City v. L.94, UFA, 23 OCB 7 (BCB 1979) [Decision No. B-7-79 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, Decision No. B-7-79

Petitioner,

-and- Docket No. BCB-333-79 (A-837-79)

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO,

Respondent

DECISION AND ORDER

Request for Arbitration

On April 6, 1979, the Uniformed Firefighters Association (UFA) filed a request for arbitration alleging that:

> "PA/ID 6/78, effective December 21, 1978 (Evaluation Program - Fireman 1st, 2nd, and 3rd Grade), and addendums and forms relating thereto, PA/ID 4/78 (Evaluation of Probationary Firemen), and addendums and forms relating thereto, and Department Order No. 10 dated January 18, 1979 [at Section 2.2] violate the collective bargaining agreement between the UFA and the City."[1]

The UFA seeks as remedy, "Immediate rescission or appropriate modification of all PA/IDs, addendums and forms related thereto covering the evaluation programs and such other relief as may be just and proper."

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[1] Department Order No.10 implements the evaluation procedures embodied in Personnel Administrative Information Directive (PA/ID) 6/78 and PA/ID 4/78 for the purposes of promotion, assignment, incentives and training. For the sake of convenience we refer to these documents collectively as PA/ID 6/78.

On or about June 19, 1979, the City, by its Office of Municipal Labor Relations (OMLR) submitted a petition challenging arbitrability. Respondent Union subsequently submitted an answer (and supporting memorandum).

Positions of the Parties

Petitioner contends that Respondent's request for arbitration does not raise an arbitrable issue and should therefore be dismissed. The City asserts that PA/ID 6/78 is not arbitrable because it (PA/ID 6/78) "specifically states that the evaluation program 'is imposed as a matter of Law and does not conflict with the right of individuals or any existing contracts.'"

Petitioner asks for denial of the Union's request because "Assuming, arguendo, that PA/ID 6/78 conflicts with Article XXI of the Contract, Respondent has failed to allege actual injury to any member of the bargaining unit." Since there has been no allegation that the individual rights of any member of the bargaining unit have been violated, the City concludes that the dispute is not arbitrable.

The City challenges arbitrability on a third basis:

> "PA/ID 6/78 and its addendums which establish the evaluation program in question are not arbitrable in that they represent the exercise of a management right as outlined in the New York City Charter."

> "The forms to be used by the Department in evaluating employees pursuant to PA/ID 6/78 are likewise not arbitrable insofar as they outline the criteria and standards to be used in evaluating employees. The establishment of criteria and standards for evaluating employees is a management prerogative."

In making this claim, the City relies upon a Charter provision which imposes upon the Fire Commissioner the duty "to establish and administer evaluation programs to be used during the probationary period and for promotions, assignments, incentives and training."

Petitioner argues, "Respondent has failed to allege a violation, misinterpretation, or misapplication of the provisions of the contract or of existing policy or regulations of the Fire Department." The City acknowledges the existence of a grievance procedure that commits a broad range of issues to final, binding arbitration. However, Petitioner argues that the promulgation and implementation of evaluation procedures and criteria do not violate any provision of the collective bargaining agreement or any existing policy or regulation of the Fire Department, and therefore, there is no basis for arbitration.

Respondent takes the position that the City's petition challenging arbitrability states no basis for denying arbitration of the grievance herein. The City's statement that PA/ID 6/78 asserts that the evaluation program "is imposed as a matter of Law and does not con-

flict with the right of individuals or any existing contract" is incorrect, begs the question, and "in any event, sets forth an issue which is clearly and obviously for the arbitrator, not the Board, to decide."

Respondent agrees with Petitioner's assertion that no claim of actual injury is being made, but argues that the issue is "... totally irrelevant. It is well-settled that such allegations are not required. To the extent such allegations are made, they are for the arbitrator, not the Board to consider."

Respondent maintains that the City's position that issuance and implementation of PA/ID 6/78 is an exercise of a "management right" set forth in the City Charter does not state a ground for denying arbitration." Nowhere in the Charter or elsewhere is the Fire Department given the power to establish and administer ... evaluation programs "if the programs conflict with the collective bargaining agreement, or existing policy."

