City, NYFD v. UFA, 41 OCB 65 (BCB 1988) [Decision No. B-65-88 (Arb)]

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

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

Petitioners,

-and-

THE UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK

Respondents
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DECISION NO. B-65-88

DOCKET NO. BCB-1015-88 (A-2716-87)

DECISION AND ORDER

On December 11, 1987, the City of New York and the Fire Department of the City of New York ("the City" and "the Department," respectively), filed a petition challenging the arbitrability of a grievance commenced by the Uniformed Firefighters Association of Greater New York ("the Union"). The Union filed its answer to the petition on January 14, 1988, to which the City filed a reply on February 5, 1988. Supplemental information was later-requested of the City and the Union, and they supplied the information by separate responses dated August 10, 1988.

## Background

### The Grievance

On or about September 28, 1987, the Union initiated a grievance at Step III of the grievance procedure[1] on:

> [w]hether the implementation, unilaterally and without prior union notification, of new work chart only for certain Fire Marshals assigned to the Queens base with a configuration different than that of the work chart newly implemented at other Fire Marshal bases, and whether the implementation on a voluntary basis, of new work charts for Fire Marshals assigned to the Bronx and Brooklyn bases and to Headquarters which change the length of tours previously worked, are at variance with the Fire Marshals work chart and notice requirements mandated by the Collective Bargaining Agreement.

The City denied the grievance on or about November 17, 1987. The grievance hearing officer found that "[s]ince the changes in scheduling at the different bases and headquarters [did] not affect the number of appearances, hours worked or length of any Fire Marshal's tour ... the Depart-

[1] The agreement out of which this dispute arises is the 1984-1987 collective bargaining agreement between the parties ("the Agreement").

ment [had] not violated Article III, Section 6." [2] He also found that the issue of lack of notice was "moot," because "the Union [had] become aware of the change of scheduling and [had] timely commenced this grievance."

Subsequently, on November 24, 1987, the Union filed a request for arbitration. The Union for its grievance queried:

> [W)hether the Fire Department's unilateral implementation (and without prior notification) of different work charts for different Fire Marshal bases and task forces and headquarters, and its negotiation and agreements with individual Fire Marshals over work charts, including work charts which alter the number of hours worked per day, violate the Agreement and the parties' past practice.

The Work Charts

The City claims that there are three work charts for Fire Marshals currently used by the Department. They are structured as follows:

[2] Article III, Section 6A of the Agreement provides that "[t]he work chart for Fire Marshal shall provide for an average work week of 40.25 hours and one fifteen and one-hall (15-½) hour adjusted tour per year."

Base Operations

| | |
|---|---|
| Administration: | 8 a.m. x 5 p.m.<br>8 a.m. x 6 p.m.<br>8 a.m. x 11:30 p.m. |
| Field Operations: | 9 a.m. x 6 p.m.<br>4 p.m. x 2 a.m.<br>6 p.m. x 9:30 a.m. |

Headquarters

8 a.m. x 5 p.m.
8 a.m. x 6 p.m.
8 a.m. x 11:30 p.m.

The City asserts that the three charts conform with "the Board's decision in B-21-87 and contain the same three tours with lengths of nine, ten and fifteen and one-half hours that the Board found completely within the Department's management rights." The City notes, however, that Fire Marshals who work at "Headquarters" may "volunteer" to vary their finishing times over three consecutive tours beginning at 8:00 a.m.

The Union claims that it "is not challenging in this grievance the mere fact that any of these unilaterally imposed charts changes the starting and ending times of a Fire Marshal's tours of duty, since that issue was resolved in Decision No. B-21-87 [emphasis in original]".

Rather, it alleges that the City's implementation of multiple charts and its negotiation with individual Fire Marshals over changes in hours worked per day violated the Agreement.

The chart proposed by the City, the promulgation of which was at issue in Decision No. B-21-87 (discussed in greater detail, infra), provided for the following tours of duty within a three-tour set:

9 a.m. x 6 p.m.
4 p.m. x 2 a.m.
6 p.m. x 9:30 a.m.

This chart replaced a chart in effect under the 1980-1982 agreement and 1982-1984 agreement which prescribed the following starting and ending times for each tour:

8 a.m. x 5 P.M.
8 a.m. x 6 P.M.
6 p.m. x 9:30 a.m.

Decision No. B-21-87

We addressed a question parallel but not identical to the issue presented in the instant matter in our Decision No. B-21-87 upon which the City relies heavily to support its petition herein. The facts in that case were as follows:

On July 11, 1986, we appointed an impasse panel pursuant to Section 1173-7.Oc of the New York City Collective Bargaining Law ("NYCCBL") to resolve bargaining issues between the City and the Union in their negotiations which eventually resulted in the 1984-1987 Agreement.[3] Among the matters discussed by the impasse panel, but upon which it did not offer recommendations, were the subjects of Fire Marshal work charts and scheduling. As we later found, the City had not presented those issues to the panel. The City subsequently did not bargain over whether to include, and subsequently did not include the Fire Marshal work chart which had appeared in the 1980-1982 and 1982-1984 collective bargaining agreements in the 1984-1987 Agreement.

As a consequence, the Union filed an improper practice petition alleging that the City had violated Sections 1173-4.2a(l) and (4) of the NYCCBL. Specifically, it alleged that the City's unilateral implementation of changes in the work chart of Fire Marshals and its refusal

[3] The report of the impasse panel appears at Matter of the Impasse between Uniformed Firefighters Association and City of New York, Case No. I-187-87 (Jan. 6, 1987)(Arbs: Nicolau, Gelhorn, Wolf).

to execute a collective bargaining agreement which would continue in effect the Fire Marshal work chart provision of the predecessor agreements, constituted an improper practice.

We rejected the Union's contentions. We held that the City had not waived "its statutory prerogative to determine the configuration of the chart," as evidenced by the fact, among others, that it did not submit the subject to the impasse panel. We found that it was therefore "free unilaterally to change the Fire Marshal work chart that was in effect under two prior agreements between the parties."

We also found the chart which was proposed at that time merely changed the starting and finishing times of tours of duty, which are permissive subjects of bargaining. The City did not change the number of appearances of Fire Marshals or the length of their tours of duty, which are mandatory subjects of bargaining.

The Union, at that time, asserted that the new chart would "result in a change in length of the work day and in the number of hours worked per year." We found that the latter allegation was simply "inaccurate" and did not consider it further.

With respect to the former allegation, we found that the Union's allegation was based on the erroneous assumption that Fire Marshals work a conventional work day (a 24-hour period that begins and ends at midnight) as opposed to a "tour" which we defined, based on practices within the uniformed services, as a period consisting of 24 consecutive hours. We stated, however, that "[i]f [the Union] believes that its members are required by the new chart to work hours in excess of limits prescribed by the contract .... it may challenge such a violation through the grievance and arbitration procedure." We also held that if it was the Union's theory that there was a practical impact on unit employees "resulting from the change in the work chart, the UFA [could] seek redress in a scope of bargaining proceeding in which the Board first [would] determine whether an impact [did], in fact, exist."

## The Parties' Positions

### The City's Position

The City contends that the Union has failed to establish any nexus between Article III, Section 6A of the Agreement and the City's conduct which is the subject of the grievance. It claims that the Department has not

altered the average number of hours per week worked by Fire Marshals or the number of appearances or the lengths of their tours: All Fire Marshals continue to work an average week of 40.25 hours and one fifteen and one-half hour adjusted tour per year.

The City asserts that it has only altered the starting and finishing times of tours and pursuant to Decision No. B-21-87, such changes are not mandatory subjects of bargaining. The City also asserts that the Union's claim regarding the length of Fire Marshals' work day is based on the erroneous assumption, rejected by this Board in Decision No. B-21-87, that a day is defined in terms of 24-hour period beginning and ending at midnight.

In support of its petition, the City cites Board decisions in which we have held that scheduling is a management prerogative.[4] It especially relies on Decision No. B-21-87 in which it claims this Board specifically resolved the issue now before us. The instant grievance, according to the City, "is merely another attempt by the [Union] to relitigate the same

[4] The City cites Decision Nos. B-21-87; B-24-75; B-10-75.

scheduling issue which it has previously litigated in other forums."

The City rejects the Union's argument that Decision No. B-21-87 did not address the issue of the City's right to promulgate multiple work charts. It argues that our decision does not limit its otherwise unfettered managerial right to schedule work.

In challenging the Union's claim that it has negotiated with individual Fire Marshals in violation of Article 1, Section 1 of the Agreement,[5] the City claims that:

> ... if a Fire Marshal at Headquarters so desires, he may volunteer to vary his finishing times. He will continue to work three tours, each beginning at 8:00 a.m. However, there is flexibility in the finishing times of these tours. It must be emphasized, however, that these tours are performed strictly on a voluntary basis and this option has been available to Fire Marshals at Headquarters as a longstanding practice. [emphasis added].

[5] Article I, Section 1 reads:

> The Employer recognizes the Union as the sole collective bargaining agent for the unit consisting of all Firefighters (Uniformed), employed by the Employer.

Finally, the City admits that the Department did not give the Union one week's notice as required by the Agreement, but argues that the lack of notice was harmless error. In its reply, the City further claims that the notice provision, Article XX, Section 7 is inapplicable, because it argues that the alteration of the starting and finishing times of work charts is not the alteration of a "policy or program" as those terms are used in Article XX, Section 7[6] of the Agreement. Nonetheless, assuming that Article XX's notice provision is applicable, the City has agreed to cease and desist from violating it in the future.

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[6] Article XX, Section 7 provides:

> Whenever the Department intends to alter an existing Citywide or Borough policy or program, the Department shall give the Union at least one week's notice of the intended change or new implementation, except in situations when the Department must act more quickly because of emergency or other good cause. This shall not affect the Department's right to implement or change said policies or programs nor the Union's right to oppose such programs.

The Union's Position

The Union alleges that its grievance is based on different issues than those that were addressed by this Board in Decision No. B-21-87. Its petition at that time "involved the Department's proposed unilateral change in the starting and ending times of one of the three tours of duty of a single work chart applied to all Fire Marshals [emphasis in original]." The Union claims that "[o]ne of the issues presented by the grievance here, ... is whether the collective bargaining agreement imposes any limit on the City's use of more than one work chart for Fire Marshals [emphasis in original]." The "unambiguous language of the contract," that is to say the Agreement's use of the singular article "the" "in connection with 'work chart,' rather than any form of plural usage, evinces an intent that the parties intended that there be only one work chart." Thus, the Union argues Article III, Section 6A is arguably related to a claim that the Department's implementation of more than one work chart violates the Agreement.

Furthermore, the Union also claims that the City breached the Agreement, particularly Article I, Sec-

tion 1 by negotiating with individual Fire Marshals over mandatory issues of bargaining "including work charts which alter the number of hours worked per day [emphasis in original]." As the certified bargaining representative, only the Union has the authority to bargain with the City "over mandatory subjects of bargaining, such as the length of the workday of those it represents." Specifically, the Union grieves the "Department's negotiation and agreements with individual Fire Marshals (rather than the UFA) over work charts that alter lengths of Marshals' tours of duty (to eight hour tours) and increase the number of appearances." The Department has allegedly "entered into individual agreements with some Marshals at some locations to work five days a week during 8 hour tours.

The Union claims that its grievance is over the alteration of tours which are determined on the basis of a "work day" as defined by the Board in Decision No. B-21-87, and not a 24-hour period beginning and ending at midnight as alleged by the City.

For a remedy, the Union seeks:

1. An order directing the Department to cease and desist from utilizing different work charts for different Fire Marshal bases, task forces and headquarters;

2. An order directing the Department to cease and desist from negotiating and agreeing with individual Fire Marshal over work charts, including work charts which alter the number of hours worked per day; and

3. An equitable remedy for Fire Marshals who have been wrongly ordered to work pursuant to improper work charts.

## Discussion

On a petition challenging the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether that contractual obligation is broad enough to include the acts complained of by the Union.[7] Furthermore, when challenged, as it is in this case, the Union must establish a nexus between the City's acts and the contract provisions it claims have been breached.[8] We resolve doubtful issues of arbitrability in favor of arbitration.[9] In the

[7] Decision Nos. B-28-82; B-15-79.

[8] Decision Nos. B-7-81; B-6-81.

[9] Decision Nos. B-15-80; B-20-79.

instant case, the City challenges each part of the Union's grievance.

The Number of Charts

The Union asserts that the Department's unilateral implementation of multiple work charts for Fire Marshals violates Article III, Section 6A of the Agreement which it claims mandates that there be only one work chart. The City claims that this Board fully adjudicated the issue of its right to promulgate multiple work charts in Decision No. B-21-87.

In order for a party to be precluded from raising an issue, as the City implies the Union should be, there must be a clear and obvious identity of issues and an identity of the parties.[10] Furthermore, it is the responsibility of this Board to decide questions of issue preclusion.[11] In this case, we find that there is a clear identity of the parties, but no identity of the issues.

[10] Decision Nos. B-25-88; B-22-86; B-3-86; B-27-82.

[11] Decision Nos. B-25-88; B-27-82.

In Decision No. B-21-87, we found that the City could unilaterally change the Fire Marshal work chart that was in effect. We noted that the proposed new chart only changed the starting and finishing times of the first and second tours of duty but did not change the number of appearances or the length of tours of duty of Fire Marshals. Thus, the issue we dealt with in Decision No. B-21-87 was whether the City was precluded, by waiver, from unilaterally changing the existing work chart of Fire Marshals.

In contrast, the issue raised by the Union in the instant grievance was not dealt with in Decision No. B-21-87 because that issue was not raised in that matter. In that case we were not asked, as we are here, to interpret the terms of a collective bargaining agreement.

Specifically, we did not address, in Decision No. B-21-87, the issue of whether contractual language which on it face refers to "the work chart" limits management to promulgating only one chart, as the Union alleges here. The City correctly notes that Decision No. B-21-87 did not limit its right to promulgate new work charts; however, that is not to say that the parties themselves may not have limited the City's prerogative.

A plain reading of Article III, Section 6A reveals that the provision arguably may create a limitation on the number of charts the City may promulgate.[12] But it is not for this Board to decide whether the City may implement only one chart;[13] that is a question that goes to the merits of the grievance and must be left for an arbitrator to determine.[14] We simply find that what might otherwise be a permissive subject of bargaining is arguably addressed in a collective bargaining agreement and, therefore, there may be a limit on the City's exercise of its management right and that these are questions of contract interpretation which are within the province of an arbitrator and not of this Board. The Union has satisfactorily established a nexus between its claim that the City may promulgate only one work chart and Article III, Section 6A so that its claim may go to

[12] We have found that the managerial prerogative remains in tact absent contractual or other limitations. See Decision Nos. B-29-85; B-9-83; B-37-80.

[13] Although the article "the" also appears in the 1982-1984 collective bargaining agreement we are faced with an issue arising only under the Agreement currently in effect.

[14] Decision Nos. B-10-83; B-20-79; B-15-79.

arbitration. We therefore reject the City's challenge to this portion of the Union's grievance.

Negotiations with Individual Fire Marshals

> The Union alleges that the City has breached the Agreement's "Recognition" clause (Article I, Section 1,[15] which guarantees that the Union will be the exclusive representative of its members for purposes of collective bargaining by negotiating and "entering into individual agreements with Fire Marshals over mandatory subjects of bargaining."

The City's challenge to the arbitrability of this issue is based solely on the ground that the Union has failed to establish a sufficient nexus between the contractual provision on which it relies and the management acts of which it complains. It alleges that it is obligated to bargain with the Union only over mandatory subjects of bargaining, and those subjects are not implicated by the Union's grievance with respect to Article I, Section 1 of the Agreement.

[15] The text of Article I, Section 1, is set forth in footnote 5/, supra.

The Union has alleged that the Department has negotiated and entered into individual agreements with Fire Marshals at some locations to work five days a week during eight hour tours. The issue of the length of a tour and the number of appearances required of an employee are, as the Union correctly notes, mandatory subjects of bargaining. In Decision Nos. B-9-75 and B-10-75, we found that a Union demand concerning the maximum hours of work per day and per week is a mandatory subject of bargaining. Similarly, in Decision No. B-16-81 we held that a demand that seeks to limit the maximum number of hours an employee may be required to work during a twenty-four hour period is also a mandatory subject of bargaining.[16]

We find that the Union has adequately pleaded, for the purposes of this threshhold determination, its allegation that the City has negotiated with individual Fire Marshals mover a mandatory subject of bargaining, i.e., hours of work. These actions, on their face, are clearly related to the Union's right to act as the exclusive bargaining

[16] See also Decision No. B-5-75 (wherein we held that the City "must bargain on changes in hours.")

representative on behalf of its members which is a right arguably found in Article I, Section 1 of the Agreement.

The City's claim that individual Fire Marshals may "volunteer" to alter their finishing times raises a question of fact which involves the merits of the grievance. It is not the role of this Board to address the merits of the Union's grievance;[17] therefore, we hold simply that the Union has established a nexus between the City's alleged actions and the Agreement. For this reason, we dismiss the City's petition challenging arbitrability to the extent it challenges the arbitrability of this portion of the Union's grievance.

Notice Requirement

Finally, the Union alleges that the City violated the notice provision of Article XX, Section 7 of the Agreement. The City does not dispute that it failed to give the Union notice. It asserts that because the provision only applies to alterations of an existing "policy or

[17] Decision Nos. B-10-83; B-27-82 (wherein we held that all questions relating to the merits of a grievance are for an arbitrator to decide).

program" by the City, it does not apply to the exercise of a strictly management prerogative, unlimited by any contractual obligation. The City has offered to cease and desist from violating Article XX, Section 7 in the future regardless of whether that provision is applicable to its actions herein. It argues that this is the only relief that an arbitrator could grant.

This Board does not decide the propriety of potential arbitral remedies nor is it within our authority to define or limit the scope of an arbitrator's remedial powers.[18] We would overstep our authority if we were to conclude that the City's unilateral concession suffices, in whole or in part, to moot the request for arbitration.

Furthermore, in the case at bar, there is a fundamental issue raised by the City's defense. The City does not believe that its actions constituted an alteration of a policy or program as contemplated in Article XX.

The issue of whether the implementation of multiple work charts is the alteration of a policy or program within

[18] Decision Nos. B-31-82; B-22-81.

the contemplation of the Agreement is a question of contract interpretation which we must leave for the arbitrator to determine. The arbitrator ultimately will be in possession of all the relevant facts in the case and will be in the unique position to evaluate and adjudge the prospective remedies and the issues raised by the City's defense.[19] Accordingly, we deny the City's challenge to the arbitrability of this portion of the Union's grievance.

## 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 City's petition challenging arbitrability be, and the same hereby is denied in its entirety; and it is further

[19] Decision No. B-9-71.

ORDERED, that the Union's request for arbitration be, and the same hereby is granted.

DATED: New York, New York
December 20, 1988

MALCOLM D. MacDONALD
MEMBER

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER