City v. UFOA, 15 OCB 11 (BCB 1975) [Decision No. B-11-75 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,
Petitioner

DECISION NO. B-11-75

DOCKET NO. BCB-221-75

-and

UNIFORMED FIRE OFFICERS ASSOCIATION,
Respondent

DECISION

On April 11, 1975, the Uniformed Fire Officers Association (UFOA) filed a Request for Arbitration alleging that the Fire Department had violated Article VI[1] of the collective bargaining agreement by 'the proposed implementation of 'Battalion Chief Discretionary Response Procedure' per Fire Department order No.53, dated March 21, 1975." Along with the Request for Arbitration, the Union

---

[1] Article VI provides in relevant part:

"Section 1. Whenever a Fire Officer (line)is assigned to the duties of a higher rank for more than two hours in any tour, he shall be paid in cash for the entire tour at the minimum rate of pay for the higher rank in which he served even though the Department may replace him at any time with an appropriate officer. in the case of a Battalion Chief assigned to the duties of a Deputy Chief pursuant to the preceding sentence, he shall be paid at the rate of pay for the Deputy Chief rank which is next higher than the rate of pay such Battalion Chief receives in his Battalion Chief rank. The intent is that the Department shall have two hours to obtain a Fire Officers (line) qualified in the higher rank...

* * * *

Section 3. No temporary assignment to Fire Officer (line) above the rank of Lieutenant shall be made out of title except by a Fire Officer (line) of the next lower Civil Service rank"

filed the required waiver of its right, if any, "to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

On or about March 31, 1975, the UFOA filed an action in Supreme Court, County of New York, alleging that the City's proposed Battalion Chief Discretionary Response Procedure ("DRP") was unlawful and in, violation of Section 61 of the Civil Service Law,[2] the Constitution of the State of New York, and Article VI of the parties' contract. The relief sought by the UFOA was an order, pursuant to Article 78, CPLR, (a) declaring and adjudging the proposed action of the City as invalid and unlawful and (b) staying and enjoining permanently and pendente lite the City from instituting the proposed program requiring out-of-title work by Fire officers.

[2] Section 61 of the New York State Civil Service Law provides in relevant part:

"No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such Position in accordance with the provisions of this chapter and the rules prescribed thereunder."

On April 18, 1975 the City filed a Motion to Dismiss and/or a Petition challenging the arbitrability of the Union's grievance inasmuch as the relief sought by the Union in court encompasses all of the relief requested by the Union in its Request for Arbitration. The City argues:

> "By commencing the [court] action ... Respondent Am made an election of remedies concerning the alleged breach of contract and has thus waived its right to invoke the arbitration machinery of the contract .... By having previously submitted the underlying dispute to another judicial forum ... Respondent did mat execute, in good faith the waiver... and thus, has not complied with the requirements of Sections 1173-8.0(d) of the New York City Collective Bargaining Law ...."

On April 22, 2975, the UFOA filed its Answer to the Motion to Dismiss, wherein it admits that it did initiate the above-describe judicial proceeding but contends that said litigation was begun "only after good faith efforts by respondent to resolve the contractual dispute by grievance and arbitration failed, whereby judicial relief became the sole timely means of contesting the DRP and Avoiding its consequential and irreparable damage to respondent and its membership."

The UFOA relates that on April 2, 1975, the aforementioned judicial proceeding was returnable at Special Term, Part 1, of the New York Supreme Court, New York County. At such time, the City agreed to defer the institution of the DRP for one month, while the parties pursued means of resolving their dispute. The UFOA now states that it will withdraw its judicial proceeding if the Board of Collective Bargaining issues a decision finding the Union's grievance arbitrable and granting the Union the opportunity to proceed to an expedited arbitration on the merits of its grievance prior to May 5, 1975. Such timely arbitration is available, claims the Union, because the parties' Impartial Chairman, Eric Schmertz, allegedly will make available the afternoons of. April 28, 29 and 30 for the arbitration hearing.

