City v. L.854, UFA, 19 OCB 7 (BCB 1977) [Decision No. B-7-77 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-7-77

DOCKET NO. BCB-267-77
(A-623-76)

-and-

THE UNIFORMED FIRE OFFICERS
ASSOCIATION, LOCAL 854,

Respondent.
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DETERMINATION AND ORDER

On March 30, 1977, the Office of Municipal Labor Relations (OMLR), filed a Motion for Reconsideration of Board Decision No. B-2-77. Decision No. B-2-77, a unanimous determination dated January 27, 1977, found in favor of the arbitrability of a grievance brought by the Uniformed Fire Officers Association, Local 854 (UFOA), concerning the refusal of the Fire Department to pay overtime to newly promoted fire officers for attendance at Post Assessment Training Programs outside of their scheduled tours of duty.

The Affirmation in support of OMLR's motion raised fundamental questions as to the meaning and effect of Decision No. B-2-77 and its impact upon the rule established in our prior decisions with regard to the subject of "training." We therefore granted the request for reconsideration and pursuant thereto, heard oral argument on the issues fierein on April 20, 1977.

The first issue raised by counsel for OMLR at the oral argument concerns an alleged error of fact made by the Board in Decision No. B-2-77. OMLR objects to the Board's statement that training program attendance is "required" of all newly promoted fire officers. As counsel for the UFOA pointed out, this Board conclusion was drawn from the language used by the OMLR Step IV Hearing Officer who, in her decision dated November 9, 1976, described the training program in question as "a management training course that all officers promoted after March, 1976 are required...to attend." There is no controversy that once an employee accepts the promotion for which the training program is designed, attendance becomes mandatory. Resolution of this issue, however, will not alter the Board's original arbitrability ruling,
a conclusion which applies equally to the next contention put forward by OMLR at the oral argument.

OMLR, although conceding that it is dealing with matter more appropriate to a defense on the merits of the underlying grievance, argues that the UFOA is trying to gain through arbitration what it failed to achieve at the bargaining table. Citing several rejected UFOA bargaining demands [1] involving same

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[1] These demands include (see pages 8-9 of transcript of April 20; 1977 Oral Argument):

> "Any ordered duty, other than recall, necessitating a member to report for any reason while off duty or kept on duty beyond a regular tour of duty to be for a minimum of 6 hours at double time.

(continued)

issues raised by the instant arbitration request, OMLR concludes that Decision No. B-2-77 is inconsistent with past

Board determinations holding that the manner and means by which employees are to be trained is a management prerogative.

We do not agree that Decision No. B-2-77 in any way constitutes a change in the rules enunciated in Decisions Nos. B-4-71, B-7-72, B-2-73, B-16-74, and B-23-75, which are cited in support of OMLR's Motion for Reconsideration. Essentially, each of these cases, except B-23-75, involved union bargaining demands for employer financing of training or of training funds which the union wished to provide as an employee benefit. We have consistently held, in all such cases, that training does not constitute a mandatory subject of bargaining. This does not mean that the employer may not bargain with regard to training but that it is not obliqated to do so. We reaffirm this rule and hold that it is not changed or amended by Decision No. B-2-77.

In Decision No. B-23-75, we held that management has the right to institute training unilaterally, to require employee participation and to determine the scheduling of such training. The underlying rationale of that decision is that the powers reserved to management by Section 1173-4.3b of the New York City Collective Bargaining Law (NYCCBL):

1 (Continued)

"The Fire Department shall provide four . . . tours every six months to be devoted exclusively to professional development training and up-date training for each Fire Officer. Such training to be conducted at the Division of Training facilities and to be free from the pressures of alarm response, fire duty, supervisory duties, etc.

"Any officer ordered to attend while off tour any training, lecture, conference, etc., shall be compensated at the rate of time and one-half in cash plus 2 hours travel time."

> ". . . to determine the standards of services to be offered by its agencies, . . . the standards of selection of employment . . . and (the authority to] exercise complete control and discretion over its organization and the technology of performing its work. . . . ."

include the power to provide for training of its employees. We reaffirm the rule of that case that it is within the prerogative and discretion of management unilaterally to institute, mandate and schedule training of its employees and hold that said rule is in no way amended by our Decision No. B-2-77.

The instant case, however, does not involve a union demand for bargaining on training to be provided by the union or to be paid for from a union-administered fund based on employer contributions, as were the cases in B-4-71, B-7-72, B-2-73 and B-16-74. Nor is any challenge offered to the right of.management unilaterally to institute,

mandate and/or schedule training, as was the case in Decision No. B-23-75 (Transcript, p. 30). The unique question presented herein is whether management, having instituted an employee training program and having so scheduled such training that some of the sessions fall outside of normal working hours may also refuse to remunerate the affected employees for the time thus spent to training outside of their regular work day or cycle.

OMLR contends that the overtime provision of the parties' collective bargaining agreement is inapplicable because it speaks in terms of performing "work" in excess of "working hours" and it is OMLR's position that training does not constitute "work." In connection with this issue, counsel for OMLR requested at the oral argument that this Board "decide whether training is work."

