City, NYFD v. Fire Alarm Dispatchers Bene. Ass., 41 OCB 63 (BCB 1988) [Decision No. B-63-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

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

Petitioners,

DECISION NO. B-63-88
DOCKET NO. BCB-1088-88 (A-2867-88)

-and-

THE FIRE ALARM DISPATCHERS BENEVOLENT ASSOCIATION, INC.

Respondent.

DECISION AND ORDER

On September 16, 1988, the City of New York appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a request for arbitration filed by the Fire Alarm Dispatchers Benevolent Association ("the Union" or "FADBA") on August 16, 1988. The Union filed its answer on September 30, 1988. The City did not submit a reply.

BACKGROUND

On February 2, 1986, Vincent Alliegro, a Fire Alarm Dispatcher, was involved in a car accident while riding in a taxi between work locations. As a result, he suffered physical injuries and developed a psychological phobia of riding in taxi cabs. After an extended sick leave, Mr. Alliegro returned to work and presented the Fire Department ("Department") with a psychiatrist's note recommending that he be relieved from all duties involving taxi travel until

August 11, 1986. He requested that the Department either refrain from assigning him to details in Brooklyn and Staten Island (which required taxi travel) until that time, or pay a resulting increase in his personal car insurance so that he could drive between work locations. The Department chose and complied with the first alternative.

Subsequent to August 11, 1986, Mr. Alliegro went on a detail to one of the boroughs from which he had previously been exempted. As a result of the taxi ride to the detail location, he suffered an anxiety attack and went home for the rest of the day. His psychiatrist then determined that he was still unable to travel by taxi.

Thereafter, Mr. Alliegro was detailed to work "off the chart" on a 9 to 5 schedule at the Manhattan Communications Office. His Chief Dispatcher indicated that this was a temporary assignment, and that when he was "better", Mr. Alliegro would be reassigned to his original station. This detail lasted approximately one month until October 28, 1986, when Mr. Alliegro was returned to his original assignment.

On or about September 27, 1986, the Union filed a Step I grievance alleging that by assigning Mr. Alliegro to Manhattan Operations, the Department had unilaterally reduced his hours causing him to lose overtime compensation in violation of the 1984-1987 Collective Bargaining Agreement (“Agreement”) and the Fair Labor Standards Act (“FLSA”). It also alleged that the Department had harassed

and discriminated against him because there were other dispatchers in the division, performing full time duty, who were not sent out on details due to medical excuses. This grievance was denied on or about October 28, 1986.

On or about November 17, 1986, the Union requested a hearing at Step II of the grievance procedure alleging that the City violated Article II, Section 2, and Article IV, Section 2(d) of the Citywide Agreement, Article IV, Section 1 of the Unit Agreement, an attachment letter to the Unit Agreement and "managerial past practices". The grievance was denied at Step II on or about March 13, 1987 on the ground that the Department's actions were consistent with its managerial prerogative.

Thereafter, the Union requested a hearing at Step III of the grievance procedure on or about March 30, 1987. The Hearing Officer at Step III determined that the grievant's temporary assignment was not improper and denied the grievance on or about November 24, 1987. She specifically noted that during his temporary assignment to Manhattan Communications, the grievant had not been "in a position to perform the regular duties of a Fire Alarm Dispatcher . . . [and] had no entitlement to a payment for overtime which was not assigned to him. . . . which he could not have performed . . .” The Union subsequently submitted a request for reconsideration of the Step III decision on or about April 14, 1987. The request for reconsideration was denied on or about July 27, 1988.

No satisfactory resolution of the dispute having been reached, the Union filed a request for arbitration alleging violations of Article III, Section 2[1] and Article VI, Sections 1 - 4 of the Citywide Agreement[2], and Article IV of the Agreement between FADBA and the City "Unit Agreement"[3]. As a remedy, the Union seeks payment for the

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[1]Article III, Section 2 of the Citywide Agreement sets forth the procedures for paying employees who work on municipal holidays, and provides in relevant part as follows:

> a. If an employee is required to work on any of the eleven (11) holidays listed in Section 9 of Article V, the employee shall receive a fifty percent (50%) cash premium for all hours worked on the holiday and shall, in addition, receive compensatory time off at the employee's regular rate of pay . . .

