City, NYFD v. UFA, 39 OCB 32 (BCB 1987) [Decision No. B-32-87 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of Arbitration

-between-

DECISION NO. B-32-87

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

DOCKET NO. BCB-906-86 (A-2459-86)

Petitioners,

THE UNIFORMED FIREFIGHTERS ASSOCIATION,

Respondent.
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DECISION AND ORDER

The City of New York, by its Office of Municipal Labor Relations ("CMLR" or "the City"), filed a petition on October 3, 1986, challenging the arbitrability of a request for arbitration submitted by the Uniformed Firefighters Association ("UFA" or "the Union" The Union, with the consent of the City, filed an amended request for arbitration on October 16, 1986.[1] The Union filed its answer to the petition on October 17, 1986, and the City filed its reply on October 28, 1986.

[1]The amendment consists of the inclusion of the remedy sought by the Union at arbitration. Since the City consented to the filing of the amended request for arbitration, we find no reason to consider the City's claim that the request for arbitration should be denied because the Union failed to state the remedy requested.

BACKGROUND

On or about August 22, 1986, the Union filed a grievance at Step III of the grievance procedure challenging the Fire Department's Medical Leave Policy as set forth in Section 2.6 of Department Order No.2.[2] and its application

[2]Department Order No. 2, dated January 4, 1985, states as follows:

2.6 Medical Leave

Request from Home

Because of the recent unexplained rapid increase in the number of members requesting medical leave from home, the following instructions will be in effect as of 0900 hours, January 5, 1985:

1. Members off duty reporting ill from home shall be ordered by the officer on duty to report to the Bureau of Health Services on the following clinic day.

2. There will be no postponements granted except in those cases where the member is non-ambulatory (severely incapacitated and unable to travel). Under these circumstances, postponements will only be granted for one (1) day and only in those cases where the member can substantiate the severity of the illness by submitting a written statement from a physician. Any member who fails to report to the Bureau of Health Services in accordance with the above and subsequently fails to furnish the required statement signed by a physician will be subject to immediate Departmental disciplinary procedures.

The following instructions are offered to assist members in complying with the above procedure:

1. When granted, postponements will be for only one (1) day. A member must request a postponement for each day he/she is unable to report to the Bureau of Health Services.

2. Required physician's statements must be on the physician's stationery and must be signed by the examining physician verifying that the member was non-ambulatory on each day in question.

to firefighter Joseph Franco and Gerard Von Essen as an "infringement of firefighters' various rights relating to medical leave." The grievance stated that the Fire Department has begun to seek compliance with Department Order No. 2 by starting disciplinary procedures against firefighters. "Specifically, on or around July 11, 1986, the Fire Department required Von Essen and Franco to elect between command and formal discipline for [the] failure [to provide physicians' statements after they called in sick from home and requested postponement of a scheduled visit to the Bureau of Health Services]." The grievance further stated that "on June 30, 1986, a medical officer of the Bureau of Health Services refused to provide such a statement when requested to do so by Joseph Franco." The Union asserted that "[b]y requiring firefighters to obtain physicians' statements prior to a visit to the Bureau of Medical Services, at a time when they are non-ambulatory, the Department is arbitrarily and unreasonably jeopardizing the health and safety of firefighters."

(...continued)

3. Members are reminded to comply with Section 17.12 of the Department Regulations as follows:

> "... members unable to report to the clinic on the next day, requesting a postponement, because they are not ambulatory, shall not leave their residence or other location until granted permission by a Medical Officer."

The Step III grievance was denied on or about September 11, 1986. Thereafter, on or about September 23, 1986, the Union filed a request for arbitration claiming that the Fire Department's actions violate Article VA, incorporating by reference Attachment C, and Article XIX of the collective bargaining agreement; and Departmental Regulations 31.3.5 and 31.3.6. Article VA deals with the Fire Department's medical offices and complaints made to the Medical Practices Review Committee. Attachment C deals with the findings and recommendations made by the Fire Department Medical Practices Review Committee in its July 28, 1978 report. Article XIX is entitled "Individual Rights," and deals with investigatory and disciplinary procedures. Departmental Regulations 31.3.5 and 31.3.6 deal with Medical Officers and their duty to members on medical leave.

As a remedy, the Union seeks the immediate withdrawal of Department Order No. 2 and requests that the Fire Department be ordered to cease and desist from the imposition of discipline for the failure to provide a physician's statement when postponement of a visit to the Bureau of Health Services is necessary. The Union

further requests that existing discipline issued for that reason be voided. Finally, the Union requests that if a physician's statement is required under any circumstances, the Bureau of Health Services provide such a statement.

