OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,

Petitioner

-and-

THE UNIFORMED FIRE OFFICERS ASSOC.,
LOCAL 854

Respondent
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DECISION NO. B-2-77
DOCKET NO. BCB-267-77
A-623-76

DETERMINATION AND ORDER

The Uniformed Fire Officers Association, Local 854, (UFOA) filed a request for arbitration on November 12, 1976, concerning the refusal of the Fire Department to pay overtime to newly appointed fire officers who have been required to attend Post Assessment Training Programs outside of their scheduled tours of duty. The Union contends that the Department's position on this matter constitutes a violation of Article III, Section 3, of the parties' collective bargaining agreement which provides that:

> "Fire Officers (line) when specifically directed by the commissioner or the chief of the department or their respective designated representatives to perform work in excess of 'working hours' as noted in Section 1 of this Article III [i.e. - the two-platoon system) shall be compensated for the same by cash payment at the rate of time and one-half based on the regular salary of Fire Officers (line) for the actual period of overtime worked .....

On November 30, 1976, the City filed a petition challenging arbitrability alleging that the necessary individual waivers have not been submitted, that the affected persons are estopped from challenging the conditions of appointment due to their voluntary

acceptance of promotion with full knowledge of the terms of appointment, that the training program is a condition of appointment, not employment, and therefore within the exclusive managerial rights of the City (Fire Department), and that attendance at the training program cannot be construed as time spent doing "productive work and/or working hours" and therefore the overtime provisions of Article III of the contract are inapplicable to the facts of this grievance.[1]

The Post Assessment Training Program (PATP), as noted in the Step IV Decision, is a management training course which all fire officers promoted after March, 1976 are required to attend. The course, run by the Urban Academy, and given over a period of six weeks, consists of five three-hour sessions once a week, plus one full-day session for a total of twenty-two hours. If a session falls during an officer's regularly scheduled duty, the officer is released from his regular assignment to attend the course. If the session is scheduled for a time when an officer is not otherwise on duty, his required attendance does not entitle him to any overtime compensation according to the Fire Department.

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[1] See excerpt from Article III Section 3 on page 1.

Article III - WORK SCHEDULE

Section 1. Working hours of Fire Officers (line) shall be in accordance with Sec. 487a-11.0 of the Administrative Code of the City of New York. It is understood and agreed that under the present two platoon system as herein set forth each Fire Officer (line) is scheduled to work in excess of a forty-hour week. This specific additional time shall be compensated for by each Fire Officers (line) being excused from one fifteen-hour tour of duty in each calendar year. In the event that a Fire officer (line) does not receive such specific additional time or because of illness or the needs of the Fire Department is unable to take this adjusted tour off during the calendar year, the entitlement may be carried over into and shall be taken during the immediately succeeding year but not beyond.

FILING OF APPROPRIATE WAIVERS

The City alleges that this is a group grievance as defined in B-20-74 [2]and that in view of the factual circumstances of this case, it is the type of group grievance, originally distinguished in B-12-71,[3] which requires the filing of individual waivers pursuant to New York City Collective Bargaining Law (NYCCBL) Section. 1173-8.0(d).[4] The City contends that the only unit members affected by this dispute are those recently promoted officers who have attended the PATP sessions during off-duty hours and that "receipt of individual waivers will make it possible to ascertain with precision the number of persons" so situated.

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[2]In B-20-74 the Board distinguished three categories of grievances

"1. Union grievances, in which the union is clearly the only identifiable grievant. This type of grievance involves a contract interpretation or application, and generally applies to all employees in the bargaining unit and probably to future employees as well.

"2. Group grievances, which do not necessarily apply to all employees in the bargaining unit, but rather to a number of employees in the unit who are similarly affected by an alleged violation.

"3. Individual grievances, in which one or more identifiable individuals claim violation of contractual rights."

[3]The Board in B-12-71, at page 4 stated:

"There may be instances in which processing of a group grievance requires, by its very nature, individual waivers signed by individual employees in addition to a waiver signed by the union. There may be other situations of group grievances in which only a union waive will be required. The Board will decide these on a case-by-case basis, as questions arise, placing substantial weight on the philosophy and evaluations described in this opinion."

[4] NYCCBL Section 1173-8.0

"D. As a condition to the right of a municipal employee

Cont.

The UFOA claims that this dispute is a union grievance for it addresses the issue of whether "working hours," as that term is used in the contract, can be construed to exclude required training, a question which necessarily affects all or a substantial number of the unit employees.

Examination of private sector law in this area lends support to the Union's argument that broad collective bargaining policy questions are subjects rightfully discussed between an employer and a union, rather than between an employer and individual employees. Disputes involving issues as fundamental as the meaning

> to be accorded the contractual Phrase "working hours," primarily concern the collective rights of the entire unit, not the personal rights of individual employees. (Brown v. Sterling Aluminum Products Corp., U.S.C.A. 8th Cir. 1966, 63 LRRM 2177, 2180). Grievance arbitration cases involving questions of contract interpretation are exclusively within the domain of the collective bargaining agent to process. (Hughes Tool Co. v. National Labor Rel. Bd., 5th Cir. 1945, 147 F.2d 69, 15 LRRIM 852_).
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> Applying the above reasoning, which the Board has previously done in B-12-71 and B-20-74, we view the instant case as one where the issue involves an alleged violation of a right possessed by the bargaining unit as a whole, or by the Union as exclusive representation

Ft. note 4 cont'd.

