

City v. L.854, UFA, 25 OCB 6 (BCB 1980) [Decision No. B-6-80  
(Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B- 6-80

-and-

DOCKET NO. BCB-388-80  
(A-623-76)

Petitioner,

THE UNIFORMED FIRE OFFICERS  
ASSOCIATION, LOCAL 854,

Respondent.

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**DECISION AND ORDER**

**Procedural Background**

This case arises from a grievance which was filed by the Uniformed Fire Officers Association, Local 854 (hereinafter "UFOA") on August 27, 1976. A request for arbitration was filed on November 12, 1976, and the City thereafter challenged arbitrability. In Decision B-2-77, this Board held that the grievance was arbitrable. The City moved for reconsideration, and requested that the Board hear oral argument. We granted the motion for reconsideration, and heard oral argument on the issues on April 20, 1977. In Decision B-7-77, rendered on July 20, 1977, we stated that upon reconsideration, we adhered to our ruling in Decision No. B-2-77, and we ordered that the grievance be submitted to an arbitrator.

After a lengthy delay, the reasons for which do not appear in the record, the arbitration in this matter was scheduled to commence on January 15, 1980. However, on January 10, 1980, the City filed a new petition challenging arbitrability, alleging in essence that the UFOA had indicated that it had expanded the scope of its grievance to include matters purportedly not raised in the prior course of this grievance, The City alleges that it would be severely prejudiced if the union were permitted to assert at the arbitration stale claims never previously brought forward.

The UFOA filed its answer to the petition challenging arbitrability on January 22, 1980, The UFOA denies that its grievance was ever limited to the extent indicated by the City, or that it has now raised any claim not already included within the original grievance.

#### NATURE OF THE GRIEVANCE

There is a significant difference in this case between the statement of the grievance contained in the original grievance, which was filed at Step III of the contractual grievance procedure, and the statement of the grievance contained in the request for arbitration, which was filed with the office of Collective Bargaining. The original grievance states the matter grieved as follows:

"Pursuant to the attached directives, the Fire Department has caused Fire Officers, including the individual grievants, to perform duties in excess of their regularly scheduled tours of duty and the hours and tours of duty prescribed by the collective bargaining agreement between the City and Uniformed Fire officers Association and has refused to pay overtime for such duty in the manner prescribed by said agreement."

Attached to this grievance and incorporated by the above reference are eight documents which consists of memoranda and directives issued by the Fire Department. These documents concern attendance at various post-promotional training programs.

In contrast, the request for arbitration states the grievance to be arbitrated as follows:

"The refusal of the Fire Department to pay overtime to Fire Officers who have been required, and are being required, to perform duties in excess and outside of their regularly scheduled tours of duty and the hours and tours of duty prescribed by the effective collective bargaining agreement; to wit, the required attendance of newly promoted Fire Officers at Post Assessment Training Programs, as aforesaid."

This differs from the statement of the original grievance in that it makes no reference to the "attached directives" described above, and instead it refers specifically to required attendance at Post Assessment Training Programs, which are only one of the types of training programs mentioned in the attachments to the original grievance.

This Board already has held that the subject matter of this grievance, i.e., the issue of the compensability under the contract of time spent in required attendance at training programs held during off-duty hours, is arbitrable (Decision Nos. B-2-77, B-7-77). The issue here is the scope of the grievance to be arbitrated -- specifically, attendance at which training programs may be considered by the arbitrator.

#### **POSITIONS OF THE PARTIES**

It is the City's position that the UFOA has consistently limited its grievance to the issue of the compensability of attendance at the Post Assessment Training Program. The City points out that the request for arbitration, including the remedy sought therein, and the UFOA's answer and supporting affidavit in response to the City's earlier challenge to arbitrability in this case (Docket No. BCB-267-77), all refer solely to the Post Assessment Training Program. The City further alleges that the Board, in Decision No. B-2-77, considered the issue of arbitrability only as it related to the Post Assessment Training Program.

The City alleges, upon information and belief, that the union now intends to ask the arbitrator to consider the compensability of attendance at two additional and completely different training programs: "Assessment" and "Orientation".

The City contends that the issue of attendance at these two additional programs was never before raised by the UFOA, that

these programs are outside the scope of the grievance which the Board ordered to be submitted to arbitration, and that the City would be severely prejudiced if attendance at these programs were to be arbitrated, inasmuch as the City stopped the Post Assessment Training Program but not the orientation or assessment programs in reliance on the UFOA's silence concerning the latter two programs. For these reasons, the City asserts that the compensability of attendance at the latter two programs is not arbitrable.

It is the UFOA's position that its grievance was never limited to the compensability of attendance at the Post Assessment Training Program, but at all times has included the issue of the compensability of required attendance during off-duty hours at all post-promotional training programs, including the assessment and orientation programs. The UFOA relies upon the fact that its original grievance, filed at Step III of the contractual grievance procedure, referred to and included "attached directives" which allegedly required newly promoted Fire Officers to attend other post-promotion training programs in addition to the Post Assessment Training Program. Thus, contends the UFOA, the assessment and orientation programs are within the scope of the original grievance.

Furthermore, the UFOA submits that the question of whether the two above-mentioned programs are within the scope of the original grievance is a matter within the competence and authority of the arbitrator to determine. The UFOA alleges that if a full record is permitted to be developed before the arbitrator, it will be shown that all post-promotion training programs, whatever their designations, are part of a single, indivisible immediate post-promotion training process, and therefore all off-duty time required to be spent at any such program should be equally compensable. The UFOA states that it is properly within the province of the arbitrator to determine the precise nature of the Post Assessment Training Program, and the extent of its separability from the assessment or orientation programs.