The UFA asserts that the grievance herein alleges complaints well within the broad scope of the definition of a grievance contained in the collective bargaining agreement. It alleges that the "issuance, implementation and practical impact" of the evaluation program in question directly violate and conflict with the rights provided by Article XXI of the collective bargaining agreement (and related Fire Department regulations and policies) concerning individual rights and discipline.

Discussion

Section 1173-2.0 of the New York City Collective Bargaining Law (NYCCBL) states, "It is hereby declared to be the policy of the city to favor and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employees organizations." This Board has adopted the principles set forth by the United States Supreme Court in United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2417(1960) which reads as follows:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

However, while it is the policy of the NYCCBL and this Board to favor arbitration of grievances, the Board cannot create duty to arbitrate where none exists, nor can it enlarge duty to arbitrate beyond the scope established by the parties in their contract. "It is well settled that a person may be required to submit to arbitration only to the extent that he has previously consented and agreed to do so." (Matter of The City of New York and International Union of Operating Engineers, Decision No. B-12-77)

The Board administers a two-tiered test in deciding questions of arbitrability:

> "In determining arbitrability, the Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented."

Thus, the power of the Board to determine that a matter is arbitrable rests upon the obligation incurred by the parties in their collective bargaining agreement to arbitrate such disputes.

Furthermore, although we have stated that the interpretation and applicability of contract terms are determinations for the arbitrator, we have nevertheless held:

> "This is not to say that the Board will make no inquiry, under any circumstances, as to the prima facie relationship between the act complainted of and the source of the alleged right, redress of which is sought through arbitration. The grievant, where challenged to do so, has a duty to show that the statute, departmental rule or contract provision he invoked is arguably related to the grievance to be arbitrated."

(Matter of The City of New York and Local 371, A.F.S.C.M.E., Decision No. B-1-76)

With this policy in mind, we may turn to a consideration of the City's petition challenging arbitrability.

Petitioner's single persuasive argument[2] relates

[2] The parties are referred to Board Decisions Nos. B-7-69 and B-4-76 which are dispositive of the issues raised by the City's other allegations attacking the arbitrability of the instant matter.

to the failure of Respondent to show how the implementation of the contested evaluation program constitutes a violation, misinterpretation, or misapplication of the provisions of the contract or of existing policy or regulations of the Fire Department. As we have mentioned, it is within the Board's jurisdiction to determine whether a prima facie relationship exists between the act complained of and the source of the alleged right. We rule that Respondent herein fails to demonstrate that the contract provisions, regulations, and Fire Department policy invoked are arguably related to the grievance to be arbitrated. In its Request for Arbitration the Union alleges a violation of "Article XXI and such other provisions of the Agreement, Rules and Regulations and policies of the Department as may be relevant." However, the Union does not submit evidence of any Department regulation or policy that may arguably have been contravened by PA/ID 6/78. Furthermore, a review of the collective bargaining agreement between the City-and the UFA discloses no provision related to the promulgation or administration of evaluation procedures or criteria.

Article XXI, the provision claimed to have been violated, deals with individual rights, declaring, "It is the policy of the Fire Department of the City of New York to secure for all employees their rights and privileges as citizens in a democratic society." The provision

establishes guidelines for the conduct of Departmental interrogations, interviews, trials and hearings: significantly, there is no mention of evaluation procedures or criteria. The Union contends, "It is overwhelmingly clear that contractual restrictions on interrogatories, interviews, trials and hearings are in conflict with the new evaluation program," but presents no convincing evidence to show that a relationship arguably exists between PA/ID 6/78 and Article XXI. In fact, there is no indication whatsoever, except for the Union's above-quoted conclusory allegation, that the parties, in incorporating Article XXI into their contract, contemplated the application of its provisions to the promulgation or administration of evaluation procedures or criteria.

As we have noted, the Union, where challenged, is required to demonstrate the existence of an arguable relationship between the source of the alleged right involved and the grievance to be arbitrated. In this case, the UFA has failed to demonstrate a relationship between the Fire Department's promulgation of procedure and criteria for evaluation and any right contained in a contract provision, or rule or regulation of the Fire Department. Therefore, we will deny the Union's request for arbitration of the dispute herein.

0 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 of the City challenging arbitrability should be, and the same hereby is granted; and it is further

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

DATED: New York, New York
September 11, 1979

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD J. CLEARY
MEMBER

FRANKLIN J. HAVELICK
MEMBER

MARIA T. JONES
MEMBER

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MEMBER