City v. UFA, 45 OCB 17 (BCB 1990) [Decision No. B-17-90 (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 FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK,

Respondent.

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DECISION NO. B-17-90

DOCKET NO. BCB-1245-90
(A-3313-90)

DECISION AND ORDER

On January 19, 1990, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Uniformed Firefighters Association of Greater New York ("the Union") on or about January 9, 1990. The grievance contests the extension of the Fire Department's Possible Medical Leave Abuse program ("PMLA program") to include Firefighters who sustain field injuries and whose medical leaves have been authorized by a Department Medical Officer. The Union filed its answer on January 26, 1990. The City filed a reply on February 5, 1990. The Union filed a sur-reply on February 9, 1990, to which the City filed a response on February 16, 1990.[1]

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[1] The Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") do not provide for the filing of sur-replies. It is the policy of this Board not to encourage the filing of subsequent pleadings. We will not consider such submissions unless it can be shown that special circumstances warrant consideration of the material in question.

In the instant proceeding, the additional submissions consist of: the Union's response to two cases concerning the issue of waiver cited for the first time by the City in its reply; the City's objection to the filing of a sur-reply by the Union; and further argument by the City in support of its position.

BACKGROUND

In September of 1985, the Fire Commissioner issued an Information Bulletin announcing that the Department's PMLA program, which had been in existence since 1983, would be expanded to curb perceived sick leave abuse. According to the bulletin, "relatively few members who are abusing the sick leave privilege by calling in from home when they are, in fact, not genuinely ill have caused our medical leave figures to be so inflated that we must now take additional steps to address these abusers." The following changes were made in the program:

> 1. The Home Visitation Unit was reinstituted, for the purpose of making unannounced visits to the homes of Firefighters who have been placed in the PMLA program.
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> 2. The PMLA program would begin to consider including those members who have made five requests for medical leave from home in the preceding 12 months.
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> 3. All members in the PMLA program who had permission to work outside the Department would have such permission reviewed.
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> 4. Members who remain in the PMLA program for longer than 6 months would be ineligible for "mutuals" and would have their absence records considered before any promotions or transfers were effected.

The Union objected to the implementation of these changes by filing two grievances based upon claimed violations of the parties' collective bargaining agreement, certain departmental disciplinary regulations, and the Administrative Code as it applies to disciplining Fire Department members. Eventually the Union sought to arbitrate both grievances. The City opposed arbitration on the grounds of laches and its managerial authority to control sick leave abuse. In a consolidated decision (Decision No. B-14-87), issued

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We do not believe that the recitation in a reply of two case citations in support of a previously stated argument is sufficient grounds to meet the "special circumstances" standard.

Accordingly, the post-reply submissions of both parties are rejected.

on April 27, 1987, this Board found that the Union had established a prima facie relationship between the denial of certain employment rights to employees who were placed in the PMLA program, and the Agreement and departmental policy. The Board ruled that both grievances should go to arbitration.

On October 29, 1987, Impartial Chairman Milton Rubin issued an arbitration award on the matter, ruling that:

> The Possible Medical Leave Abuse Program is contractually proper, and in accord with regulations and policy, to the extent that it does not impose the discipline of withholding mutuals. The Program may be continued in compliance with the Agreement, regulations and policy without the imposition of withholding mutuals until such time as the procedures for discipline may be invoked.

Meanwhile, the Department again expanded the PMLA program, by order dated January 9, 1987, making Firefighters placed in the program subject to the following sanctions:

a) suspension of overtime eligibility
b) mutual suspension for a minimum of six months
c) restrictions on transfers and promotions
d) confinement for duration of medical leave request
e) medical notes for postponements
f) home visitation.

The stated reason for taking these more stringent steps was to reduce the Department's medical leave rate and to further address those members who abuse the system. This Board, in Decision No. B-31-87, again denied the City's challenge and ordered that the grievance be submitted to arbitration.

In 1988, the PMLA program was once again expanded, resulting in the filing of a third grievance. Upon learning of the newest dispute, the Impartial Chairman secured the parties' agreement to merge the 1987 program grievance, already the subject of arbitration, with 1988 program grievance. At about the same time, the City announced that the Department had withdrawn its overtime sanctions from the program. In an award dated September 13, 1988, consistent with his earlier decision, the Impartial Chairman again ruled that "both the 1987 and 1988 Absence Control Programs, as modified by the withdrawal of the overtime sanctions, do not violate the Agreement."