POSITION OF THE PARTIES

City's Position

The City challenges the arbitrability of the Union's grievance on several grounds. First, the City argues that pursuant to its statutory management rights as set forth in Section 1173-4.3b[3] of the New York City Collective Bargaining Law ("NYCCBL") it has an "unfettered right" to direct its employees. The City

[3]Section 1173-4.3b of the NYCCBL states as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

asserts that the provisions of the agreement and departmental regulations cited by the Union do not place any limitation upon that right. The City maintains that the provisions cited and relied upon by the Union deal with the duty of Medical Officers to maintain the health of members and minimize the time lost due to medical leaves. Article XIX, also cited by the Union, sets forth the established guidelines regarding interrogations, interviews, trials and hearings conducted by duly authorized representatives of the Department. The City contends that the Union has failed to show how the Department's actions through Department Order No. 2 constitutes a violation of any rights or benefits granted to Department employees. Therefore, it is argued by the City, the Union's request for arbitration must be denied because there exists no nexus between Section 2.6 of Department Order No. 2 and the provisions alleged to have been violated.

The City disputes the Union's contention that it seeks to have the Board rule on the alleged merits of the grievance. Rather, the City asserts that it seeks to have the Board follow its established policy of examining the prima facie relationship between the act complained of and the source of the alleged right.

The City further urges that the grievance should be barred in its entirety because the Union is guilty of laches. According to the City, the Union waited more than 1 years after Department Order No. 2 was implemented to file a grievance challenging its terms. The City maintains that, even assuming arguendo that the Union filed its grievance within 120 days of learning that disciplinary procedures were filed against firefighters Franco and Von Essen, it would still be guilty of laches. Article XX, Step I-A of the collective bargaining agreement states that a grievance must be initiated within 120 days following the date on which the grievance arose. The City contends that in this case the grievance arose when Department Order No. 2 was promulgated, on January 4, 1985. The City also claims that the Union was clearly put on notice that Department Order No. 2 was being enforced; since February 1985 at least eight members have been disciplined pursuant thereto. Moreover, the City asserts that it has "relied upon this vital Order for close to two (2) years to curb a rapid increase in medical leave abuse."

Finally, the City argues that the Union's request for arbitration must be dismissed because "complaints concerning the handling of a medical matter or alleging unprofessional conduct by Medical Division personnel" cannot be brought through the grievance procedure. Rather, the City contends that such complaints must be brought through the review procedure set forth in Article VA, Section 3. The City further claims that determinations made under the review procedure set forth in Article VA, Section 3 "shall not be subject to review under the grievance procedure of (the] Agreement, and do not create any judicially enforceable rights."

Union's Position

The Union argues that contrary to the City's assertion of its "unfettered" management prerogative, any right the Department has to direct its employees is limited by the provisions of the collective bargaining agreement and its own existing policies and regulations. The UFA contends that the contractual and departmental provisions cited in its request for arbitration clearly limit management's rights.

With respect to the City's claim that there is no nexus between the provisions cited by the Union and

Section 2.6 of Department Order No. 2, the UFA asserts that the City improperly seeks to engage the Board in the merits of the dispute. The Union maintains that it is the role of an arbitrator, not the Board, to determine what rights are stated by the provisions and whether those rights have been violated. In any event, alleges the Union, a nexus does exist. Department Order No. 2 provides that an employee may be subject to "immediate Departmental disciplinary procedures" for the failure to furnish a physician's statement. Because discipline may be imposed without compliance with the procedural safeguards set forth in the cited provisions, the requisite nexus is established. Moreover, the Union maintains that Medical Officers are required to serve as firefighters"treating" physicians. Thus, the refusal by Medical Officers to provide firefighters with documentation of their illness or injury also constitutes a grievable violation of the provisions relied upon by the Union.

The Union submits that the doctrine of laches, asserted by the City as a bar to arbitration, is not applicable to the facts of this case. The UFA argues that the City Is claim of laches is really an attempt to have the Board decide an issue of procedural

arbitrability. In any event, the UFA asserts that the City's claim of laches must fail because there was no "extrinsic delay" or lack of diligence in initiating the claim. The Union maintains that it filed the grievance within 120 days of learning, for the first time, that Department disciplinary procedures were being commenced against firefighters for their failure to provide a doctor's note. The Union contends that if in fact several unidentified members have been disciplined pursuant to the terms of Department Order No. 2 since its promulgation, it was not aware of those disciplinary actions. Furthermore, argues the Union, the City has failed to allege any undue burden caused by delay in initiating the grievance. The UFA asserts that the City's claim that it has "relied" on the provisions of Department Order No. 2 "can hardly amount to the necessary showing, since the remedy sought is essentially prospective, i.e. a 'cease and desist' of the rule, and therefore does not impose any burden upon the Department."

