

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and THE FIRE  
DEPARTMENT OF THE CITY OF NEW YORK,

DECISION NO. B-31-87

DOCKET NO. BCB-945-87  
(A-2549-87)

Petitioners,

-and-

THE UNIFORMED FIREFIGHTERS  
ASSOCIATION OF GREATER NEW YORK,

Respondent.

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DECISION AND ORDER

The City of New York, by its Office of Municipal Labor Relations ("OMLR"), filed a petition on April 2, 1987, challenging the arbitrability of a request for arbitration submitted by the Uniformed Firefighters Association ("UFA" or "the Union") in case number A-2549-87. The Union filed an answer to the petition and a memorandum of law on April 22, 1987. The City submitted a reply on May 26, 1987. The UFA filed a supplemental memorandum of law on June 5, 1987. The City submitted a statement in the nature of an amendment to its reply on June 15, 1987.

Nature of the Request for Arbitration

the UFA's request for arbitration, dated February 23, 1987, presents a challenge to aspects of the Fire Department's Absence Control Policy, as set forth in a Departmental Order dated January 9, 1987, and

in PA/ID's entitled "Absence Control Policy" and "Medical Leave Requests by Off Duty Members", both effective January 19, 1987. The challenged documents represent an expansion and/or revision of the Department's pre-existing Possible Medical Leave Abuse ("PMLA") program. Pursuant to the January 9, 1987 Order, Firefighters placed in the PMLA program,

"... will be subject to the following sanctions:

- a) suspension of overtime eligibility
- b) mutual suspension for a minimum of six months
- c) restrictions on transfers and promotions
- d) confinement for duration of medical leave request
- e) medical notes for postponements
- f) home visitation"

The stated reason for implementing a more stringent absence control program, including the above "sanctions", is to reduce the Department's medical leave rate and to address those members who abuse the system.

The Union challenges the implementation of the absence control program as constituting the arbitrary imposition of punishment or discipline in violation of the collective bargaining agreement and the Department's regulations and policies concerning disciplinary procedures.

In addition, the UFA contends that the program violates Firefighters' overtime, medical leave, transfer, and mutuals rights. The request for arbitration cites the following provisions of the contract and Departmental regulations and policies as having been violated by the implementation of the program: collective bargaining agreement, Articles VA, XIX, XXVI, Attachment C, and Side Letter re: Mutuals; Regulations Ch.26 and 31; PA/ID 3-75; AUC 263; and the Department's historic policies<sup>1</sup> concerning medical leave and discipline. Article VA deals with the Department's medical offices and complaints made to the Medical Practices Review Committee. Article XIX is entitled "Individual Rights", and deals with investigatory and disciplinary procedures. Article XXVI deals with manning and the allocation of overtime necessitated by the manning provisions. Attachment C deals with the July 28, 1978 findings and recommendations of the Fire Department Medical Practices Review Committee. The Side Letter on "mutuals"

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<sup>1</sup>Under Article XX, Section 1, of the agreement, the term "grievance" is defined to include claimed violations of "existing policy", unlike the definition in many other contracts which limit grievances to claimed violations of "written policy".

sets forth the Department's policy concerning the mutual exchange of tours of duty. Chapter 26 of the Fire Department Regulations deals with procedures for the taking of disciplinary action. Chapter 31 of the Regulations deals with procedures in the Department's Medical Division. PA/ID 3-75 concerns command discipline procedures. AUC 263 sets forth the Department's policy concerning the transfer of uniformed personnel.

### Positions of the Parties

#### City's Position

The City asserts that its right to promulgate policy regarding absence control is within the scope of its statutory management right, under Section 1173-4.3b of the New York City Collective Bargaining Law ("NYCCBL"), to "direct its employees" and to "maintain the efficiency of governmental operations". The City submits that the UFA has failed to demonstrate any limitation on or waiver of that right. Moreover, the City contends that the violations of contractual provisions and Departmental regulations alleged by the Union are "conclusory", and that the UFA has not set forth the sources of rights it claims have been violated. In this regard, the City argues that the Union has failed

to show a nexus between the existence of the Absence Control Program and any alleged violations of the collective bargaining agreement or the Department's own regulations. The City submits that none of the sections relied upon by the UFA in any way limit the City's management prerogatives or establish any of the rights alleged to have been violated. Accordingly, the City requests that the Union's request for arbitration be dismissed.

