City v. L.854, UFA, 39 OCB 5 (BCB 1987) [Decision No. B-5-87 (Arb)]

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

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO,

Respondent.

DECISION NO. B-5-87
DOCKET NO. BCB-898-86
(A-2435-86)

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DECISION AND ORDER

The City of New York (hereinafter "City"), by its Office of Municipal Labor Relations, filed a petition on August 25, 1986 which challenged the arbitrability of a grievance submitted by the Uniformed Fire Officers Association, Local 854 IAFF, AFL-CIO (hereinafter "Union" or "UFOA"). The Union filed its answer to the petition on September 10, 1986. The City submitted a reply on September 22, 1986. The Union submitted a sur-reply on October 8, 1986.[1]

[1]The Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules") do not provide for the submission of pleadings subsequent to a reply. However, the UFOA's sur-reply purports to respond to new matters raised in the City's reply. Under such circumstances, a sur-reply has been permitted by the Board.

Background

The Union grieves the detail and/or transfer of two fire officers, Captain John Ievolo and Battalion Chief Joseph Mastrella, from their previous assignments to a "covering status" in which they have no permanent assignment but are assigned to different units each tour. The grievants' transfers to a "covering status" requires them to travel from firehouse to firehouse, and sometimes from borough to borough, with all of their equipment for each new tour. The Union alleges that the grievants' transfer is punitive in nature, and constitutes a disciplinary response to allegations of sexual harassment which may have occurred in a fire unit (Engine 207) which was under the supervisory jurisdiction of the grievants. The grievants were interrogated by the Fire Department's Inspector General in the course of an investigation into the allegations of sexual harassment in this unit, and were designated as "subjects" of that investigation, but no charges have been served against either grievant, and no formal disciplinary procedures have been commenced.

In the Step III grievance decision, the Fire Department denied that the transfers or "details" were of a punitive nature, and stated that they were an exercise of management's prerogatives and were consistent with Departmental policy,

specifically as set forth in a document entitled All Units Circular 263 ("AUC 263"). The Step III decision further stated:

> "That directive states that in cases where there exists unacceptable behavior and performance in violation of the Department's regulations of a serious nature, the Department can effect temporary reassignments pending the outcome of formal disciplinary procedures in order to avoid the loss of administrative effectiveness in the Department. Furthermore, superior officers are affirmatively charged with effectiveness of units and their commands. The seriousness of sexual harassment and discrimination cannot be argued. The officers detailed were, or should have been, aware of the magnitude of this issue in general, and of the specified problems in Engine 207, and of the Department's much publicized strategy recently promulgated to deal with it. Indeed, approximately two weeks immediately prior to the details, one of the grievants had attended a personal briefing by the Fire Commissioner during which, among other things, Chief Officers were reminded of their command responsibility and were directed to exercise it to eliminate sexual harassment."

In denying the grievance, the Step III decision concluded:

> "The Department can and must take all necessary steps to eradicate the problem of sexual harassment within its ranks. Management has not only the right but the duty to act swiftly and firmly and to stand behind its actions. In view of the fact that the Department acted in accordance with its rules and regulations, it would be inappropriate to revoke these details. In addition, and more importantly, the union has failed to establish a violation of the Col-

lective Bargaining Agreement or the Department's policies. Accordingly I find against the grievants herein."

Following receipt of the Step III decision, the Union filed the request for arbitration which is challenged by the City's petition herein.

Positions of the Parties

City's Position

The City observes initially that Section 1173-4.3b of the New York City Collective Bargaining Law ("NYCCBL") expressly recognizes the City's management right 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."

Pursuant to this statutory provision, the City asserts that it possesses an "unfettered right" to detail and/or transfer its employees.