Finally, the UFOA disputes the City's allegation of prejudice due to its reliance upon the UFOA's silence concerning the assessment and orientation programs, and the UFOA points out that the City did not discontinue the Post Assessment Training Program until at least one year and seven months after the Step III grievance was filed. For all of these reasons, the UFOA contends that the compensability of attendance at the assessment and orientation programs should be submitted to arbitration.

### DISCUSSION

The issue to be determined in this case is whether the compensability of attendance at the assessment and orientation training programs is a matter within the scope of the original grievance filed with the Fire Department at Step III of the contractual grievance procedure, or whether it is a new matter not previously raised by the union. In considering this issue, we are guided by our long-held recognition of the fact that:

"The purpose of the multi-level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement."<sup>1</sup>

In this regard, this Board has also observed that:

"Ideally, sound effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances.... obviously, none of these elements is achievable if easy amendment of the grievance at the penultimate moment, i.e., at the arbitration step, were to be permitted."<sup>2</sup>

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<sup>1</sup> Decision No. B-22-74.

<sup>2</sup> Decision No. B-20-74.

Based upon these principles, the Board has consistently refused to permit a party to raise at the point of arbitration new claims or issues which have not been the subject of the grievance procedure.<sup>3</sup>

The record in this case demonstrates that at each stage of the prior proceedings herein, both in the course of the contractual grievance process and before this Board on the City's earlier challenge to arbitrability,<sup>4</sup> the parties addressed themselves solely to the issue of the compensability of required attendance at the Post Assessment Training Program. No mention was made of the assessment or orientation programs. Although the original grievance, filed at Step III of the contractual grievance procedure, included attachments which dealt with several post-promotional training programs, including the assessment as well as the post assessment programs, the remedy sought in that initial grievance confirms the City's contention that the grievance was limited to the post assessment program; the remedy sought was:

"Payment of overtime for duty performed  
and time spent pursuant to attached  
post assessment training program."

All pleadings and other submissions filed with this Board prior to the UFOA's answer to the City's latest petition in this case were similarly limited to the post assessment program.

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<sup>3</sup> See Decision Nos. B-12-77, B-6-76, B-27-75, B-22-74, and B-20-74.

<sup>4</sup> Docket No. BCB-267-77.



Significantly, the request for arbitration filed by the UFOA does not include, as an attachment, or refer to the documents which were annexed to the Step III grievance, and which serve as the sole justification offered by the UFOA for its attempt to include the assessment and orientation programs within the scope of the instant arbitration. The request for arbitration, as the earlier Step III grievance, states as the remedy sought only payment of overtime for time spent in the post assessment training program.

The record shows that the decision of the hearing officer at Step IV of the contractual grievance procedure states the UFOA's grievance as relating to the Post Assessment Training Program, and describes that program in some detail.<sup>5</sup> Our comparison of this description to that given for the various post-promotional programs contained in Fire Department "All Units Circular #240" (UFOA Exhibit C) reveals the hearing officer's description is consistent only with the Post Assessment Training Program and not with any of the other programs.

For this reason, upon receipt of the Step IV decision, the UFOA should have been on notice that the City considered the grievance to be limited to the Post Assessment Training

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<sup>5</sup> We note that in prior proceedings in this matter, the Fearing officer's description of the program was quoted by UFOA's counsel in support of his presentation of the grievance. See Affidavit of Ronald Shechtman, Esq. paragraph 2 thereof, in Docket No. BCB-267-77.

Program as defined by the hearing officer. If the UFOA believed that the scope of the grievance was broader than this, it had an obligation to make its belief known to the City. The record does not contain evidence of any objection by the UFOA to the City's expressed understanding of the scope of the grievance, prior to the recent statements by its counsel which resulted in the City's instant motion challenging arbitrability.

Accordingly, we find that UFOA's contentions regarding the compensability of required attendance at the assessment and orientation programs constitute new issues not within the scope of the grievance filed at Step III in this matter, and which the City was not given prior opportunity to resolve through the contractual grievance process. Therefore, we will grant the City's petition challenging arbitrability as to these two programs.

We wish to emphasize that our decision in this matter is based upon our finding that the City was not given adequate notice that the two programs in question were included as part of the UFOA's grievance. If such notice had been given, we would clearly find the substance of the UFOA's grievance to be arbitrable, for the reasons stated in our prior rulings which held arbitrable the grievance with respect to the post assessment training program.<sup>6</sup> For this reason, our denial

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<sup>6</sup> Decision Nos. B-2-77 and B-7-77.

of the UFOA's request to arbitrate in this case its claims with respect to the assessment and orientation programs, does not in any way prejudice its rights to timely grieve and, if necessary, arbitrate any present or future claims concerning attendance at these programs.

**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 City's petition challenging arbitrability be, and the same hereby is, granted, only to the extent that it concerns the assessment and orientation programs; and it is further

ORDERED, that the UFOA's request for arbitration be, and the same hereby is, granted, only to the extent that it concerns the post assessment training program.

DATED: New York, N.Y.  
March 20, 1980

ARVID ANDERSON  
CHAIRMAN

WALTER L. EISENBERG  
MEMBER

VIRGIL B. DAY  
MEMBER

EDWARD SILVER  
MEMBER

EDWARD F. GRAY  
MEMBER

EDWARD J. CLEARY  
MEMBER