

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- - - - - X

In the Matter of

THE CITY OF NEW YORK

DECISION NO. B-10-74

Petitioner

DOCKET NO. BCB-174-74

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION

Respondent

- - - - -X

DECISION AND ORDER

The City's petition herein contests the arbitrability of a grievance filed by the Uniformed Firefighters Association. The UFA's original request for arbitration alleged that the City violated

"...the existing collective bargaining agreement and the existing policy and practice of the Fire Department with regard to involuntary transfers in that these transfers were made without regard to seniority, not in compliance with the past practice and policy of the Fire Department and as punishment for Union activity contrary to the public policy of the City and State of New York."

The request for arbitration specifically cited Article XX of the contract as having been violated and sought as a remedy that,

"All men transferred on Fire Department Order No. 3 of 1/4/74, who wish to be returned to their original assignments be returned and all future transfers made in accordance with contract provisions and Fire Department policy and practice."

Article XX of the 1973-74 contract between the City and the UFA provides,

"In filling vacancies, the Department recognizes the importance of seniority (measured by time in the Department) provided the senior applicant has the ability and qualifications to perform the work involved. However, the Department's decision is final."

The City's petition contesting arbitrability contended that since "the Department's decision is final", "...any matter alleged to be within the purview of Article XX is not reviewable. "And,"only those disputes which the parties have agreed to permit an arbitrator to resolve may be brought before an arbitrator."The City further contended that the UFA waiver filed in case number A-345-74,¹ which the City alleged

¹ Case No. A-345-74 also involved transfers under Fire Department Order No. 3. The UFA in that case cited a violation of Article XXVII A, Section 4D (1). The allegedly violated language of the Article, titled "Productivity Issues", reads as follows:

"D. After July 1, 1972, the City may make unilateral changes and install programs unilaterally subject to the following:

- (1) No less than 2 weeks notice of the change is to be given to the Union."

In A-345-74, the award, dated January 14, 1974 reads:

"The Unions have not offered or adduced sufficient evidence to show that the transfers set forth in

involved the same underlying dispute, constitutes a waiver of "Respondent's right to raise the same underlying issue again."

The agreement between the parties defines grievance in Article XXII, Section 1 as follows:

"A grievance is defined as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment."

In its answer filed May 31, 1974 the UFA withdrew "so much of its claimed grievance as deals with any claimed violation of Article XX of the Collective Bargaining Agreement, so that said issue may be and is resolved." The UFA continues to rely on "a claimed violation, misinterpretation, or inequitable application...of existing policy" as the term grievance is defined in Article XXII of the contract.

The answer further states that the Union's waiver executed in A-345-74 does not bar its right to bring the instant grievance. The union contends that in A-345-75 the underlying dispute, and sole issue decided, was

"...whether the actions of the Fire Department with regard to Department Order No. 3 of 1974 violated Article XXVII-A, Section (4) (D) (1) of the Collective Bargaining Agreement, which in essence provides that the union shall be given two weeks notice of unilateral changes to be made by the City; the Impartial Chairman in the case decided only that the facts did not adduce

Departmental Order No. 3 dated January 4, 1974 were for the reason or reasons for which two weeks notice is required under Article XXV Section 4 D 1 of the UFOA contract and Article XXVII-A Section 4 D 1 OF THE UFA contract. Therefore the grievance is denied. " (Impartial Chairman Eric J. Schmertz)

a violation of that section of the Collective Bargaining Agreement. Here, respondent's grievance consists of a claimed violation of Article XXII, Section 2 [sic] of the Collective Bargaining Agreement....

Finally, the UFA affirmatively alleges that the transfer of certain Union members pursuant to Department Order No. 3 of 1974 is a violation or an inequitable application of the existing policy of the Fire Department with regard to involuntary transfers, "an issue which, incidentally, the City has stipulated as being a grievable issue in Case A-347-74."²

The union requests opportunity to present oral argument before the Board.

The reply of the City filed June 6, 1974 again states the City's position that the UFA has previously taken the underlying dispute to arbitration and that the waiver executed at that time, pursuant to Section 1173-8.0(d) of the New York City Collective Bargaining Law, waives the Union's right to submit the same underlying issue to any other tribunal.