In response to the contractual bases for arbitration alleged by the Union in its request for arbitration, the City submits that there exists no nexus between the act com-

plained of (i.e., the transfers and/or details) and the contractual provisions cited by the Union. Specifically, the City argues that Article XVIII, entitled "Individual Rights", does not relate to or limit the Department's right to detail and/ or transfer any of its uniformed officers. Similarly, the City contends that Article XIX merely sets forth a grievance and arbitration procedure which, alone, is not sufficent to support a challenge to a detail and/or transfer.[2]

The City, notes that while the Union alleges a violation of existing policy under Article XVIII, it does not allege a violation of AUC 263, the Fire Department's written and existing transfer policy. The City submits that the terms of AUC 263 support the Department's actions in this matter.

Finally, the City argues that a prior Board decision[3] which found arbitrable a dispute concerning a fire officer's transfer for allegedly disciplinary reasons, is distinguishable on the basis that the grievant in the earlier case was

[2]The City also challenges the Union's reliance on Article I, the Union recognition provision of the Agreement. However, in its Answer, the Union states that it had agreed to withdraw any claim based on Article I. Moreover, the Union has not offered any explanation or justification for the request for arbitration's citation to Article I. Accordingly, this basis for the grievance is deemed to have been dropped and will not be considered by the Board herein.

[3]Decision No. B-36-80.

served with disciplinary charges while the grievants in the present case have not been served with charges. The City asserts that this difference has a direct bearing on the nexus between the act complained of and the alleged violations of Articles XVIII and XIX.

For these reasons, the City asks that the request for arbitration be denied.

Union's Position

The Union contends that the existing policy of the Fire Department prohibits the detail and/or transfer of a fire officer for disciplinary or other punitive reasons. The Union points out that pursuant to Article XIX, Section 1 of the collective bargaining agreement,

> "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. (Emphasis supplied)

Grievances, as defined above, are subject to the grievance and arbitration procedures set forth in Article XIX.

The Union alleges that the City's purported authority to detail and/or transfer fire officers is limited by the provisions of the collective bargaining agreement, particularly by Article XVIII, which sets out procedures to be

followed in disciplinary cases, and Article XIX, which makes existing Departmental policy and regulations binding on the City. The Union also cites an arbitration award in an earlier case between the parties[4] which held that a transfer for disciplinary purposes would violate existing Departmental policy.

The Union argues that an issue identical to that presented here was considered by the Board in another arbitrability proceeding[5] and that the determination in that matter should be controlling in this case. In the earlier proceeding, a fire officer was transferred shortly after he had been acquitted of disciplinary charges by an administrative law judge. Under the circumstances of that case, the Board held arbitrable the officer's claim that his transfer was violative of the Department's existing policy of not transferring an employee for disciplinary reasons. The Union submits that this ruling is equally applicable to the facts of the present case.

The Union asserts that the City's reliance on AUC 263 is misplaced and misleading, and that it ignores language in that document which supports the Union's claim. The

[4]Case No. A-347-74.

[5]City v. Uniformed Fire Officers Association, Decision No. B-36-80.

Union points out that AUC 263 permits only a

> "...temporary reassignment pending the outcome of formal disciplinary procedures to avoid a loss of administrative and operational effectiveness in the Department."

In contrast to this policy, alleges the Union, the grievants have been detailed to "covering status" for months and no charges have been served nor any other disciplinary procedures commenced. The Union contends that such a long-term punitive detail, absent the pendency of charges, is not authorized by AUC 263 and is contrary to existing Departmental policy.

Finally, the Union alleges that the City's petition challenging arbitrability was filed in bad faith and as a dilatory tactic. The Union asks that the request for arbitration be granted and that the City be directed to pay the Union's costs in this proceeding, including reasonable attorney's fees.

Discussion

It is well established that in determining disputes concerning 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.[6] 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 claims that the Fire Department's actions have violated Article XVIII of the agreement and existing Departmental policy concerning transfers for punitive reasons, are matters which, on their face, fall within the contractual definition of an arbitrable grievance.[7] However, the City argues that the actions complained of herein, i.e., the transfer and/or detail of the grievants, constitute the exercise of an "unfettered" management prerogative; and further that the Union has failed to establish a nexus between the cited contractual 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

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[6]See, e.g., Decision Nos. B-40-86; B-1-84; B-6-81; B-15-79 and decisions cited therein.