Union's Position

The Union alleges that, notwithstanding the management rights provision set forth in NYCCBL Section 1173-4.3b, the Fire Department's right to take unilateral action with respect to its employees' working conditions is not without limits. It is submitted that even the Department's exercise of rights explicitly granted by Section 1173-4.3b may be limited by collective bargaining agreements, and that the Department is bound by its own regulations and policies, as well. The collective bargaining agreement between the parties herein provides that disputes over a "claimed violation, misinterpretation or inequitable application of the

provisions of this contract or of existing policy or regulations of the Fire Department" constitute arbitrable grievances. The UFA alleges that the "penalties" and "sanctions" imposed by the Department under its Absence Control Program violate specific provisions of the contract and the Department's regulations and policies. The Union asserts that in the light of its specific allegations of these violations, the City's contention that there is no evidence of any limitations on its management rights simply is frivolous.

In response to the City's claim of a lack of nexus between the Absence Control Program and the provisions cited by the Union, the UFA alleges that the Department's conduct at issue in this grievance plainly is punitive. The Departmental Order establishing the Absence Control Program defines all of the challenged conduct as "sanctions". Further, while the denial of overtime opportunities is punitive on its face, any doubt is removed by the Department's provision for alternative "penalties" for those who ordinarily do not work overtime. The Union submits that the Absence Control Program is an attempt to

punish, with a variety of "sanctions" and "penalties", Firefighters whom the Department believes to be "abusing" their medical leave rights. The Union asserts that the imposition of such discipline, without compliance with the formal and informal disciplinary procedures set forth in Chapter 26 of the Department's Regulations and in PA/ID 3-75, constitutes grievable violations of those documents. The UFA also points out that certain of the "sanctions" imposed infringe upon rights granted elsewhere in the contract and in the Department's Regulations and policies, such as the right to work Minimum Manning Overtime (Article XXVI, Section 3); the right to trade scheduled tours of duty - "mutuals" (Side Letter re: Mutuals); and the right to obtain a transfer upon request (AUC 263, Section 3).

The UFA contends that the extent to which any of these provisions create rights for the benefit of Firefighters or limit rights of the Department, relates not to the issue of arbitrability, but to the merits of the grievance. All that is necessary in the context of an arbitrability challenge, alleges the Union, is that the provisions relied upon be arguably related to the grievance. The Union submits

that its allegations in this grievance satisfy that test.

Finally, the Union alleges that the essential characteristics of the Department's Absence Control Program are virtually identical with those of its predecessor program, which was the subject of the UFA's grievances in cases no. A-2266-85 and A-2439-86. The Board denied the City's challenges to arbitrability in those matters and directed that they be submitted to arbitration in Decision No. B-14-87. The UFA argues that the Board's decision in B-14-87 is dispositive of the dispute raised herein, and that for the reasons stated in that decision, the City's petition should be denied.

#### Discussion

We agree with the Union that our recent decision in B-14-87 is dispositive of the present case. The challenged actions of the Fire Department in the earlier cases between these same parties (A-2266-85 and A-2439-86), which were consolidated for decision in B-14-87, were almost identical to the actions prescribed by the Departmental Orders, issued effectively January 19, 1987, and disputed by the UFA herein. In both cases,



the City has challenged arbitrability, relying upon its management prerogatives and claiming that the Union has failed to show a nexus between the subject of the grievance and the contractual provisions and Departmental regulations and policies claimed to have been violated. In response, in both cases, the UFA has alleged that the Department's action are punitive in nature, and constitute violations of the disciplinary procedures set forth in Departmental regulations and policies, as well as violations of other specific rights provided in the contract and in Departmental regulations and policies.