There matters stood until February of 1989, when the Fire Commissioner modified the PMLA program for the fourth time. Supplement to Order No. 27, which is the subject of this request for arbitration, requires that:

> Any member requesting medical leave from the field who

> after examination by a Department Medical Officer is deemed to have an undetermined injury, will have such medical leave flagged. As a result, the episode will be included in the count towards the Possible Medical Leave Abuse (PMLA) program.

The reason given for this new restriction is that "the Department has witnessed an inordinate increase in the number of medical leave requests from on-duty members . . . which has grown to unreasonable levels . . .."

Once again, the Union objected to the modification of the PMLA program. By letter dated February 23, 1989, it asked the Impartial Chairman for permission to file a grievance concerning the new expansion directly to Step IV (arbitration). The letter reads, in pertinent part, as follows:

> Pursuant to Article XX, Section 3 of the collective bargaining agreement, the UFA urgently requests leave to file a grievance at Step IV and to proceed immediately to a hearing on the grievance.
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> The grievance concerns the Fire Depart-ment's announced intent to amend the criteria for inclusion in the PMLA program on Wednes-day, March 1, 1989. Until now, the PMLA program has been limited to Firefighters with five or more medical leave requests from home. The Department now plans to include medical leaves from the field that have been granted by a Department doctor, but which are of an "undetermined" nature such as "sprains and strains." A copy of the Fire Depart-ment's new criteria is enclosed. [Emphasis in original.]
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> Firefighters who receive injuries which the Medical Office later decides are "unde-termined" and which are common line-of-duty injuries given the type of work Firefighters perform, will be inhibited from reporting those injuries for fear that, even if a Fire Department doctor determines after an examin-ation that they should be on medical leave, they will be placed in the PMLA program and punished if the injury turns out not to have some outward physical manifestation. At the same time, of course, Firefighters who do not report their injuries could be violating Fire Department regulations requiring them to report injuries that may require medical leave. Most importantly, however, the Fire Department is recklessly endangering the health and safety of Firefighters by coercing them to refrain from reporting injuries and thereby exposing them to the risk of suffering even more serious injuries to themselves, as well as to others, as a result of working while injured.

The City opposed the Union's request, by letter dated February 28, 1989, on the ground while the Agreement allows the Union to petition the Impartial Chairman for leave to file a grievance "involving potential irreparable harm concerning safety and health" directly to Step IV, the amended criteria of the PMLA program "clearly does not state a health and safety grievance involving potential irreparable harm."

By letter dated March 29, 1989, the Impartial Chairman advised the parties that "[o]n consideration of the parties' positions and the nature of the subject, I am of the opinion that the most appropriate level for an initial meeting is Step III."

A Step III hearing was held on October 20, 1989. By letter dated January 2, 1990, a departmental Grievance Hearing Officer found that "the union has not demonstrated that including 'undetermined' field medical leaves in the PMLA program presents a safety or health concern to firefighters."

On or about January 9, 1990, the Union filed the request for arbitration that presently is before us, claiming that the amended PMLA program "violates and/or constitutes an inequitable application of the Department's policies and regulations," in violation of departmental policy PA-ID 3-75R ("Command Discipline Policy and Procedures").

POSITIONS OF THE PARTIES

City's Position

The City maintains that the present grievance should not be arbitrated because the underlying issue already has been adjudicated and resolved by the Impartial Chairman's arbitration award dated October 29, 1987. It asserts that the doctrine of res judicata bars its relitigation. According to the City, this Board has held, in Decision No. B-25-88, that res judicata bars arbitrability where there exists (1) a final judgment on the merits in an earlier suit, (2) an identity between the cause of action in both the earlier

and later suit, and (3) an identity of the parties or their privies in the two suits. The City contends that all three of these criteria have been satisfied in this case.

As to the first part of the test, the City contends that the Impartial Chairman, in his October 1987 award, arrived at a final decision on the merits of the PMLA program when he ruled that the PMLA program "is contractually proper, and in accord with the regulations and policy [of the Department]." The City supports its contention by noting that the Impartial Chairman went on to say that "attempts to measure and monitor the utilization of the restricted purpose unlimited paid sick leave right and benefit is consistent with the Department's managerial right and prerogative." The City claims that the Union makes "a false distinction between grievances" by attempting to distinguish this grievance from earlier ones on the ground that previous changes concerned monitoring medical leave requests from home while this one concerns the Department's decision also to monitor medical leave requests from the field. According to the City, the inclusion of medical leave requests from the field in the PMLA program's 1989 modification in no way alters the purposes of the program, which the Impartial Chairman has already found to be appropriate. Thus, the City concludes, "there is a clear and obvious identity of issue between the earlier decision and the instant grievance."

