OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

UNIFORMED FIRE OFFICERS ASSOCIATION
LOCAL 854,

Respondent.

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DECISION NO. B-14-81

DOCKET NO. BCB-478-81
(A-1171-80)

DECISION AND ORDER

Procedural Background

On January 21, 1981, the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO (hereinafter "UFOA") submitted a request for arbitration which stated the grievance to be arbitrated as:

> "The failure and refusal of the Fire Department to comply with the provisions of Article VI of the collective bargaining agreement, and other applicable provisions of the agreement and the rules and regulations of the Fire Department, relative to out-of-title employment in the Battalion Chief rank (and the consequential effect thereof on out-of-title employment in other Fire Department titles)."

The City of New York responded to this request on January 28, 1981, by filing a document which it denominated as a "motion for particularization." The UFOA, by its attorney, submitted a letter in answer to the City's motion on February 24, 1981.

Subsequently, the City filed a petition challenging arbitrability, on March 6, 1981.[1] The UFOA's answer and affidavit in opposition to the petition was submitted on April 7, 1981 The City, by its attorney, submitted a letter in reply on April 10, 1981.

Nature of the Grievance

The grievance which is the basis for the UFOA's request for arbitration concerns alleged violations by the Fire Department of provisions of Article VI of the Collective Bargaining Agreement, which states:

"ARTICLE VI - OUT OF TITLE - SPECIAL ASSIGNMENT TOURS

Section 1.

> The Fire Department will use its best efforts to maintain an adequate number of Fire Officers (line) as the term is defined in Article 1, Section 1 of the Agreement) in each rank to minimize acting out-of-title tours. The Department will fill vacancies in the above ranks by promotions within sixty days unless the Department projectes [sic] that the filling of these vacancies is not necessary as the Department has minimized acting out-of-title tours and that that conditions shall continue without the filling of these vacancies.

[1]It appears that upon receipt of the UFOA's letter of February 24, 1981, the City abandoned its motion for particularization. It chose to challenge the arbitrability of the request for arbitration rather than reply to the UFOA's letter in response to the City's motion.

Section 2.

The Department will attempt to eliminate or minimize acting out of title, while keeping special assignment officer tours to a minimum. The Department will make a monthly analysis of the number of acting out of title tours, and special assignment tours in the Fire Officer (line) ranks described in Section 1.

The Department will: (i) each month provide the union with data on acting out of title and special assignment for the preceding month; and (ii) meet every sixty (60) days with the Union to review the aforesaid data.

Section 3.

Any grievance brought pursuant to this provision shall be initiated at the third step of the grievance procedure.

Section 4.

Nothing contained in this Article shall amend, alter or impair any other provision in Article III or Article VII of the 1976-78 Agreement or any successor thereto."

The UFOA contends that Captains have been required to work out of title as Battalion Chiefs so frequently as to violate the letter and spirit of the Collective Bargaining Agreement. The UFOA asserts that the Fire Department has failed to use its "best efforts" to maintain an "adequate" number of Fire Officers in the chief officer ranks, and has failed to fill vacancies in the chief officer ranks by promotions within sixty days after such vacancies arose. These alleged failures by the

Fire Department are claimed by the UFOA to constitute violations of Article VI of the Agreement, as well as violations of unspecified rules and regulations of the Department. The remedy requested by the UFOA is:

> "compliance with the implementation of the provisions of Article VI of the collective bargaining agreement, and such other relief as may be appropriate and warranted."

Positions of the Parties

Position of the City

The City argues that the UFOA's request for arbitration does not raise any claims properly arbitrable under the Agreement, but, instead, improperly seeks review of legitimate unilateral managment decisions made by the City-within the scope of its statutory management prerogatives under §1173-4.3(b) of the New York City Collective Bargaining Law (hereinafter "NYCCBL").

The City, in its reply, concedes that there may be issues appropriate for arbitration pursuant to Article VI, Section 1 of the agreement." Specifically, the City admits that "A claim that the Department failed to use its %est efforts to minimize acting out of title would be arbitrable.... However, the City denies that the UPOA seeks to arbitrate such a claim. What the UFOA really seeks to arbitrate, contends the City, is the level of manning established by the City for the rank of Battalion

Chief. The City asserts that the determination of manning levels for a particular title is a fundamental management right, as is the determination of whether to fill vacancies in that title by promotion. The City argues that these management rights have not been modified by anything contained in the Collective Bargaining Agreement.

Moreover, the City contends that even if the issue of filling vacancies by promotion were arbitrable, the remedy sought by the UFOA on this claim could not legally be granted. The City alleges that at the Step III Grievance Hearing, it was the UFOA's position that the civil service list for the title of Battalion Chief, which expired on July 1, 1980, should be reopened and extended for purposes of filling vacancies in that title.-*The City submits that the determination of the City Personnel Director not to further extend the list is not subject to arbitral review, and that, in any event, the list having expired on July 1, 1980, as a matter of law it cannot now be reopened, not even by the City Personnel Director, and certainly not by an arbitrator. The City contends that the remedy sought by the UFOA would involve the arbitrator in an impermissible interference with the civil service system, would allow the arbitrator to fashion an illegal remedy, and would invite further litigation which would undermine the sanctity of the arbitral process. For these reasons, the City concludes that the UFOA's claim regarding the filling of vacancies in the Battalion Chief title by promotions is not arbitrable.