[2]Article VI, Sections 1 - 4 of the Citywide Agreement set forth the procedures for establishing a holiday leave bank and provide in relevant part as follows:

> TIME AND LEAVE VARIATIONS
>
> This Article shall apply only to employees who work other than than a regularly scheduled standard work week consisting of five (5) seven (7) hour, seven and one-half (7 1/2) hour or eight (8) hour days.
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> Section 1. A "holiday leave bank" shall be established for each employee covered under this Article. This bank shall be credited with holiday leave time equal to one-fifth (1/5) the number of hours in the respective employees work week as each holiday occurs.
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> Section 2. The total holiday leave credits granted per annum shall be based on the number of hours in the respective employee's work week . . .

[3]Article IV of the Unit Agreement provides in relevant part as follows:

> Section 1. The hourly work week for Fire Alarm Dispatchers and Supervising Fire Alarm Dispatchers shall be 40 hours. It is understood and agreed

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hours which it contends that grievant should have worked, as well as holiday premium pay.

City's Position

The City argues that the Union's blanket assertion that the grievant was improperly reassigned to Manhattan Operations fails to demonstrate that the contractual provisions invoked were arguably violated. It maintains that nothing in Article IV of the Unit Agreement refers in any way to chart assignments, and that the Union has not alleged any limitation on the Department's authority to temporarily reassign Fire Alarm Dispatchers in the instant case. Consequently, the City contends that its actions were within its statutory authority under the the management rights provision of the New York City Collective Bargaining Law ("NYCCBL")[4], and that it was justified in temporarily

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> that Fire Alarm Dispatchers . . . are currently scheduled to work on the average 40.32 hours per week. From July 1, 1984 to April 15, 1986, the specific additional time shall be compensated by excusing each Fire Alarm Dispatcher . . . from sixteen (16) hours per annum to be scheduled at the beginning of their annual vacation leave. On April 15, 1986 the accrual of this sixteen (16) hours per annum, adjustment shall cease.
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> Section 2. Pursuant to Article V, Section 23 of the 1980-82 Citywide Agreement dated September 5, 1985, the City shall apply for a variation of the list and number of holidays . . .

[4]Section 12-307(b) of the NYCCBL provides that:

> It is the right of the city, or any other public employer acting through its agencies, to 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

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reassigning grievant for medical reasons. Therefore, it asserts that the Union's request for arbitration should be denied.

Union's Position

The Union maintains that it has easily satisfied this Board's arbitrability test. It contends that the issue it is seeking to arbitrate is not whether the Department had a right to reassign the grievant from one location to another, but whether the Department, by assigning the grievant to work off chart at Manhattan Operations, improperly denied him the benefits provided in the cited provisions of the Citywide and Unit Agreements.

The Union notes that Article IV, Section 1 of the Unit Agreement establishes a work schedule averaging 40.32 hours per week for Fire Alarm Dispatchers. It alleges that this schedule is implemented by an annual work chart in which employees are scheduled to work 48 hours over a four day period (12 hours per tour), followed by either 4 or 5 consecutive 24 hour periods off. Therefore, it argues that in assigning the grievant to work a five day, 35 hour work week, the Department forced him to work less time and receive less pay than contractually provided.

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efficiency of governmental operations; determine the methods means and personnel by which governmental 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.

The Union also asserts that since the grievant was assigned to a regular 9 - 5 work schedule, he was deprived of the benefits set forth in Article III, Section 2 and Article VI, Sections 1-4 of the Citywide Agreement which provide for a variation of the list and number of municipal holidays. It contends that these provisions are made applicable to FADBA members pursuant to Article IV, Section 2 of the Unit Agreement, and asserts that Article VI of the Citywide Agreement, by its own language, applies to employees such as Fire Alarm Dispatchers who do not work a regularly scheduled work week.

In conclusion, the union maintains that it is not questioning the City's managerial authority to reassign an employee to a different office under "proper circumstances", but is protesting the change in the grievant's work hours and holiday pay which are mandatory subjects of bargaining. Therefore, it argues that it has demonstrated a nexus between the contractual provisions invoked and the instant grievance.

DISCUSSION

In considering challenges to arbitrability, this Board must determine whether a prima facie relationship exists between the act complained of, and the source of the right being invoked, and whether the parties agreed to arbitrate disputes of that nature[5]. Therefore, where challenged to do so, a party must demonstrate that the contractual

[5]Decision Nos. B-5-88, B-16-87, B-35-86, B-22-86.

arbitration clause extends to the dispute in question, and that the right being invoked is arguably related to the grievance.

In the instant case, it is undisputed that the parties have agreed to arbitrate alleged contractual violations. However, the City contends that the Union has failed to demonstrate that the contractual provisions it cites were arguably violated. We find that the Union has demonstrated a nexus between the grievance in question and Article IV, Section 1 of the Unit Agreement, but has failed to do so with respect to Article III, Section 2 and Article VI, Sections 1 - 4 of the Citywide Agreement, and Article IV, Section 2 of the Unit Agreement.

We reject the City's contention that the Union has not demonstrated any restrictions on its authority temporarily to reassign the grievant in this case. The Union has alleged a violation of Article IV, Section 1 of the Unit Agreement, which clearly provides that: "The hourly work week for Fire Alarm Dispatchers . . . shall be 40 hours . . .", and makes special provisions for Dispatchers who are scheduled to work an average of 40.32 hours per week. In the instant case, the grievant was temporarily reassigned to work a 35 hour week. Consequently, we find that the Union has demonstrated an arguable relationship between the grievance in question and Article IV, Section 1 of the Unit Agreement, and that this portion of its request for arbitration is arbitrable.

In this regard, we note however, that we find no basis for the Union's assertion that the currently effective work chart is an implementation of Article IV, Section 1. This provision does not arguably set forth the manner in which working hours are to be allocated throughout the week.

We decline to delve into the merits of any justifications the City may offer for its actions, including its assertion that the grievant was only temporarily reassigned due to his psychological problem. We have held on numerous occasions that the final resolution of matters involving the merits of a case is beyond our jurisdiction and is exclusively within an arbitrator's domain.[6] Therefore, it is for an arbitrator to decide whether the City acted properly in the instant case.

However, we reject the Union's argument that the grievant was improperly denied the benefits set forth in the holiday premium pay and holiday leave bank provisions of Article III, Section 2 and Article VI, Sections 1 - 4 of the Citywide Agreement. Although the Union correctly maintains that Article IV, Section 2 of the Unit Agreement makes these provisions applicable to FADBA members by providing that "the City shall apply for a variation of the list and number of holidays . . .", it has failed to prove that the grievant is arguably entitled to receive the benefits they provide.[7]

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[6]Decision Nos. B-36-88, B-30-86, B-27-86, B-31-85.

[7]See also Decision Nos. B-16-87 and B-35-86 where we held that Article III, Section 1(a) of the PBA Agreement, which

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Article VI of the Citywide Agreement by its own language applies "only to employees who work other than a regularly scheduled work week". As we noted previously, the provision of the Unit Agreement cited by the Union does not arguably mandate that Fire Alarm Dispatchers fall within this category. Furthermore, Article III, Section 2 of the Citywide Agreement does not arguably limit the City's authority to assign employees to work on municipal holidays, it merely sets forth the procedures for paying employees who are "required" to do so.

Consequently, the Union has failed to demonstrate that the City arguably violated the cited provisions of the Citywide Agreement by temporarily reassigning the grievant to its Manhattan Communications Office. Therefore, we dismiss the portion of the Union's request for arbitration relating to Article III, Section 2 and Article VI, Sections 1 - 4 of the Citywide Agreement, and Article IV, Section 2 of the Unit Agreement.

O R D E R

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

ORDERED, that the request for arbitration of the Fire Alarm Dispatchers Benevolent Association be, and the same is hereby granted with respect to Article IV, Section 1 of the Unit Agreement, and denied with respect to Article III,

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provides for overtime compensation, did not entitle the grievants to overtime work.

Section 2 and Article VI, Sections 1 - 4 of the Citywide Agreement and Article IV, Section 2 of the Unit Agreement, and it is further

ORDERED, that the petition of the City of New York contesting arbitrability be, and the same is hereby denied with respect to Article IV, Section 1 of the Unit Agreement, and granted with respect to Article III, Section 2 and Article VI, Sections 1 - 4 of the Citywide Agreement, and Article IV, Section 2 of the Unit Agreement.

Dated: November 29, 1988
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

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MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER

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MEMBER