The UFOA's position on this question was stated by its counsel at the oral argument as follows:

> "What is significant, and how working hours have been defined, at least in the private sector, is to what extent the person is then under the control of management and is free to do what he or she might elect. In this case, certainly, as would be a fire-fighter waiting for the next alarm, he is required to be at a certain place for a certain duration and respond to the directions given to him by his superiors. Those are the crucial elements of work hours."
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> (Transcript, p. 32)

Examination of private sector law concerning this question reveals that under interpretations of the Portal-to-Portal Act made by the Wage-Hour Division of the United States Department of Labor, time spent by employees at training sessions need not be counted as time worked if all of the following conditions are met:

1. Attendance by the employee is voluntary;

2. the employee does not produce any goods or perform any other productive work during the training session;

3. the training program takes place outside regular working hours;

4. the training is not directly related to the employee's job function.

(see Bureau of National Affairs, Labor Relations Expediter, 347)

There can be no argument that the training program at issue herein is directly related to the job responsibilities of the affected employees and therefore on the basis of the above test, attendance at the training session would be viewed as compensable work in the private sector (see U.S. Borax and Chemical Corp. and Longshoremen and Warehousemen, Local 30, 62 Labor Arbitration Reports 891).

Whether attendance at the Post Assessment Training Program is the type of activity encompassed by the overtime provision of the contract, however, is a question of contract interpretation best left for an arbitrator. On this point, OMLR states

that its position is not based on interpretation of contractual language but rather is a product of contract application. Be it a product of interpretation or application, it is, nevertheless, within the definition of a grievance as provided by the contract [2] and therefore an arbitrable matter.

OMLR has tried to persuade this Board to look behind the language used to frame the arbitration request and discover that this grievance really concerns a non-mandatory subject of bargaining which is not a part of the contract and therefore not an arbitrable matter. This argument might be appropriate for presentation as part of the merits but cannot stand as a successful challenge to arbitrability. The request for arbitration filed by UFOA alleged that the Fire Department's refusal to compensate fire officers for attendance at the training program is a violation of the overtime provision of the contract. As we stated in Decision No. B-2-77 such attendance would necessarily affect the number of hours worked per day and per cycle. The subject of hours is by specific provision of the NYCCBL and of the Taylor Law,[3] a mandatory subject of bargaining and, therefore, training session attendance is within the scope of the agreement and a proper subject for the grievance procedure.

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[2]Article XIX, Section 1, of the parties' contract provides, in part, 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 (Emphasis supplied).

[3] NYCCBL §1173-4.3a and Taylor Law §§ 201.4 and 203.

Decision No. B-23-75, which OMLR cites for the proposition that training is a managerial prerogative, is just as clear a precedent for the position taken by the Board herein on arbitrability. In Decision No. B-23-75, we ruled that to the extent that the elimination of a training program would affect working hours of fire alarm dispatchers, it was an appropriate subject for bargaining. Similarly, as we stated in Decision No. B-2-77, 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 an appropriate subject for submission to an arbitrator. OMLR cannot simply draw a connection between a grievance and the subject of training and expect this Board to relieve the Fire Department of its contractual obligation to submit a dispute involving hours to impartial arbitration.

Finally, OMLR raises once again the question of appropriate waivers. The Board, discerning no new arguments on behalf of OMLR's position on this issue, will defer to our prior conclusions on this matter as stated in Decision No. B-2-77.

This decision, although finding in favor of UFOA's position on arbitrability, is in no manner a reflection of the Board's views on the merits of the underlying dispute. Neither this determination nor our prior ruling in Decision No. B-2-77 is dispositive of the issue of whether the contractual overtime provision applies to time spent attending the Post Assessment Training Program. This question, plus several of the arguments presented by OMLR herein should properly be directed to an arbitrator for consideration and resolution.

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 motion of OMLR for reconsideration be, and the same hereby is, granted, and upon such reconsideration we adhere to our ruling in Decision No. B-2-77; and it is further

ORDERED, that the grievance presented by UFOA's request for arbitration be submitted to an arbitrator in accordance with our finding in Decision No. B-2-77.

DATED: New York, New York
July 20, 1977.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

VIRGIL B. MAY -Concurring Opinion
M e m b e r

FRANCES MORRIS-Concurring Opinion
M e m b e r

EDWARD F. GRAY
M e m b e r

DANIEL L. PERSONS
M e m b e r

* See page 10 following for Concurring Opinion

CONCURRING OPINION OF
CITY MEMBERS VIRGIL DAY AND FRANCES MORRIS

While concurring, we are concerned by the arbitrability finding in this decision to the extent that it appears to be part of an effort to manipulate contract language to achieve arbitrability and which encroaches upon management's right to administer its training prerogatives. Nevertheless, we reluctantly concur with the Board's decision based upon the unique facts presented for our consideration.

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