City v. UFOA, 15 OCB 2 (BCB 1975) [Decision No. B-2-75 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK DECISION NO. B-2-75

-and DOCKET NO. BCB-200-74

UNIFORMED FIRE OFFICERS ASSOCIATION

DECISION AND ORDER

The City's petition herein contests the arbitrability of a grievance filed by the Uniformed Fire Officers Association (UFOA). The Union's request for arbitration alleges that the Fire Department has violated Article XIX of the parties' collective bargaining agreement through its "denial to Fire Officers of the benefits set forth in Department Order No. 123 (1962) and Department Order No. 60 (1967), incorporating Section 239 of the New York Military Law in and as part of departmental orders and policy." The remedy sought is "application and entitlement of those benefits described and set forth in the above departmental orders to Fire Officers qualifying thereunder."

Article XIX of the parties' agreement provides, in relevant part:

> "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."

Fire Department order No. 123 (1962) at §1.2 provides as follows:

> "The following is promulgated for the information of all concerned:
>
> Section 249 - State Military Law
> (State and Municipal officers and Employees Granted Leave of Absence on July 4th - In Certain Cases)
>
> 'Each officer and member of the State or of a municipal corporation or of any other political subdivision thereof who was a member of the national guard or naval militia or a member of the reserve corps at a time when the United States was not at war and who has been honorably discharged therefrom, shall insofar as practical be entitled to absent himself from his duties or service with pay, on July 4th of each year. Notwithstanding the provision of any general, special, or local law or the provision of any city charter, no such officer or employee shall be subjected by any person whatever directly or indirectly by reason of such absence to any loss or diminution of vacation or holiday privilege or be prejudiced by reason of such absence with reference to promotion or continuance in office or employment or to reappointment to office or to re-employment.'
>
> Members who are affected by the above law shall forward reports to the Bureau of Personnel and Administration, submitting proof of membership in specified units and honorable discharge therefrom.
>
> The following form shall be used:
>
> Name
> Rank
> Unit Group No.
> Unit of Service
> Date of Honorable Discharge."

Fire Department No. 60 (1967) at §2.1 provides as follows:

> "Section 249 State Military Law
>
> Paragraph 1.2 of Department Order No. 123, 1962, shall be amended as follows:
>
> Delete: second and third paragraph in their entirety."

The City's petition contesting arbitrability contends that Article XIX of the contract "does no more than define a 'grievance' and set forth the procedures for an alleged violation of some contractual provision or 'existing policy.' It is impossible to violate a definition ...."

The City further contends that the Union does not present an arbitrable grievance because the implementation of Section 249 of the State Military Law is not an existing policy of the Fire Department. Moreover, the City argues that the Union's statement of its grievance "admits that the benefits of Section 249 of the State Military Law have never been implemented as a policy of the Fire Department." It is the City's view that the Union alleges a violation of an existing policy which the Union "has thus conceded never existed."

The City argues that the Union seeks an arbitration

award which would require the City to establish an "existing policy" of implementing Section 249 of the State Military Law. The Union's request for arbitration, it is alleged does not raise an arbitrable grievance, because "it is beyond the authority of an arbitrator -to direct that Petitioners establish an 'existing policy', since under Article XIX ... a grievance may only be maintained under a claim of violation of an already 'existing policy.'"

In its Answer, the Union contends that the Fire Department has violated existing policy and regulations by failing to interpret and apply properly the provisions of Department Orders No. 123 (1962) and No. 60 (1967), "which, as promulgated, authorize, allow, and grant to eligible Fire Officers those benefits therein stipulated."

The Union points out that its Request for Arbitration is directed toward an interpretation of an existing policy and departmental regulation, "as expressly set forth in the aforesaid Department Orders." The Union argues:

> "The fact that the Fire Department has failed and refused to apply this policy and/or regulation does not obviate this grievance, but is rather its very gravamen.
>
> Section 249 of the State Military Law is not the basis of this grievance except to the extent that the provisions of that statute have been adopted by and incorporated into the policy and regulations of the Fire Department pursuant to the aforesaid Department Orders."

Discussion

The City's major contention is that the Fire Department has never implemented Section 249 of the State Military Law; therefore, it cannot be found to have violated an if "existing policy" within the meaning of the contract. The Board has held, however, that the question of whether a practice or policy is even existent or effective is arbitrable.

In Decision B-8-68, City of New York and CWA, Local 1180 the Board found that the parties had entered into an agreement for released time "to become effective when, and to the extent that, the then proposed new City policy on released time became operative." The Board then held arbitrable questions as to whether the City actually did adopt such a policy, and if so, the nature and extent thereof.

In decision B-5-69, City of New York and Local 420, District Council 37, the Union grieved that the employer violated existing policy by unilaterally removing parking privileges of non-professional employees. The Board found the grievance arbitrable and stated:

> "The meaning of the term 'existing policy' as used in the contract; whether the provision of parking facilities for non-professional employees constitutes a 'policy' within the meaning of that term; and whether the employer has the right to modify or cancel and 'existing policy' are questions involving the application or interpretation of the collective bargaining agreement between the parties."

The Board reached the same conclusion in B-6- 69, City of New York and UFA, Local 94, wherein the Union had charged the employer of breaching existing policy and reducing employee benefits because of the "elimination of Ambulance No. 3." The Board concluded that the meaning of the contractual term "existing policy" and the question of whether the City's provision of the ambulance and any related services constituted a policy were matters to be determined by arbitration.

In the instant case, the promulgation of Department Order No. 123 and Department Order No. 60, which incorporate Section 249 of the State Military Law, is sufficient to establish the arbitrability of the Union's grievance. The parties' contract provides for arbitration of alleged misinterpretations or misapplications of existing policy. Department Orders arguably embody or set forth Department policy, and the Union has raised a question as to the meaning and implementation of two Department Orders that specifically incorporated Section 249 of the State Military Law. Whether or not the Fire Department ever implemented Section 249 and whether or not such implementation would have been necessary in order to establish that the Department violated an "existing policy" are questions directly related to the merits of the

parties' dispute and are, therefore, for the arbitrator. Our function, as we have noted before, is confined to determining whether the grievance is one which, on its face, is governed by the contract. (See, e.g. Decision No. B-5-74, City of New York and Communication Workers of America and Civil Service Bar Association.)

Accordingly, we conclude and determine that the grievance herein is arbitrable.

O R D E R

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

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

ORDERED, that the Union's request for arbitration be, and the

same is granted.

DATED: New York, New York
January 28, 1975

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

EDWARD F. GRAY
Member

THOMAS J. HERLIHY
Member

Impartial Member Schmertz did not participate in the consideration of this matter.