The Battalion Chief Discretionary Response Procedure ("DRP")

By letter dated March 19, 1975, the UFOA was notified of the Fire Department's intent to institute a "Pilot Program - Battalion Chief Discretionary Response Procedure," in the Seventh Division of the Fire Department, commencing on April 7, 1975. The procedure for implementing said DRP was promulgated in the supplement to Department Order No.53, dated March 21, 1975.

Pursuant to D.O. 53, DRP is "a modification of the normal response procedure" under which Battalion Chief Officers will no longer be required to respond to certain pulled street box alarms, thus placing Lieutenants and Captains (lower ranking officers, referred to as Company Officers) responding to those alarms in command on a regular and non-emergency basis of the multiple company units responding thereto and of such firefighting operations as may be required at the scene of the response. According to the Union, "these command responsibilities and duties which Company Officers will be required to assume under DRP are those which are and have been exclusively appropriate to the rank and title of Battalion Chief Officers. Company Officers are further required under DRP to prepare and file such Fire and/or Emergency Reports of responses, whose preparation and filing would otherwise be within the assigned duties and responsibilities of Battalion Chief Officers. The Union claims that the Seventh Division of the Fire Department, wherein the DRP is to be instituted, includes fire districts with the highest incidences of alarms, emergencies, fires, human injury, and property damage.

Pursuant to Article XXV of the parties' contract (the "two-week notice" provision), officials of the Fire Department met with UFOA representatives to discuss the proposed DRP. No agreement was reached, and the UFOA filed a Step III grievance, dated March 26, 1975, complaining that the DRP will require Company officers to perform on a regular basis out-of-title work in violation of the contract and seeking a stay of the implementation of the DRP, pending final disposition of the grievance. The Union claims that the Fire Department, by not acting promptly on the grievance, precluded its final resolution by arbitration prior to April 7, 1975, the proposed date of DRP implementation. The Union, therefore, initiated its action in court, alleging that the implementation of the DRP would result in irreparable harm to fire officers and members of the public for the following reasons:

> "... (i) Battalion Chief Officers will no longer initially respond to perform such supervisory and command duties as are exclusively appropriate to their rank and title ... ; (ii) in the absence of Battalion Chief Officers at the initial response, critical supervisory duties will be assumed and performed by less experienced or qualified Company Officers and, in some cases, Firemen; (iii) Firemen whose Company Officer is forced to assume Chief Officer supervisory duties and responsibilities over several companies at the initial response in the absence of a Battalion

> Chief, will be required to engage in firefighting without the prescribed normal, and regular supervision and participation of that Company officer; and (iv) the vehicular, communications and first-aid resources, necessary for the health, safety, and welfare of firefighters at the scene of a fire, which are solely and exclusively in the possession and control of Battalion Chief Officers, will no longer be available at the initial response to the scene of the alarm."

In addition to the above stated allegations, the Union claimed in court that the Fire Department intends to institute the DRP in order to avoid making appointments and promotions of eligible Company Officers to the position of Battalion Chief, and, further, to reduce the quota of Battalion Chiefs in the Department by means of requiring out-of-title work by Company Officers. The Union also contended that Company Officers performing out-of-title work will not be compensated at the higher rate of pay appropriate to the rank of Battalion Chief. The DRP, if instituted, will violate Section 61 of the Civil Service Law, argued the Union, because it will require Company Officers to perform the work of Battalion Chiefs without having been promoted or appointed to such higher rank or compensated at a higher rate of pay in accordance with Section 61 and the state constitution. Finally, the Union maintained that the DRP will violate Article VI of the collective bargaining agreement.