The Union also claims that the City has misstated the scope of the grievance. The Union maintains that not

only does the grievance concern implementation of Department Order No. 2, but also misconduct by the Bureau of Health Services which began on or about June 30, 1986 and is of a continuing nature. The UFA contends that the City has presented no basis upon which to find this aspect of the grievance untimely.

Finally, the Union disputes the City's contention that complaints against Medical Division personnel only can be reviewed under the procedure set forth in Article VA, Section 3; and argues that in asserting this claim, the City seeks a determination regarding procedural arbitrability which the Board is not empowered to make. The Union claims that the review process set forth in that provision is not intended for the type of medical officer conduct here at issue. According to the Union, the refusal of Medical officers to provide documentation of illness or injury is not a matter of individual

misconduct. Rather, it is a departmental policy which is properly reviewed under the grievance procedure set forth in Article XX of the collective bargaining agreement. Furthermore, the Union maintains that the fact that determinations made under Article VA, Section 3 are not reviewable under the grievance procedure does not limit its ability to elect to use the grievance mechanism. The Union asserts that Article VA, Section 3 expressly states that "[t]his Section shall not expand or reduce any rights previously held by the parties," and that any determinations made thereunder "are not intended as an adjudication of the rights of the parties."

DISCUSSION

The City argues that the grievance submitted herein should be barred from proceeding to arbitration under the equitable doctrine of laches. It is well established that a claim may be barred by laches only when it has been demonstrated that (a) the claimant is guilty of a long and unexcused delay in asserting a claim, and (b) the party asserting the defense has been prejudiced by the claimant's delay.[4] In the present case, we find

[4]See, e.g., Decision Nos. B-14-87; B-46-86; B-23-83; B-20-79.

that it is not entirely clear when the grievance arose and, therefore, whether the Union was in fact guilty of a "long delay" in initiating its claim. Although the City contends that since February 1985 several firefighters have been disciplined pursuant to Department Order No. 2, it does not present any evidence to show that the Union was aware of those particular disciplinary actions and, therefore, had knowledge that Department Order No. 2 was being enforced. The Union contends that it first learned Department Order No. 2 was being enforced when Department disciplinary procedures were commenced against firefighters Franco and Von Essen; and it filed a grievance objecting both to the Order and its application to Franco and Von Essen soon thereafter. Moreover, the Union claims that the refusal by a medical Officer to provide a member with documentation of their illness or injury occurred on or about June 30, 1986; and that this violation is of a continuing nature.

We find that the real issue here is the timeliness of the grievance under the contractual grievance procedure. As we have stated previously, such question is a matter of procedural arbitrability which must be

submitted to an arbitrator for determination.[5]

Additionally, there has been no showing of prejudice to the City resulting from any delay in filing the grievance. The City's assertion that it "has relied upon the provisions of the order for over 20 months to curb what had been a rapid increase in the number of members requesting medical leave from home" and that it has "adjusted [its] operations in reliance on [the Union's] silence" is insufficient for a finding of prejudice where, as here, the remedy sought by the Union is prospective only. Furthermore, the City has not alleged the existence of any other form of recognizable prejudice attributable to delay, such as the loss of evidence or the unavailability of witnesses. Accordingly, for the above reasons, we find that the doctrine of laches is inapplicable to the facts of this case.

In disputes concerning arbitrability, it is the function of this Board to 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.[6] It is clear in the

[5]Decision Nos. B-36-82; B-33-82; B-3-82; B-38-80.

[6]See, e.g., Decision Nos. B-14-87; B-5-87; B-40-86; B-1-84; and decisions cited therein.

present case that the parties have agreed to arbitrate grievances, as defined in Article XX of their collective bargaining agreement, and that the Union's claim that the Fire Department's actions have violated Articles XIX and VA, and Attachment C thereof; and Departmental Regulations 31.3.5 and 31.3.6; are matters which, on their face, fall within the contractual definition of an arbitrable grievance.[7] The City argues, however, that the action complained of herein, i.e., implementation of Section 2.6 of Department Order No. 2 and the refusal by Medical officers to provide members with documentation of their illness or injury, constitutes the exercise of an "unfettered" management prerogative; and further that the Union has failed to establish a nexus between the cited contractual and Departmental provisions and the challenged management action.

Where, as here, it is alleged that the disputed action is within the scope of an express management right, this Board has been careful to fashion a test of arbitrability which strikes a balance between often conflicting considerations and which accommodates both the City's management prerogatives and the contractual

[7]Article XX, Section 1 states that "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."

rights asserted by the Union.[8] The City observes that the right to direct its employees is within the City's statutory management rights, pursuant to NYCCBL §1173-4.3b. On the other hand, the Union asserts that the City's exercise of its management prerogatives is limited by provisions of the collective bargaining agreement, particularly by Article XIX, which sets out procedures to be followed in disciplinary cases; Article VA and Attachment C thereof, which deals with medical offices and complaints concerning the handling of a medical matter or alleging unprofessional conduct by Medical Division personnel; and Departmental Regulations 31.3.5 and 31.3.6, which deal with Medical officers and their duty to members on medical leave.