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 underlyinq dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

and therefore the Union's waiver alone is sufficient to warrant proceeding to arbitration in the absence of additional arguments challenging arbitrability.

ADDITIONAL CHALLENGES

The first of the City's three additional attacks on the arbitrability of the instant grievance concerns the alleged knowledge of all persons promoted during the period in question that one of the conditions of appointment was attendance and successful completion of the training course.

> "At any time candidates for promotion could have elected not to accept promotion having been informed of the conditions of appointment. [The City's] position is that the knowing and voluntary acceptance of promotion with knowledge of such conditions estops said persons from contesting such conditions of appointment."[5]

The Union flatly denies that the promoted employees waived whatever rights they possessed to now challenge the conditions of appointment. Further, the Union questions the legality of con-ditioning promotions upon individual waivers

[5] The City's Reply dated December 13, 1976 at page 4.

of contractual rights, especially when done under coercion and duress. Even if the existence of such waivers can be shown, the fact is properly addressed to an arbitral tor whose responsibility it is to decide the merits of the case and not to this Board whose jurisdiction is limited to determining substantive arbitrability.[6]

[6] NYCCBL Section 1173-5.0(3).

As the Union points out, this Board has repeatedly stated that in deciding questions of arbitrability, it will not 7/ inquire into the merits of the dispute.[7] Proof of the existence of the waivers, or the alleged "agreements" as they are referred to by the Union, would serve as a defense by the City to the Union's claims for overtime compensation. However, this defense deals with the merits of the Union's case and cannot prevent the case from being heard by an arbitrator. It should also be noted that a union's right to bring a union grievance to arbitration cannot be waived by the actions of individual unit members.

The second substantive argument raised by the City is that attendance at the training program is a condition of appoint-ment, not employment, and therefore, pursuant to NYCCBL Section 1173-4.3(b),[8] a managerial right outside the scope of

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[7] See Board decisions -8-74; B-19-74; and B-1-75.

[8] NYCCBL Section 1173-4.3

"b. It is the right of the city, or any other public employer, acting through its agencies, to determine the sandards of services to be offered by its agencies; determine the standards of selection for employment; 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 government 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 discre-ion over its organization and the technology of per-forming its work...." (emphasis added)..

agreement.

The Union counters that training session attendance outside of an officer's normal schedule affects total number of hours worked per day and per cycle. Citing several prior Board Decisions,[9] the Union concludes that the issue of compensation for such "overtime" is clearly a mandatory subject of bargaining and a proper subject for arbitration.

It is uncontested by either party that newly promoted fire officers are required to attend the training sessions, irrespective of the time when scheduled. Even if we were to adopt the City's argument that attendance at the training program is a condition of appointment and therefore a managerial prerogative, it is hard to refute the Union's claim that such attendance would necessarily affect the number of hours worked per day and per cycle.

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[9] Board Decisions B-5-75; B-10-75; B- 23-75.

The subject of hours is by specific provision of the NYCCBL and of the Taylor Law, a mandatory subject of bargaining.[10]

In Decision No. B-5-75, involving the City and the Patrolmen's Benevolent Association, the Board ruled that any action by the
Police Department which would result in a change in the total hours worked per day or per week by patrolmen and policewomen would be a mandatory subject of bargaining. In Decision No. B-23-75

[10] NYCCBL Section 1173-4.3a and Taylor Law Sections 201.4 and 203.

the Board ruled that insofar as the elimination of a training program would affect the total number of hours worked per day, per week, and per cycle by fire alarm dispatchers it was an appropriate, subject of bargaining. Therefore, attendance at the Post Assessment Training Program, at least to the extent that it affects the number of hours worked per day or per cycle, is within the scope of the agreement and a proper subject for the grievance procedure.

The City's final argument is that attendance at a training session cannot be construed as time spent doing "productive work" and/or "working hours." Therefore, it concludes that Article III of the contract, which covers work schedules and compensation for work performed in excess of working hours, does not apply to the time spent by fire officers at PATP sessions.

As the Union points out, when fire officers receive on-the-job training or attend the PATP sessions during their regularly scheduled working, hours, the City never contends that the officers should be, denied compensation because training is not “productive work." This contradictory position aside, the City has interpreted the contract and is attempting to use that interpretation as an arbitrability challenge. This very issue is the subject of the Union's request for arbitration; the City’s interpretation of the contract cannot now also serve as a successful ban to arbitration. As the Board has previously stated, issues

concerning the interpretation of contract terms and the deter-
mination of their applicability are matters for the arbitrator
and not for the forum dealing with the question of the arbitra-
bility of the underlying disputes.[11]

ORDER

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, denied; and it is further

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

DATED: New York, N.Y.
January 27, 1977

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

VIRGIL B. DAY
MEMBER

EDWARD F. GRAY
MEMBER

[11] See Board Decision No. B-4-72