In Decision No. B-14-87, we noted initially that management's exercise of its statutory prerogatives is not "unfettered" in every instance. We recognized that an action which on its face falls within an area of management prerogative may conflict with the rights granted to an employee in the collective bargaining agreement. In such cases, we have noted that the right to manage is not a delegation of unlimited power nor does it insulate the City from an examination of actions claimed to have been taken within its limits.<sup>2</sup>

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<sup>2</sup>See, Decision Nos. B-5-87; B-27-84; B-8-81.

We found, in Decision No. B-14-87, that the UFA had met its burden of showing facts sufficient to establish a prima facie relationship between the Fire Department's actions under the expanded Possible Medical Leave Abuse program ("PMLA") and the Union's claimed violations of various procedural and substantive provisions of the collective bargaining agreement and Departmental regulations and policies. We observed, particularly, that the uniform deprivation of certain benefits solely because of a Firefighter's "possible" abuse of sick leave, constituted an exercise of management's prerogative which was at least arguably punitive in nature. We held that the requisite nexus between the Department's arguably punitive actions and the alleged violation of disciplinary procedures contained in the contract and Departmental regulations and policies, had been established.

In the present case, the nexus is even more apparent. The Challenged Departmental Order, dated January 9, 1987, and effective 10 days later, expressly describes the suspension or restriction of certain enumerated benefits as "sanctions". For affected employees who cannot be penalized by the "sanction" of the suspension

of overtime eligibility because they ordinarily do not work overtime, alternate "penalties" are provided. The UFA's grievance alleges that under the new Absence Control Program, these "sanctions" and "penalties" are imposed without compliance with the applicable disciplinary procedures set forth in the Department's own regulations and policies. We find that the Department's actions arguably are punitive in nature, and that there is a sufficient nexus between those actions and the disciplinary procedures cited by the Union to require that this matter be submitted to arbitration.

Additionally, we are satisfied that a sufficient relationship has been demonstrated between the Department's Absence Abuse Program and the provisions cited by the Union concerning the subjects of overtime (Article XXVI and PA/ID 5-74), mutuals (Side Letter re: Mutuals), and transfers (AUC 263). It is not our function to examine the merits of the Union's claim that these provisions create rights which limit management's prerogatives. Having found that there exists an arguable nexus between the subject matter of these provisions and the disputed actions of the Department, our inquiry is at an end. The determination of the merits of

the parties' claims concerning the meaning and effect of these provisions must be left to the arbitral forum.<sup>3</sup>

However, concerning the UFA's reliance on Article VA of the contract and Attachment C thereof, we fail to find any basis for the assertion of an alleged right which is even arguably related to the Absence Control Policy. Article VA, which adopts certain of the recommendations of the Medical Practices Review Committee, the report of which is appended to the contract as Attachment C, does not appear to deal with any of the subjects which are enumerated as sanctions in the Department's Absence Control Program. In support of its citation to Article VA and Attachment C, the UFA alleges that, under the Absence Control Program, targeted Firefighters may not obtain certificates of illness or injury from the Medical Division, but must obtain them from their personal physicians at their own expense. Yet, the Union fails to point to anything in Article VA or Attachment C which mentions certificates of illness or injury or which requires

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<sup>3</sup>See, e.g., Decision Nos. B-14-87; B-15-80; B-10-77; B-1-76; B-25-72; B-8-68.

that members be permitted to use the Division's staff as treating physicians. Accordingly, we sustain the City's challenge to this claim and hold that it may not be submitted to arbitration.

For the reasons set forth above and in our determination in Decision No. B-14-87, we hold that the City's petition should be dismissed, except to the extent indicated supra, and the request for arbitration should be granted except as to the claimed violation of Article VA and Attachment C of the Agreement.

O R D E R

Pursuant to the power 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 of New York be, and the same hereby is, denied except as to the UFA's claim based upon Article VA and Attachment C of the Agreement, and as to such claim it is granted; and it is further

ORDERED, that request for arbitration of the Uniformed Firefighters Association be, and the same hereby is, granted, except as limited above.

DATED: New York, N.Y.  
August 4, 1987

ARVID ANDERSON  
CHAIRMAN

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MEMBER

EDWARD SILVER  
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