Exec. Order No. 38, February 7, 1987 (as amended), was arbitrary and capricious. To the extent that the petition seeks to review the examination scheduling activity on July 9, 1988, it is barred by the four month time limitation cf CPLR 217. The proceeding was commenced on April 28, 1989 which was more than four months from July 9, 1988, when the scheduling activity became final and binding and "had its impact" upon petitioner. Edmead v. McGuire, 67 N.Y.2d 714. Neither party raised the issue whether the appropriate remedy should be a declaratory judgment but in any event the result would be the same. There is a very fine line distinction in this type of case. See Matter of Hertz v. Rozzi, 148 A.D.2d 535.

The application is denied and the petition is dismissed as to all respondents.