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,

Respondent.

DECISION NO. B-29-85

DOCKET NO. BCB-765-85
(A-2066-85)

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On March 6, 1985, the City of New York, by its Office of Municipal Labor Relations (hereinafter "OMLR"), filed a petition challenging the arbitrability of a grievance submitted by the Uniformed Fire officers Association (hereinafter "UFOA" or "the Union") concerning a claimed violation and/or inequitable application of Fire Department policy regarding the supervision of field Fire Marshals by Supervising Fire Marshals. The Union filed its answer to the City's petition on March 19, 1985. The City did not submit a reply.

Background

The grievance presented by the Union herein involves the number of Supervising Fire Marshals required to be assigned to supervise a given number of field Fire Marshals. According to the Union, Fire Department policy requires

that whenever there are more than nine Fire Marshals assigned to field investigations at the same time, two Supervising Fire Marshals must be assigned for that time. The Union complains that since February 1984, there have been occasions on which the Department has assigned one Supervising Fire Marshal to supervise as many as fourteen Fire Marshals. The UFOA asserts that this practice constitutes a violation and/or inequitable application of Fire Department policy. The grievance not having been resolved at the lower steps of the contractual procedure, the Union seeks to take this matter to arbitration. The City has challenged the arbitrability of the grievance.

Positions of the Parties

City's Position

The City observes, initially, that the Union does not allege any facts which would support a claim that the employer has violated or misinterpreted any term of the collective bargaining agreement. The City contends that the agreement contains no provision concerning the assignment of Supervising Fire Marshals to supervise any number of field Fire Marshals.

The City further alleges that the Fire Department has

not violated, misinterpreted or misapplied its rules or regulations, written policy, or orders affecting the grievant's terms or conditions of employment. The City asserts that the letter, dated June 24, 1981, relied upon by the Union, does not qualify as official Fire Department "policy", but rather outlines a procedure to meet the Department's management objective of proper supervision-of field Fire Marshals.

The City argues that the issue of span of supervision is a management prerogative and is not subject to arbitral review. The City submits that any claim of right to limit management's exercise of its statutory prerogative in this area, pursuant to 51173-4..3(b) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), must be based upon clear and explicit management waiver. It is the City's position that the letter relied upon by the UFOA does not constitute such a waiver. The City characterizes the letter as merely a directive which management unilaterally could implement or discard' as the-situation required. For these reasons, the City asse r ts that the grievance herein is not arbitrable.

Union's Position

The basis for arbitration cited by the Union is Article XIX of the collective bargaining agreement, which pro vides, in pertinent part, that:

> "A grievance is defined as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the rovisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment." (Emphasis added)

The UFOA further relies upon the text of a letter from Chief Fire Marshal John B. Regan to all Base Commanders, dated June 24, 1981, which the the Union characterizes as a statement of existing Fire Department policy. The letter provides as follows:

> TO: Base Commanders
>
> FROM: John B. Regan, Chief Fire Marshal
>
> SUBJ: SUPERVISION OF FIELD FIRE MARSHALS
>
> In order to ensure the proper supervision of Field Fire Marshals, the following procedures will be effective immediately:
>
> 1. When there are more than nine Fire Marshals assigned to field investigations at the same time, the Base

> Commander shall ensure that two SFM's are assigned for that time.
>
> 2. When two SFM'S are assigned at the same time, one shall perform administrative duties, and one shall perform Field supervision duties.
>
> SFM's shall assign members to best cover the work load of the particular tour.

The Union alleges that Chief Fire Marshal Regan's directive, above, and subsequent departmental statements in relation thereto, established a policy in the Fire Department that "[w1hen there are more than nine Fire Marshals assigned to field investigations at the same time, the Base Commander shall ensure that two SFM'S are-assigned for that time." Further, the UEDA submits that the City has admitted that since February of 1984, there have been occasions on which the Department has ordered one Supervising Fire Marshal to supervise as many as fourteen Fire Marshals, allegedly in direct violation of Department policy.

The Union argues that the instant grievance, alleging a violation of existing Fire Department policy, constitutes a grievance as defined in Article XIX of the collective nargaining agreement and is therefore subject to final and binding arbitration. Accordingly, the UFOA requests that

the petition challenging arbitrability be denied, and the request for arbitration be granted.

Discussion

It is well established that in determining questions of arbitrability, this 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 at issue in the matter before the Board.[1] It is clear in the present case that the parties have agreed to arbitrate grievances, as defined in Article XIX of their collective bargaining agreement, and that the Union's claim of a violation and/or inequitable application of existing Fire Department policy, on its face, is expressly within the contractual definition of an arbitrable grievance.

However, the City contends that the letter or "directive" of Chief Fire Marshal Regan, dated June 24, 1981, relied upon by the Union herein, does not constitute a "policy," of the Fire Department the violation of which

[1] See, e.g., Decision Nos. B-17-84; B-5-84; B-1-84; B-6-81; B-15-79, and decisions cited therein.

could be grievable. Rather, according to the City, this directive merely outlined a procedure to meet the Department's management objectives. The City implies that such a procedure can be ignored or discaried at will, based upon the City's statutory management prerogatives under the NYCCBL.

As we see it, the UFOA does not dispute that the assignment of personnel ordinarily is a management right. Rather, the Union contends that a limitation on that right has been established by management through the promulgation of a departmental policy, as set forth in Chief Fire Marshal Regan's directive, and that this having been done, the Department can be required, under the terms of the collective bargaining agreement, to arbitrate claimed violations of its own existing policy.

We have previously held that where a limitation on, a management right has been imposed by contract, management must exercise that right with due regard for any contractual undertaking it may have made.[2] Therefore, if the contractual provision permitting the Union to grieve

[2] Decision Nos. B-14-84; B-4-83.

of existing Fire Department policy can be read as a limitation on the exercise of management's prerogatives, the statutory management rights provision contained in §1173-4.3b. of the NYCCBL will not stand a-s a bar to arbitration.

The arguments presented as to whether Chief Fire Marshal Regan's letter constitutes a policy of the Fire Department, whether it imposes a limitation on management's rights, and whether the Department could "discard" such a policy" or "procedure" unilaterally, are not appropriate forconsideration and determination by this Board. The answers to these questions necessarily involve interpretation of the parties' collective bargaining agreement, a matter into which we may not inquire. we have long held that in cases involving a definition of the term "grievance" which includes a claimed violation of "existing policy", such questions must be submitted to the arbitrator for determination. Thus, in City of New York v. Local 420, District Council 37, we stated:

> "The meaning of the term 'existing policy' as used in the cofitract; whether the provision of parking facilities for non-professional employees constitutes a 'policy' within the meaning of that term; and whether the employer has the right to modify or cancel an 'existing policy' are questions involving

> 'the application or interpretation' of the collective bargaining agreement between the parties."[3]

We found these questions to be arbitrable under the parties' collective bargaining agreement. We have adhered to these principles consistently in later cases involving claimed violations of various purported "existing policies", in each case submitting these issues to arbitration.[4]

For these reasons, we find that the grievance herein is arbitrable. Nothing stated herein shall be deemed to preclude the City from asserting the arguments raised herein before the arbitrator in connection with the merits of the grievance. We have not ruled on the validity of the City's arguments; we merely hold that these arguments go to the merits of the grievance and not to its arbitrability.

ORDER

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

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[3]Decision No. B-5-69

[4] See, e.g., Decision Nos. B-22-83; B-9-75; B-2-75; B-6-69; see also, B-7-68.

ORDERED, that the City of New York's petition challenging arbitrability be, and the same hereby is, denied; and it is further

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

Dated: New York, N.Y.
September 19, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

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