In its Answer to the City's Motion to Dismiss, the Union claims that on April 2, 1975, the City agreed to submit to a prompt arbitration of the underlying contract dispute, pending the Union's withdrawal of its judicial proceeding. The Union states:

> "Respondent has foregone its rights to prosecute the judicial proceeding as expeditiously as possible in reliance upon petitioner's assurance to submit the dispute to arbitration. Respondent also agreed to withdraw its ligitation, including statutory and constitutional claims not directly at issue in the grievance (which is limited to a claim under Article VI of the contract). For respondent's relinquishment of those rights, petitioner agreed to an expedited arbitration .... Accordingly, the request for arbitration and the accompanying waiver herein at issue were submitted in good faith."

The Union seeks an expeditious determination by this Board, no later than April 23, 1965, since the pending litigation - "which must be pursued, if arbitration on the merits is not made available, before the implementation of the DRP,"- is scheduled to be heard on April 24, 1975. The City, immediately upon receipt of the Union's Answer to the Motion to Dismiss, telephoned the Board to deny the existence of any agreement concerning expedited arbitration and to request the opportunity to file a Reply.

DISCUSSION

In Decision No. B-10-74, City of New York and UFA, we considered the arbitrability of a grievance which was also the subject of an improper practice charge before the Public Employment Relations Board. In that case, we found 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 1173-8.0d, 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."

In Decision No. B-8-71, UFA and City of New York, the Union had commenced an Article 78 proceeding in state supreme court, alleging a breach of a contract provision in connection with a disciplinary proceeding, and one month thereafter, filed a request for arbitration, claiming a violation of the same contractual provision. We held:

> "The grievants in the Article 78 proceeding elected to plead, in part, a breach of the contract as a basis for obtaining reversal of the Commissioner's determination, and in the arbitration request, while the same breach of contract is pleaded, a result is sought which, on its face, is different than the result sought in the Article 78 proceeding. This is a classic illustration involving the doctrine of election of remedies (cf. Terry et al v. Manger, 121 NY 161). Having commenced an action invoking a statutory remedy for redress of an alleged contractual breach prior to commencing the arbitration proceeding, they may not now be permitted, through their representative, to invoke the arbitral remedy. The commencement of the Article 78 proceeding, with knowledge of the contractual remedy known to the grievants, is an election of remedies concerning the alleged breach of contract.
>
> The relief sought in the Article 78 proceeding encompasses all the relief being requested in the arbitration Proceeding with respect "to the alleged breach of contract and is totally sufficient to grant the grievants everything they are requesting by way of relief."

In light of the above cited decisions, up will not entertain an arbitrability proceeding unless and until the UFOA withdraws its judicial proceeding, currently pending in the state supreme court. Our decision herein is without prejudice to the right of the City to timely file a Reply to the Union's Answer to the City's Motion to Dismiss, pursuant to §7.9 of the Revised Consolidated Rules of the Office of Collective Bargaining, In addition,

our decision is without prejudice to the merits of such Reply regarding the Motion to Dismiss.

This is not a case in which the Union instituted a Judicial proceeding solely to seek a stay of implementation of a City action pending the outcome of an arbitrability proceeding or an arbitration hearing. In the instant matter, the Union instituted a court action in which it seeks not only a temporary injunction but a substantive finding that the implementation of DRP would violate the parties' collective bargaining agreement. Thus the relief which the Union seeks in the Article 78 proceeding encompasses all of the relief obtainable from an arbitrator.

We find that the Union may not litigate a dispute in court and simultaneously seek arbitration of the same underlying dispute. The requirement of filing a waiver, pursuant to §1173-8.0(d) of the New York City Collective Bargaining Law, is a condition precedent to the right to arbitration. The pendency of a proceeding in court is an absolute bar to any proceeding before this Board with respect to the Union's request for arbitration.

DETERMINATION

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

DETERMINED, that there will be no further processing of the Union's Request for Arbitration or of the City's Motion to Dismiss and/or Petition Challenging Arbitrability while the UFOA judicial proceeding is pending in New York Supreme Court, New York County.

DATED: New York, N.Y.
April 22, 1975

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

THOMAS J. HERLIHY
MEMBER

VINCENT D. McDONNELL
MEMBER

HARRY VAN ARSDALE, JR.
MEMBER