The reply also alleges for the first time that the UFA has submitted the underlying dispute to the New York State Public Employment Relations Board (PERB) as an improper practice charge. The City urges that "Respondents waiver cannot be effective

² A-347-74 involved a request for arbitration citing a violation of Article XX and the policy and practice of the Fire Department. The case referred to transfers under Fire Department Order 225 of November 23, 1973. The City withdrew its challenge to arbitrability when the UFA stipulated to the following issue:

"The issue is the Union's allegation that under Department Order 225/1973 the City has violated or inequitably applied the existing policy of the Fire Department not to transfer members of the Fire Department for punitive reasons or arbitrary and capricious reasons."

A hearing on A-347-74 was last held April 24, 1974 before Eric J. Schmertz, and a decision is pending.

where it has already arbitrated the dispute and is attempting to proceed under the same dispute at PERB."

DISCUSSION

The UFA has, in fact, filed with PERB, an improver practice charge against the City, alleging that since November 6, 1973, the Fire Department has deliberately interfered with, restrained and coerced public employee members of the UFA in the exercise of rights guaranteed by Section 202 of the Civil Service Law, and has discriminated against such employees for the purpose of discouraging participation in the activities of the Union, all in violation of Sections 209 (a) (1) (a) and (c) of the Civil Service Law. The charge is based, in part, on the fact that since the firefighters strike of November 5, 1973, members and delegates of the UFA "have been involuntarily transferred in unprecedented numbers by Fire Department Orders Nos. 225/72, 3/74 and 12/74 dated November 23, 1973, January 4, 1974 and January 17, 1974 respectively." The thrust of the UFA charge, therefore, is that certain UFA members have been involuntarily transferred by the City in reprisal for the strike in which they participated last November. The Union contends that these retaliatory actions on the part of the City, "constitute a threat to the continued existence of the UFA" and violate the rights of union members to engage in concerted activity.

In the arbitrability case before us the UFA has alleged that the involuntary transfers made pursuant to Department Order No. 3 constitute a violation or inequitable application of "existing policy." The Union cites no specific written policy concerning involuntary transfers, and the City's petition does not speak to this issue, It is clear, however, that the UFA is alleging that the involuntary transfers made pursuant to Dept. Order No. 3 were in retaliation for the November strike, and as such, constituted a violation of an existing policy not to transfer members off the Fire Department "as punishment for union activity."

Section 1173-8.0 d of the New York City Collective Bargaining Law states:

"As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

The UFA filed the statutory waiver with its Request for Arbitration in the instant matter. However, the arbitrability case

before us and the improper practice case before PERB both stem from and challenge the involuntary transfers made pursuant to Department Order No. 3. The Union alleges before this Board that transfers violated department policy, which is grievable under the contract, while it alleges before PERB that the transfers violated the Civil Service Law. The basis of the charges in both forums, however, is that the involuntary transfers constituted reprisals for the November strike. We find, therefore, that the Union has submitted to PERB the same underlying dispute which is the subject of the instant case before us. In so doing, the Union has violated the waiver provision of the New York City Collective Bargaining Law and may not avail itself of arbitration while simultaneously pressing an improper practice charge with PERB. In order not to render meaningless the waiver requirement contained in Section 1173-8.0 d, we shall hold in abeyance a decision on the arbitrability of the instant grievance until the Public Employment Relations Board either rules on the improper practice charge or until the UFA withdraws the improper practice charge currently before PERB.

While we have noted the several contentions of the parties with respect to the arbitrability of the instant grievance, in view of our decision to hold a determination in abeyance, we do not, at the present time, pass upon the question of whether the arbitration award in Case A-345-74 precludes the Union from

seeking arbitration on the allegations presented in the instant grievance.

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,

ORDERED, that the petition herein be held in abeyance, pending a ruling by the Public Employment Relations Board on the improper practice charge which the Respondent has filed with it, or Respondent's withdrawal from the Public Employment Relations Board of the improper practice charge it has filed with respect to involuntary transfers pursuant to Fire Department Order No. 3.

DATED: New York, N.Y.
July 29, 1974.

ARVID ANDERSON
CHAIRMAN

THOMAS J. HERLIHY
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

WALTER L. EISENBERG
MEMBER