Initially, we observe that management's exercise of its statutory prerogatives is not "unfettered" in every instance. We have 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 these 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.[9]

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[8] See, Decision Nos. B-14-87; B-5-87; B-40-86; B-5-84; B-9-81; B-8-81.

[9] See, Decision Nos. B-14-87; B-5-87; B-27-84; B-8-81.

In cases such as this one, the Board has fashioned a test of arbitrability which endeavors to balance the competing interests that arise when a disputed action falls within the scope of an express management right.[10] This test may be stated as follows: The grievant is required to allege facts sufficient to establish a prima facie relationship between the act complained of and the source of the alleged right. The bare allegation that a management action violates various procedural and substantive provisions of the agreement and departmental regulations will not suffice. The burden in this case, therefore, is on the Union to establish to the satisfaction of the Board that there exists a prima facie relationship between the sources of the rights asserted by the Union (Articles XIX and VA, and Attachment C thereof, and Departmental Regulations 31.3.5 and 31.3.6) and the acts complained of (the alleged failure to comply with the contractual disciplinary procedures in enforcing the terms of the Department Order No. 2 and the refusal of Medical officers to provide members with documentation of their illness or injury).

[10]See, Decision Nos. B-14-87; B-5-87; B-40-86; B-27-86; B-5-84; B-9-81; B-8-81.

We find that the UFA has met its burden with respect to the alleged violation of Article XIX of the agreement. The Union asserts that under Section 2.6 of Department Order No. 2 firefighters are subject to "immediate Department disciplinary procedures" for the failure to provide a physician's statement after they have called in sick from home and requested postponement of a scheduled visit to the Bureau of Health Services. The Union alleges that in enforcing Department Order No. 2, the Department has imposed discipline without complying with the procedural safeguards set forth in Article XIX. We find that these allegations establish the requisite nexus between the provisions claimed to have been violated and the challenged management action.

We also find that the Union has met its burden with respect to the alleged violations of Departmental Regulations 31.3.5 and 31.3.6. The Union asserts that medical officers are to serve as firefighters' "treating" physician. Departmental Regulation 31.3.5 states that "Medical Officers shall issue necessary orders and directions for the treatment of members on medical leave Departmental Regulation 31.3.6 states that

"Medical Officers shall have medical supervision over members who are on medical leave .... They shall issue orders essential for the care and treatment of those members We find that the Union has established an arguable relationship between these Departmental Regulations and its claim that the refusal by Medical Officers to provide firefighters with documentation of their illness or injury violates their duty to members on medical leave.

Concerning the UFA's reliance on Article VA of the agreement and Attachment C thereof, we find that the Union has failed to state a claim which may be submitted to Article VA, which adopts certain of the recommendations of the Medical Practices Review Committee, the report of which is appended to the agreement as Attachment C, sets forth a procedure for the review of complaints concerning the handling of a medical matter or alleging unprofessional conduct by medical Division personnel. It does not provide any substantive rights. While the Union's assertion concerning the refusal by Medical officers to provide members with documentation of their illness or injury may state a complaint which is

reviewable under Article VA, the Union does not allege a violation of the procedures set forth therein. In fact, the Union does not even seek to address its grievance in that forum. Accordingly, we sustain the City's challenge to this claim and hold that it may not be submitted to arbitration.

Finally, we reject the City's contention that complaints against Medical Division personnel only can be reviewed under the procedure set forth in Article VA, Section 3. We find nothing in that provision which precludes the Union from filing the instant grievance in the arbitral forum. Article VA, Section 3.D states that determinations made thereunder "shall not be subject to review under the grievance procedure of [the] Agreement, and do not create any judicially enforceable rights." It does not, however, preclude the Union from electing to use the grievance procedure in the first instance.

Having made the above findings, the Board's inquiry is at an end. It is not the function of the Board to examine the merits of the Union's claim. Once we have found that the dispute is arguably within the scope of those matters which the parties have agreed to arbitrate, the determination of the merits of the parties respective claims must be left to the arbitral forum.[11]

For the reasons set forth above, 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

[11]E.g., Decision Nos. B-14-87; B-15-80; B-10-77; B-6-77; B-1-76; B-25-72; B-4-72; B-8-68.

ORDERED, that the 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 27, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

EDWARD SILVER
MEMBER

CAROLYN GENTILE
MEMBER