Position of the UFOA

It is the UFOA's position that the Fire Department has failed to comply with the provisions of Article VI of the Collective Bargaining Agreement in two respects; the Department has failed to "...use its best efforts to maintain an adequate number of Fire Officers ... in each rank to minimize acting out-of-title tours", and the , Department has failed to "...fill vacancies in the above ranks by promotions within sixty days...." The UFOA alleges that as a result of these failures by the Department, Fire Officers have been required to work out-of-title as Battalion Chiefs and Deputy Chiefs so frequently as to exceed "...by an exponential factor the number of tours of out-of-title employment which was contemplated in the negotiation of the contractual language here at issue." The UFOA claims that, for example, data provided by the Department for the month of December, 1980, shows a high incidence of assignment to acting out-of-title tours in the ranks of Battalion Chief and Deputy Chief. It is alleged by the UFOA that this data demonstrates that the Department has not used its "best efforts" to minimize acting out-of-title tours, as required by the Agreement.

The UFOA disputes the City's reliance on its management prerogatives as a bar to the arbitration of this matter. The UFOA observes that the employer is free to bargain voluntarily on subjects of management right, and that any agreement entered into with respect to such subjects will be binding and effective and will serve to limit management's rights to the extent of the agreement. In the present case, the parties have negotiated an agreement concerning maintenance of an adequate level of manning in the Fire officer ranks so as to minimize acting out-of-title tours of duty. The UPOA submits that an arbitrator should be permitted to interpret and apply the clear language of Article VI of the Collective Bargaining Agreement so as to enforce the contractual commitment of the City to minimize out-of-title employment.

The UFOA also argues that the Agreement expressly requires that the Department fill vacancies in the chief officer ranks by promotion within sixty days. Again, contends the UFOA, this is a subject which might have been a matter of

management prerogative but for the fact that the City voluntarily negotiated a limitation on that prerogative. Since the parties did include this subject in Article VI of their Agreement, the City's contention that the determination of whether to make promotions to fill vacancies is solely a management right, is without merit, claims the UFOA, and cannot serve to bar arbitration of a dispute concerning this matter.

The UFOA further contends that the City's challenge to the remedy suggested by the UFOA at the Step III hearing -- reopening of the promotional eligibility list for Battalion Chief cannot render this dispute non-arbitrable, for that remedy was only one out of a broad array of possible and appropriate remedies suggested by the UFOA. The UFOA notes that the Board has long held that the mere possibility that an arbitrator might render an award violative of a specific statutory proscription will not bar an otherwise valid request for arbitration. The UFOA submits that it is domain of the arbitrator to determine what remedy, if any, is appropriate.

For all the above reasons, the UFOA requests that the petition challenging arbitrability be dismissed and that this matter be submitted to arbitration.

Discussion

This Board has long held that in determining disputes concerning arbitrability, we 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 at issue in the matter before the Board.[2] It is clear in this case that the City and the UFOA have agreed to arbitrate grievances, as defined in Article XIX of their collective bargaining agreement.[3] It is equally clear, and is conceded by the City, that the parties' agreement to arbitrate grievances encompasses a claimed failure by the Fire Department to:

> "...use its best efforts to maintain an adequate number of Fire Officers ...in each rank to minimize acting out-of-title tours",

in alleged violation of Article VI of the Agreement.

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[2]See e.g., Decision Nos. B-6-81; B-22-80; B-15-79 and decisions cited therein at footnote 7.

[3]Article XIX, Section 1, of the Agreement provides, in pertinent 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...."

In view of the express language of Article VI of the Agreement, and the City's limited concession of arbitrability, we will order that this dispute be submitted to arbitration. We are not persuaded by the City's contention that the UPOA really means to arbitrate some issues (i.e., matters of alleged management right) other than the issues raised by the Union's pleadings in reliance upon the express language of Article VI of the Agreement. The question of whether certain provisions of Article VI specifically limit, or instead recognize, management prerogatives, is a question of contract interpretation which is for the arbitrator to determine.

The City argues that if that part of the UFOA's claim under Article VI, regarding the filling of vacancies by promotion, is submitted to arbitration, the remedy requested by the UFOA at the Step III grievance hearing, i.e., the reopening and extension of an expired civil service promotional list, could not be granted leg ally by an arbitrator. We agree that an arbitrator would not possess the power to affect a civil service list which has expired by operation of law. However, the UFOA has alleged that the remedy referred to by the City is only one of "a broad array of possible and appropriate remedies" suggested by the UFOA.

This Board has held that the mere possibility that an arbitrator might render an award that would violate a provision of law is not a sufficient basis to deny an otherwise valid request for arbitration.[4] Neither the Board nor the parties should anticipate that an arbitrator will fashion improper, illegal or inappropriate relief. Our ruling that this grievance may be submitted to arbitration will only afford the arbitrator an opportunity to consider a remedy and fashion one, if warranted, appropriate to the circumstances of this particular case and within the limits of applicable law.[5]

For the reasons stated above, we hold that the UFOA's grievance shall be submitted to arbitration. We note that, as we have long held, a finding that a grievance is arbitrable is in no manner a reflection of the Board's view, if any, on the merits of the grievance.[6] Examination of the merits of the dispute is appropriately left to the arbitrator.

[4]Decision No. B-2-78; see B-1-75.

[5]See Decision No. B-2-78.

[6]Decision No. B-7-77.

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 petition challenging arbitrability, filed by the City of New York, be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration, filed by the Uniformed Fire Officers Association, be, and the same hereby is, granted.

DATED: New York, N.Y.
July 7, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER