City v. L.854, UFOA, IAFF, 41 OCB 36 (BCB 1988) [Decision No. B-36-88 (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,

DECISION NO. B-36-88

-and

DOCKET NO. BCB-1033-88
(A-2754-88)

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

Respondent.
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DECISION AND ORDER

On February 19, 1988, the City of New York ("the City") by the Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance submitted by the Uniformed Fire officers Association, Local 854, IAFF ("the Union") on January 25, 1988. The Union filed an answer to the petition on March 31, 1988, to which the City filed a reply on April 22, 1988.

Background

On or about October 8, 1987, the Union initiated a grievance at Step III of the contractual grievance procedure[1] based on the "improper failure and refusal of the

[1]The agreement under which this dispute arises is the July 1, 1984 to June 30, 1987 contract between the parties ("the Agreement").

Fire Department to fill the position of Captain of Engine Company 72 since approximately April 18, 1987." It claimed the City had violated Article XIX of the Agreement, All Units Circular 263 ("AUC 263") , "other applicable rules or regulations" and "past practice."

Article XIX of the Agreement defines "grievance" 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."

AUC 263 provides in relevant part that "[c]ompany officer vacancies by promotion, transfer or retirement will remain unfilled for four weeks to allow members to submit transfer requests." The Union claims that the past practice and the existing policy of the City in applying this provision was to fill a position once it had been vacant for a period of thirty days or within a reasonable time thereafter and not to keep the position vacant for an indefinite period of time.

The City denied the grievance on or about January 4, 1988, and the Union subsequently requested arbitration. The Union seeks the "permanent appointment of a Captain to Engine Company 72, consistent with the procedures required

by the contract and AUC 263."

The Parties' Positions

The City's Position

The City posits three arguments in support of its challenge to arbitrating the grievance. First, it asserts that pursuant to Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL"), the City has an "unfettered right" to "direct its employees" and to "determine the methods, means and personnel by which governmental operations are to be conducted." In the instant grievance, so the City argues, the Union has failed to demonstrate the existence of any limit to that right.

Second, the City argues that the Union cannot rely simply on an alleged breach of Article XIX of the Agreement. In support of this proposition, it cites Decision No. B-22-80 wherein the Board of Collective Bargaining ("the Board") held that a union's reliance only on the contractual definition of "grievance" does not "furnish an independent basis for a grievance." The Board held in that case that "[i]n submitting a request for arbitration it is not enough to rely solely upon the contractual definition of a grievance." A union must specify the portion of the agreement or the policy which gives rise to a grievance.

Finally, the City argues that the Union cannot rely on AUC 263 as a basis for the right it claims. AUC 263, according to the City, sets a guideline for the assignment and transfer of uniformed personnel but does not establish any period of time by which the City must fill a vacancy. Thus, the Union has failed to establish the requisite nexus between the act complained of, the City's failure to fill a vacancy within thirty days, and the term of the Agreement or policy the Union claims has been violated or misapplied.

The Union's Position

First, the union claims that the City, as a consequence of the Agreement and past Board decisions, does not have an "unfettered right" to detail employees in the Union's bargaining unit. The Agreement, including Article XIX, which makes existing-policy and regulations binding on the City, constrains the City's freedom of action. The Union relies on Decision No. B-5-87 in which the Board held that management's right to manage may conflict with employees' rights under a collective bargaining agreement. Where there is such a conflict, the Board found that Article XIX, as well as defined policies of the City, may set a limit on

management's right.[2]

The Union also relies on Decision No. B-29-85 in which the Board found that the issue of whether a letter or directive of the Chief Fire Marshal was an "existing policy" which limited management's rights, was an issue for an arbitrator to determine and not the Board.

The Union also disagrees with the City on whether Article XIX provides a basis for the grievance.[3] The definition of "grievance," the Union argues, includes violations of "existing policy."[4] Therefore, a violation of a policy is also a violation of Article XIX.

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[2]The City, in reply to the Union's assertion, notes that the Board's finding in that case on the issue of whether or not transfers were punitive was dependent on a claimed violation of Article XVIII of the Agreement. Significantly, the Board also found that the Union's claim was also arguably related to a policy of the City, the existence of which had been supported by an arbitrator's earlier opinion.

[3]It should be noted that the Union's "Request for Arbitration" identifies only Article XIX of the Agreement as "the contract provision, rule or regulation" which the Union claims has been violated. Nonetheless, the Step III grievance lists not only Article XIX of the Agreement, but AUC 263 and "other applicable rules or regulations" as well as "past practice" as being the basis for its grievance. These issues were addressed by the parties at the Step III level, and they have further addressed them in the pleadings submitted herein.

[4]The City, in its reply, argues that there is no existing policy which could arguably form the basis for a grievance.

Finally, the Union argues that "AUC 263 has been construed and applied by the Fire Department to require such assignment be made within a reasonable time after the thirtieth day that the position has been vacant. Where several officers apply for a particular position, the position is to be filled in accordance with the criteria set forth in AUC 263." It is the City's failure to follow this policy, according to the Union, which is the core of the Union's grievance.[5]

Discussion

This Board determines whether a particular grievance is arbitrable in two steps. First, we must determine, if the parties raise the issue, whether there is an agreement to arbitrate grievances. Second, we must decide whether the claim is arguably covered by the contractual grievance procedure.[6]

[5]The City, in turn, claims that this so-called "policy" does not exist. Indeed, it posits that the real issue raised by the Union's grievance is simply the alleged failure or refusal by the City to fill the position of Captain of Engine Company 702 since approximately April 18, 1987, and that there is no prima facie relationship between filling the vacancy and the terms of AUC 263.

[6]See Decision Nos. B-15-79; B-13-85; B-6-85.

Furthermore, when a union is so challenged, it has the burden of establishing that there is a prima facie relationship between the acts of the City complained of and the source of the alleged right, redress of which is sought through arbitration.[7] Doubtful issues of arbitrability are to be resolved-in favor of arbitration.[8] At no point may the Board consider the merits of the underlying claim.[9]

The parties do not dispute that the parties have agreed to arbitrate "grievances" as defined by Article XIX of the Agreement. Rather, the petition raises the question of whether the Union has adequately pleaded "a claimed violation, misinterpretation or inequitable application of the provisions of [the Agreement] or of existing policy or regulations of the Fire Department." We hold that the Union has.

The Union does not dispute that the assignment of personnel is ordinarily a management right. It claims:

> ... that a limitation, on that right has been established by management through the promulgation of a departmental policy.... and that this having been done, the De-

[7]See Decision Nos. B-10-83; B-27-84; B-22-86.

[8]See Decision No. B-7-79.

[9]See Decision Nos. B-1-84; B-29-85.

> partment can be required, under the terms of the collective bargaining agreement, to arbitrate claimed violations of its own existing policy.[10]

We agree with the City that if the Union had merely relied on Article XIX, without citing any further substantive right as a basis, it would not have a grievable claim under the Agreement.[11] However, during the grievance procedure, and in the instant proceeding, the Union has relied on an alleged violation or misapplication of an existing policy as the basis for its claim.

The City's contention that the Union "has failed to cite to a single Department policy which is arguably related to its claim" to the contrary, the pleadings reveal that the Union has cited to an alleged policy, described supra. This policy may simply be an unwritten interpretation and application of AUC 263, or it may be a policy which exists independent of AUC 263. Whatever it may in fact be, if it does exist, the Union has adequately pleaded its existence for purposes of determining the threshold issue before the Board. This alleged policy is directly related to the acts of the City which gave rise to the

[10] See Decision No. B-29-85.

[11] See Decision Nos. B-7-81; B-30-84.

Union's grievance.

The City correctly notes that the two arbitration awards cited by the Union[12] were based on the existence of a writing that was determined to constitute a policy. However, under the Agreement the term "grievance" is not limited to a claimed violation of a written policy; the term "policy. is not so modified.[13]

This Board's opinion in Decision No. B-27-86 is particularly instructive. The City challenged the arbitrability of a grievance filed by the Uniformed Firefighters Association of Greater New York, Local 94 ("UFA") which alleged that the City had violated a policy and practice of equipping fire marshals with emergency radios by failing to maintain an operative emergency radio system. The City contended that the union could only allege the violation of a written policy as the basis for an arbitrable grievance, not an unwritten policy, an argument which the City does not proffer explicitly in the instant case.

[12]A-2066-85 and A-1928-84.

[13]See Decision No. B-30- 84 (wherein the Board found that The contractual grievance procedure expressly covered only claimed violations, misinterpretations or misapplications of "written policy." It thus rejected the union's contention that a violation of a "verbal agreement" with respect to staffing could be arbitrated). See also Decision Nos. B-25-83; B-28-82.

The Board found that the parties' contract, which defined "grievance" as a claimed violation "of the provisions of [the contract] or of existing policy or regulations...," included claimed violations of unwritten policies. The contract did "not require that [the policy] be either written or expressed in a rule or regulation."

As we noted in the case and as we find here, the issue of whether there is such a policy or practice and whether that policy is an "existing policy" within the meaning of the Agreement as claimed by the Union are not matters for the Board to resolve, but are questions which require an interpretation of the Agreement.[14] This Board has consistently refused to comment on the merits of a claim on a petition challenging arbitrability of a grievance and will not do so herein. Arguments on the merits of the grievance must be saved for another time and another forum, that is to say before an arbitrator. We decide only that the Union's grievance is arbitrable, and do not reach the City's arguments addressed to the merits.

[14]See Decision Nos. B-6-69; B-7-68; B-29-85; B-30-86.

Decision No. B-36-88
Docket No. BCB-1033-88
(A-2754-88)

0 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 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.
July 27, 1977

MALCOLM D. MacDONALD
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MEMBER

DANIEL G. COLLINS
MEMBER

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