[7]Article XIX, Section 1, provides as follows:

> "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."

We note that this provision differs from the language found in most other City collective bargaining agreements, in that definition of a grievance includes claimed violations of existing policy", not merely "written policy" as is usually the case.

which strikes a balance between often conflicting considerations and which accomodates both the City's management prerogatives and the contractual rights asserted by the Union.[8] The City asserts that the right to transfer or "detail" an employee is within the City's statutory management rights, pursuant to NYCCBL §1173-4.3b.[9] On the other hand, the Union asserts that the City's right to detail and/or transfer a fire officer is limited by provisions of the collective bargaining agreement, particularly by Article XVIII, which sets out procedures to be followed in disciplinary cases, and Article XIX, which makes binding on the City the allegedly existing policy of the Fire Department against the use of transfers as punitive measures.[10]

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

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

[9]The relevant text of §1173-4.3b is quoted supra at p.4.

[10]The Union cites the arbitration award in Case No. A-347-74 as evidence of the existence of this Departmental policy.

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.[11]

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.[12] 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 transfer or assignment was made for a punitive purpose 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 (Article XVIII of the agreement, and the allegedly existing Departmental policy concerning punitive transfers made grievable through Article XIX) and the acts complained of (the allegedly punitive detail and/or transfer of the grievants).

[11]See, Decision Nos. B-27-84; B-8-81.

[12]See, Decision Nos. B-40-86; B-27-84; B-5-84; B-9-81; B-98-81.

Moreover, assuming that such a relationship is shown to exist, the Union also is required to show that there is a substantial issue with respect to the disciplinary nature of the detail and/or transfer.

We find that the Union has met its burden in this case. Article XVIII, entitled "Individual Rights", sets forth procedures concerning employees' participation in Departmental investigations, interrogations, interviews, trials, and hearings, including such proceedings as may lead to disciplinary action. Article XIX makes grievable claimed violations of existing Departmental policy affecting terms and conditions of employment. The Union alleges the existence of a Departmental policy that transfers shall not be made for punitive reasons. This allegation finds support in an arbitrator's ruling in an earlier case[13] in which the arbitrator stated that the Fire Department asserted,

> "...that its existing policy is not to transfer for punitive reasons .... "[14]

We find that there is at least an arguable relationship between the contractual Articles and alleged Departmental policy relied upon by the Union and the claim that the grievants' punitive details and/or transfers were violative of

[13]Case No. A-347-74.

[14]Arbitrator's opinion and award at p.7.

the rights created in the cited Articles and alleged policy. We are unable to say that a contractual provision dealing with disciplinary procedures and an alleged policy dealing with transfers for punitive reasons are unrelated to the claimed punitive details and/or transfers of the grievants.

In this regard, we are not convinced that the Department's written policy AUC 263, relied upon by the City, necessarily is inconsistent with the policy asserted by the Union. While AUC 263 does indicate the Fire Department's right to reassign an employee,

> "[i]n an instance where any number of the Department fails to contribute to the development of the level of excellence required in these areas, i.e., through his attitude, behavior, or lack of commitment ...."

it also provides, in the very same paragraph, that:

> "Unacceptable behavior and performance in violation of the Regulations of the Department are occasionally of such a serious nature that, in the judgment of the superior officers in command of the unit, it is necessary to effect temporary reassignment pending the outcome of formal disciplinary procedures in the Department."

It is the Union's position that this latter quotation is evidence of the Department's violation of its own policy, since it permits only a temporary reassignment pending the outcome of formal disciplinary procedures. Nevertheless, it is undisputed that the grievants herein have been re-

assigned for months and no formal disciplinary procedures have been initiated against them.

We believe that the City's arguments to the effect that neither Article XVIII nor the alleged Departmental policy recognized by the arbitrator in Case No. A-347-74 nor the temporary reassignment provisions of AUC 263 support the Union's claim, are addressed to the merits of the grievance and not to its arbitrability. Whether the City's interpretation of those documents and its proof of the Fire Department's existing policy are persuasive, are matters properly submitted to an arbitrator for determination. It is well established that in deciding questions of arbitrability, this Board will not inquire into the merits of the dispute.[15]

We agree with the Union that our decision in a prior case between these same parties[16] is instructive in determining the present matter. The earlier case also involved an allegedly punitive transfer of a fire officer, and reliance by the Union on Article XVIII of the agreement and the Department's written transfer policy (which appears to be the same document as AUC 263). In that case, we held

[15]See, e.g., Decision Nos. B-10-77; B-5-76; B-19-74; B-8-74; B-12-69.

[16]Decision No. B-36-80.

that there was a sufficient nexus between both Article XVIII and the written transfer policy, and the allegedly punitive transfer of the grievant. Moreover, we stated that the question whether the contractual and Departmental disciplinary procedures and/or the written transfer policy had been violated, were to be decided in arbitration and not by this Board. The City asserts that our ruling in the prior case is distinguishable, since the grievant in the earlier case had been served with written disciplinary charges. However, we note that at the time the grievant was transferred in that case, the disciplinary charges had been dismissed by an Administrative Law Judge and no charges were pending. Thus, the grievant was situated no differently than the grievants in the present matter. More importantly, as we will discuss below, we find that the Union here has alleged sufficient facts to raise a substantial issue concerning whether the grievant's detail and/or transfer were punitive in nature, notwithstanding the lack of formal disciplinary charges. Accordingly, we find no basis for distinguishing our decision in B-36-80 from the matter presented herein.

As we stated, supra, in a case such as this one the burden is on the Union to establish the required nexus and to show that there is a substantial issue as to the the disciplinary or punitive nature of the detail and/or transfer.

We held above that the Union has satisfied the first part of its burden. We now find that the second part of the burden has been satisfied, as well.

The Fire Department's decision in this case at Step III of the grievance procedure[17] refers to "unacceptable behavior and performance" and the fact that,

> "...the officers detailed were, or should have been, aware of the magnitude of this issue [sexual harassment] in general, and of the specified problems in Engine 207...."

The Step III decision also stated,

> "The Department can and must take all necessary steps to eradicate the problem of sexual harassment within its ranks. Management has not only the right but the duty to act swiftly and firmly and to stand behind its actions. In view of the fact that the Department acted in accordance with its rules and regulations, it would be inappropriate to revoke these details."

This decision must be read in the context of the facts that there were allegations of sexual harassment and discrimination in Engine 207, a unit which was under the supervisory jurisdiction of the grievants; and that the grievants were interrogated by the Fire Department's Inspector General in the course of an investigation into the allegations concerning this unit, and were designated as "subjects" of that

[17]This decision is quoted at length at p.3, supra.

investigation.

We find that the specific allegations and evidence submitted concerning the circumstances surrounding the grievants' detail and/or transfers raise a clear and substantial question as to whether the actions taken were punitive in nature. Having so found, it remains for the arbitrator to determine the merits of the Union's allegations.

We wish to emphasize that our holding that this matter is arbitrable is in no manner a reflection of the Board's view on the merits of the Union's claim. Further, we do not suggest that it would be inappropriate for the City to exercise its prerogative to reassign or transfer its employees in some cases for disciplinary reasons. That is not the question presented to us. The issue, here, is whether the City has placed limitations on the exercise of its prerogatives either through the collective bargaining agreement or through its own policies. It is this latter issue which we submit to arbitration herein.

Finally, although we take cognizance of the Union's contention that the petition challenging arbitrability was interposed in bad faith and as a dilatory tactic, inasmuch as the filing of the petition was timely under our Rules and since we do not find the City's arguments to have been frivolous, we decline to consider the Union's request for

costs and attorney's fees.

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; and it is further

ORDERED, that request for arbitration of the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO be, and the same hereby is, granted.

DATED: New York, N.Y.
January 27, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER