City v. UFOA, 43 OCB 27 (BCB 1989) [Decision No. B-27-89 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

-and-

THE UNIFORMED FIRE OFFICERS ASSOCIATION,

Respondent.
- - - - - - - - - - - - - - - - - - - - x

Decision No. B-27-89
Docket No. BCB-1093-88
(A-2868-88)

DECISION AND ORDER

The City of New York ("the City") filed a petition on September 23, 1988, challenging the arbitrability of a grievance commenced by the Uniformed Fire officers Association ("the Union") on behalf of Supervising Fire Marshals. The Union filed its answer on October 28, 1988. On November 3, 1988, the City filed its reply.

Background

By memorandum dated September 25, 1987, from "Queens Boro Command," all Supervising Fire Marshals and Fire Marshals were told to "FLOP 4x2 TOURS" and appear at Camp Smith to participate in the fall "firearms qualification cycle" at 9:30 a.m. on a date dependent on the particular Supervising Fire Marshal's squad assignment. Subsequently, on or about November 10, 1967, the Union filed a Step III grievance on behalf of Supervising Fire Marshals who were ordered and required to attend the firearms

qualification "outside of their regularly scheduled tours of duties."[1]

On or about August 1, 1988, the city denied the Union's Step III grievance. In its determination, the City found that Supervising Fire Marshals were rescheduled to appear at the firearms qualification in lieu of the evening tour (4X2) on those days. When some Supervising Fire Marshals appeared for a regular shift at 4:00 p.m., they were sent home.

Relying on Article III, §5A of the Agreement,[2] and on an

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[1]The pertinent collective bargaining agreement is the 1984-1987 agreement between the parties ("the Agreement"). Article XIX, §1 of the Agreement defines "grievance" to include:

> 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.

[2]Article III, §5 provides, in its entirety:

> A. The Department has adjusted the work chart applicable-to Supervising Fire Marshals so as to provide for an average work week of 40.25 hours and one fifteen and one-half (15 1/2) hour adjusted tour per year. Such work chart shall continue in effect for the term of this Agreement.
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> B. Ordered overtime authorized by the Commissioner or the Chief Fire Marshal as his designated representative which results in Supervising Fire Marshal's working in excess of his normal tour of duty shall be compensable in cash at time and one-half.
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> C. When Supervising Fire Marshals not continued on duty are ordered to report for Court on a scheduled rest period, they shall

be compensated for a minimum of four hours in

unspecified decision in which this Board allegedly held that scheduling is a managerial prerogative, the Hearing officer found that, in effect, only the starting and finishing times of the tours had been altered; the City did not require Supervising Fire Marshals to work beyond the contractual limit of 40.25 hours per week. Thus, the Hearing Officer denied the Union's grievance.

On August 17, 1988, the Union filed a request for arbitration. Relying upon Article 111, §5 and Article XIX, §1 of the Agreement, as well as other "applicable agreements, regulations, policies and practices," the Union's grievance seeks the payment of overtime compensation plus interest.

## Positions of the Parties

### The City's Position

The City challenges the arbitrability of the Union's grievance on several grounds. The City argues that Article III, §5A provides for an average work week of 40.25 hours. The Union has not alleged, according to the City, that Supervising Fire Marshals have worked in excess of 40.25 hours, thus there is no

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> cash at the overtime rate. The four hours of compensation shall include any travel time to which they are presently entitled.
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> D. Supervising Fire Marshals shall not be rescheduled when required to appear in court in connection with matters assigned to them.

nexus between its grievance and Article III, §5A of the Agreement. The City contends that, in fact, the memorandum assigning Supervising Fire Marshals to firearms qualification refers only to a "flop" of tours, thus there was simply a substitution of tours so that Supervising Fire Marshals did not work in excess of 40.25 hours per week.

The City also argues that there is no nexus between Article III, §5B of the Agreement and the right alleged by the Union in its grievance. The City analogizes the overtime provisions of the Agreement at issue to those in the collective bargaining agreement between the Patrolmen's Benevolent Association ("PBA") and the City.[3] The City argues that under both agreements, overtime must be ordered and authorized to be compensable. Because the Union has not alleged that overtime was ordered and authorized, there is no nexus between the right alleged by the Union and Article III, §5B.

The City also notes that Article III, §5D only bars the rescheduling of Supervising Fire Marshals with respect to court appearances. The City contends that the Agreement, thus, specifies a single exception to the general rule that vests the City with the right freely to reschedule its employees and that other unexpressed exceptions to the rule are, therefore,

[3]The City cites Decision Nos. B-41-88; B-27-88; B-20-87; B-16-87; B-35-86; B-7-81. These cases addressed the overtime provisions of the PBA agreement.

excluded.[4] It objects to the Union characterizing this argument as one which seeks an interpretation of the Agreement by this Board. Rather, the City argues that Article III is so manifestly void of any prohibition against rescheduling Supervising Fire Marshals, that there is clearly no contractual basis for the Union's claim.

The City also relies on New York City Collective Bargaining Law ("NYCCBL") § 12-307b which it claims guarantees its right to direct employees. The City cites Decision No. B-35-86 in which it argues that we held that in the absence of contractual limitations, the City is free to assign overtime. Because the Union has failed to establish a limitation on the City's right to assign overtime in the Agreement or otherwise, according to the City, the Union has failed to establish an arbitrable claim.

Finally, the City challenges the Union's citation of Article XIX, §1 of the Agreement in its request for arbitration. The City contends that the section only defines the term "grievance" and does not provide an independent basis for an arbitrable claim.[5]

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[4]The City cites what it calls a "maxim" of contract interpretation, expressio unius est exclusio alterius, which means that the expression of one thing is the exclusion of another.

[5]The City cites Decision Nos. B-22-85 and B-7-81.

The Union's Position

The Union posits two sources for the benefit it claims on behalf of Supervising Fire Marshals. First, it argues that there is an existing policy, as that term is used in Article XIX of the Agreement, which prohibits the City from requiring Supervising Fire Marshals to work a tour other than that agreed to by the parties without payment of overtime compensation. The Union argues that there is a nexus between the right it claims has been violated and the existing policy which it characterizes as a construction and application of Article III, §5.

Second, the Union contends that Article III, §5 arguably provides the benefit at issue. It argues that Article III, §5A when read in conjunction with Article III, §5B can be construed to require payment of overtime when Supervising Fire Marshals work beyond or outside of their regularly scheduled tours of duty regardless of the total hours worked during the week. The Union contends that an arbitrator and not this Board should determine the proper construction of Article III, §5.

Moreover, the Union argues that there is a nexus between Article III, §5B of the Agreement and the right in question. It contends that the fact that overtime was ordered by the City is self-evident from the memorandum.

The Union also rejects the City's proffered canon of textual construction. It contends that Article III, §§5C and 5D merely

set forth the most common instance in which rescheduling of tours is prohibited. Article III, §§5C and 5D do not, according to the Union, vitiate the existing policy with respect to overtime and the rescheduling of tours, nor do they undermine Article III, 5A and 5B to the extent they are also a source of the benefit claimed by the Union. In any event, the Union contends that the City, by asking the Board to apply a canon of construction, is improperly asking this Board to interpret a collective bargaining agreement.

## Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in anyway obligated to arbitrate their controversies and, if they are, whether that contractual obligation is broad enough to include the acts complained of by the Union.[6] Furthermore, when challenged, as it is in this case, the Union must establish a nexus between the City's acts and the contract provisions or policies it claims have been breached.[7] We resolve doubtful issues of arbitrability in favor of arbitration.[8]

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[6]Decision Nos. B-19-89; B-65-88; B-28-82.

[7]Decision Nos. B-19-89; B-7-81.

[8]Decision Nos. B-65-88; B-15-80.

The parties in the instant matter do not dispute that they have agreed to arbitrate disputes arising under the Agreement. Instead, the City argues that the Union has failed to establish a nexus between the right of Supervising Fire Marshals to receive overtime compensation when attending firearms qualification and the provisions of Article III, §5. The Union contends that not only has it established a nexus between its claim that Supervising Fire Marshals should receive overtime compensation and Article III, §5, but it also alleges that there is an existing policy which entitles Supervising Fire Marshals to receive overtime compensation in the precise circumstances alleged herein. The City generally denies the existence of such a policy.

As a preliminary matter, we note that the City is correct in arguing that the definition of a grievance set forth in Article XIX, §1 cannot form an independent basis for the grievance in this matter. However, the Union does not rely on Article XIX, §1 as the source of the substantive right claimed herein. Rather, the Union contends that the contractual definition of grievance is broad enough to encompass the alleged violation of the two sources of the benefit it claims has been denied Supervising Fire Marshals.

Pursuant to Article XIX, §1 of the Agreement, a claimed violation, misinterpretation or inequitable application of an existing policy can form the basis for a grievance. The City

does not deny this contention;[9] it generally denies that there is an existing policy which entitles Supervising Fire Marshals to receive overtime compensation when they have worked a tour other that agreed to by the parties.

We have held that the existence of a policy or practice is a question which goes to the merits of a grievance.[10] As such, it is a question for an arbitrator and not this Board. Therefore, to the extent the Union alleges the violation or misapplication of the existing policy pleaded herein, even though the City has denied a policy exists, an arbitrable claim has been stated.

The City also argues that Article III, §5 cannot form the basis for the instant grievance. Article III, §5A states that the work chart for Supervising Fire Marshals had been adjusted to provide for an average work week of 40.25 hours and that the work chart would continue in effect for one year. Article III §5B provides that ordered overtime authorized by the Commissioner or Chief Fire Marshal which results in a Supervising Fire Marshal working in excess of his normal tour of duty shall be compensated cash at time and one-half. The Union contends that these sections require the payment of overtime compensation to Supervising Fire Marshals who have worked beyond or outside of

[9]We have held that an unwritten policy can form the basis for a grievance under contractual language similar to that at issue herein. See Decision Nos. B-36-88; B-2-75; B-9-75.

[10]Decision Nos. B-9-75; B-2-75.

their normal tours of duty as alleged in the underlying grievance. The extent to which the work chart in effect restricts the rescheduling of tours, and how the chart may have been altered by requiring supervising Fire Marshals to "flop" tours, as well as the appropriate remedy, if any, for such rescheduling, are issues which relate to the merits of the grievance and not to substantive arbitrability. Arguably, the contractual mandate that the work chart "shall continue in effect for the term of this Agreement," restricts the City's right to schedule and reschedule.

Whether overtime was actually "ordered" or "authorized" as those terms are used in Article III, §5B of the Agreement is another issue going to the merits of the grievance. Contrary to the City's assertion, the Union has alleged that the overtime was ordered and authorized. The allegation is supported by the text of the memorandum. Whether the rescheduling directed in the memorandum constitutes overtime pursuant to Articles III, §§5A and 5B is a question for the arbitrator.[11]

Similarly, while Article III, §§5C and 5D clearly do not supply an independent basis for the grievance herein because there are no allegations with respect to court appearances, the extent to which they may limit the operation of Article III, §§5A and 5B is also an issue of contract interpretation and

[11]See Decision No. B-71-88.

construction which should be decided by an arbitrator and not this Board.

In conclusion, we find that the Union has established a nexus between the alleged right of Supervising Fire marshals to receive overtime compensation and Article III of the Agreement, as well as the unwritten existing policy discussed, supra. By so finding, we are not deciding the merits of the underlying grievance. We merely find that the Union has pleaded an arguable limit on management's right to direct its personnel.

## ORDER

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 petition challenging arbitrability filed by the City of New York be, and the same hereby is dismissed, and

ORDERED, that the request for arbitration submitted by the Uniformed Fire Officers Association be, and the same hereby is granted.

Dated: New York, New York
May 23, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD SILVER
MEMBER