With respect to the second element, the City argues that an identity plainly exists between the two causes of action. It notes that in the grievance underlying the 1987 award, the Union alleged that the PMLA program violated, among other things, the collective bargaining agreement and the Department's own regulation, "namely PA/ID 3-75." In the present case, the Union is again alleging that the 1989 modification is in violation of "PA-ID 3-75R of the Department's policies."

The City asserts that the third part of the test is satisfied because the identity between the parties in both cases, the City and the Uniformed

Firefighters Association, is not in dispute.

The City raises a second objection to arbitrability in this case by claiming that it also violates the waiver provision contained in Section 12-312d. of the New York City Collective Bargaining Law ("NYCCBL").[2] According to the City, although the Union attached a written waiver to its request for arbitration, the waiver is invalid because the same dispute has already been submitted to another tribunal for adjudication, "i.e., to this Board for adjudication via the arbitration process." Therefore, the City concludes, because the Union waived its right to relitigate the appropriateness of the PMLA program under the Department's policies, this request for arbitration must be dismissed.

Union's Position

The Union denies that this request for arbitration duplicates earlier grievances. It contends that before the 1989 PMLA modification, the program's application had been limited to Firefighters with five or more medical leave requests from home. The present grievance, the Union points out, concerns the broadening of the program so that it now will include medical leaves from the field that have been granted by a Fire Department doctor. According to the Union, this change "dramatically expand[s] the PMLA program . . . because it will inhibit firefighters from reporting line of duty injuries."

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[2] Section 12-312d. of the NYCCBL reads as follows:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration ... the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

The Union agrees that the res judicata criteria cited by the City accurately and correctly represents the standard that this Board has established for making claim preclusion determinations. It goes on to point out, however, that this Board has held that two grievances are distinguishable "when the claims, though factually close, are not identical."[3] The Union asserts that, in this case, it is "readily apparent" that the issues are not identical with those in the earlier grievances, and it concludes, therefore, that the cases are distinguishable.

With respect to the City's waiver claim, the Union maintains that there is no difference between an arbitrability challenge based upon waiver and an arbitrability challenge based upon res judicata. Citing Decision No. B-25-88, the Union asserts that this Board has considered a waiver challenge and a res judicata challenge to constitute the same issue.

Finally, the Union contends that because there is a similarity of facts between this case and the earlier grievances involving the PMLA program, the real issue raised by the City is whether the doctrine of stare decisis is applicable. Again citing Decision No. B-25-88, however, the Union argues that the determination of the applicability of stare decisis is appropriately within the province of an arbitrator, and is not for this Board to decide.

DISCUSSION

As a preliminary matter, we note that the parties do not dispute that they are obligated to arbitrate their controversies, nor do they deny that a claimed violation of a departmental policy is within the scope of their agreement to arbitrate. The dispute before us is limited, therefore, to the two objections raised by the City: that an arbitrator already has ruled on the same claim, and, therefore, that the doctrine of res judicata bars the present matter from arbitration; and that the waiver filed by Union was invalid

[3] Quoting from Decision No. B-25-88 at 11.

because the Union has previously litigated the issues raised in this proceeding in another forum.

Res Judicata

The City contends that a prior arbitration award upholding management's authority to modify an existing policy should bar the arbitrability of a subsequent similar modification. We agree that, in appropriate cases, the doctrine of res judicata should be employed to prevent vexatious or oppressive relitigation of a previously litigated dispute.[4]

As the parties recognize, we have established a test to decide whether such an attempt at relitigation is being made. The test sets out three criteria, or "essential elements," that must be met before we will apply the doctrine of res judicata to bar arbitrability. It is useful to restate them here:

(1) there must have been a final judgment on the merits in an earlier suit;

(2) there must be an identity between the cause of action in both the earlier and later suit; and

(3) there must be an identity of the parties or their privies in the two suits.[5]

To decide whether the essential elements have been satisfied in the present case, it has been necessary for us to review the prior arbitration awards of the Impartial Chairman dated October 26, 1987, and September 13, 1988. This review discloses that the first and third criteria are satisfied: a final judgment on the merits was rendered in both previous actions, and the parties were and are identical. The second criterion is not met, however.

In the Union's words, this grievance is "unquestionably distinguishable" from the earlier cases. It points out that the earlier disputes focused on

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[4] Decision Nos. B-35-88; B-25-88; B-27-85; and B-16-75.

[5] Decision Nos. B-35-88; B-25-88; and B-22-86.

monitoring unverified medical leave requests that unit members made from their homes, whereas this case concerns medical leaves from the field after they have been authorized by departmental physicians. Thus, the Union argues, the change in question here differs substantially from earlier changes in the PMLA program.

We find merit in the Union's assertion. In his 1987 opinion and award, the Impartial Chairman stated that:

> [A]ttempts to measure and monitor the utili-zation of the restricted purpose unlimited paid sick leave right and benefit is consis-tent with the Department's managerial right and prerogative. Advice to all of the uni-formed members that their sick leave experi-ence and pattern is one of the factors con-sidered in response to their requests for various assignments is appropriate and proper.

The "abuse of the sick leave privilege" by members "calling in from home when they are, in fact, not genuinely ill" was given by the Fire Department as the basis for its expansion of the PMLA program in 1985, the act which gave rise to the grievances which resulted in the issuance of the 1987 award.[6] The case now before us obviously is very different because here the department's own physicians, in reviewing requests for leave made from the field, have had the opportunity to examine injuries alleged to have been incurred in the field and to make proper medical diagnoses. Arguably, such doctor-certified injuries are presumptively genuine, and thus, at least initially, the Union's claim that such injuries cannot constitute an abuse of the sick leave privilege is not implausible.

It is not our function to determine whether this distinction and the Union's arguments with regard thereto will be sufficient to convince the Impartial Chairman to modify or reverse his earlier rulings. That question involves the merits of the grievance, with which we may not concern ourselves. For our purposes, however, we find that the new inclusion of field injuries in

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[6] See page 2, supra.

the PMLA program arguably represents a new class of injuries that were not part of the earlier cases. Therefore, the Union's grievance is sufficiently different from the earlier grievances concerning the PMLA program to make this cause of action distinct, and to make the doctrine of res judicata inapplicable.

This determination is consistent with a number of our earlier decisions. We have held, for example, that where two or more grievances are distinguishable because there have been contractual changes that redefine the terms and conditions of employment, res judicata will not apply as a bar to arbitrability.[7] Similarly, we have said that the doctrine will not apply when claims, though factually close, are not identical.[8]

Waiver

In view of our finding that res judicata does not bar arbitral consideration of the Union's claim, we now turn to the City's contention that the waiver filed by the Union was invalid because it has sought to litigate the same dispute in another forum on an earlier occasion.

Section 12-312d. of the NYCCBL provides that a grievance, even where otherwise arbitrable, may not be submitted to arbitration if the waiver provision has been violated. The purpose of this provision is to prevent multiple litigation of the same dispute, and to ensure that a grievant who chooses to seek redress through the arbitration process will not attempt to relitigate the matter in another forum.[9] A union is deemed to have submitted the underlying dispute to two forums where the matter in controversy involves

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[7] Decision Nos. B-22-86 and B-9-78.

[8] Decision Nos. B-26-88 and B-27-82.

[9] Decision Nos. B-54-88; B-28-87; and B-28A-87.

either common legal issues or common factual issues.[10]

For reasons that we have already stated in our res judicata discussion above, we are satisfied that the subject of this request for arbitration is distinct from all previous requests. Although all the grievances in question can be traced back to the Fire Department's absence control policy known as the PMLA program, the sole issue to be considered here is whether the Department is justified in unilaterally extending the program's application to unit members who have been diagnosed by a Department physician as having suffered a field injury. This is a significant factual distinction from the earlier disputes. We find, therefore, that under the facts and circumstances present in the case now before us, the waiver filed by the Union was not invalid.

Finally, we find merit in the Union's argument that the real issue presented by the City is whether the doctrine of stare decisis is applicable, there being a similarity of facts upon which "a standard of judgment with respect to subsequent cases involving the same issues" may be adopted.[11] As the Union correctly points out, however, it is well-established that determination of the applicability of stare decisis is appropriately within the province of the arbitrator.[12]

For all the above reasons, therefore, we shall grant the Union's request for arbitration, and we hold that the City's petition should be dismissed.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by

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[10] Decision Nos. B-54-88; B-31-81; B-8-81; B-10-74; and B-8-71.

[11] Decision Nos. B-25-88 and B-3-86.

[12] Decision Nos. B-25-88; B-22-86; and B-3-86.

the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York, and docketed at BCB-1245-90, be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association of Greater New York in Docket No. BCB-1245-90 be, and the same hereby is, granted.

DATED: New York, N.Y.
April 25, 1990

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