City v. UFA, 45 OCB 76 (BCB 1990) [Decision No. B-76-90 (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-76-90

DOCKET NO. BCB-1320-90
(A-3546-90)

DECISION AND ORDER

On September 10, 1990, the City of New York, appearing by its Office of 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"). The request for arbitration was dated August 14, 1990. The grievance asserted that a new Fire Department policy of having Borough Commanders speak to firefighters with high medical leave usage violates the parties' collective bargaining agreement. The Union filed its answer on October 29, 1990. The City filed a reply on November 7, 1990.

BACKGROUND

By memorandum dated March 29, 1990, the Fire Department's Chief of Operations issued an order requiring Borough Commanders to interview members with numerous medical leave requests. The memorandum reads as follows:

> 1. Attached are the names and unit assignments of the members in your Borough who have had the largest number of medical leave requests for the period of 2/1/89 to 2/1/90.
>
> 1.1 The Department is concerned that the number of medical leave requests by these members may be indicative of their having a health problem.
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> 2. Borough Commanders shall <u>at the earliest possible date</u> interview each member assigned to his Boro whose name appears on the attached sheets. [Emphasis in original.] Members shall be

> made aware that the Department has a serious concern for their well being and for the impact of the stress and demands of active firefighting on their health. **These interviews are NOT in any sense of the word to be considered, nor conducted as disciplinary interviews.** [Emphasis added.] They are an effort on the part of the Department to determine if members with an unusual number of medical leave requests may have a health problem which could be exacerbated by continued assignments to a line unit.
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> 3. Borough Commanders shall conduct interviews of all members on the attached list and forward a report with recommendations on each member to Chief of Department. Reports shall be forwarded as interviews are conducted and need not be sent in one group. Unless unusual circumstances prevent it, all interviews shall be completed by 4/15/90. If circumstances prevent conducting any interview at this time please notify Chief Feehan by telephone.

The Union objected to the implementation of this order by filing a grievance based upon a claimed violation of Article XIX of the parties' collective bargaining agreement.[1] In his Step III decision, dated August 2, 1990, the Department's Grievance Hearing Officer described the Union's grievance as a claim that the medical leave usage policy "is an intimidating tactic intended to put fire-fighters on notice that they are having too many medical leaves," and a demand that the interviews "cease unless a union representative or counsel is present." The Hearing Officer ruled, however, that "since these meetings do not include any disciplinary component . . . Article XIX is not applicable."

The Union was not satisfied with the Grievance Hearing Officer's decision, and, on August 14, 1990, it filed a request for arbitration. As a

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[1] "Article XIX - Individual Rights" of the Agreement sets forth the rights of employees being interrogated, interviewed or tried by representatives of the Department. Article XIX, Section 5 provides, inter alia, that "when an employee is a suspect in a departmental investigation or trial, the officer in charge of the investigation or trial . . . [shall advise the employee] of his right to union representation." It provides further that "when the interrogating officer is advised by the employee that he desires the aid of counsel and/or a union representative, the interrogation shall be suspended and the employee shall be granted a reasonable time to obtain counsel and/or a union representative."

remedy, the Union seeks an order preventing the Department from speaking to firefighters with high medical leave usage unless a union representative or counsel is present.

POSITIONS OF THE PARTIES

City's Position

The City maintains that the present grievance is non-arbitrable because a nexus between the subject matter of the grievance and the contractual provisions cited by the Union allegedly does not exist. According to the City, Article XIX of the Agreement delineates the rights of employees who are subject to a departmental investigation. The City concedes that when an employee is the target of a disciplinary action, under the contract, that employee has the right to be accompanied by a union representative during an interrogation. It argues, however, that the right of representation is not an unlimited one and that it does not apply in this case.

The City notes that this issue was the subject of a recent arbitration award, dated December 27, 1989.[2] In his Opinion, the Impartial Chairman ruled that firefighters, including those who are being interviewed as witnesses rather than suspects, have a right to representation if it is impressed upon them that they may be subject to the disciplinary procedure, or if they have reason to believe that the interview may culminate in discipline. In the City's view, since the memorandum of the Chief of Operations states on its face that the medical leave usage interviews are not "to be considered nor conducted as disciplinary interviews," they are not connected in any way to the disciplinary process. The City points out that the Union has not offered proof, nor has it contended, that employees who are interviewed pursuant to

[2] Office of Collective Bargaining Docket No. A-3079-89 (Impartial Chairman Milton Rubin).

the memorandum are the subjects or targets of a disciplinary investigation. It concludes, therefore, that there is no nexus between a contractual provision concerning disciplinary interrogations, and the Department's new sick leave usage interviews.

Second, the City contends that even if the interviews could lead to disciplinary action, at most, they would be "preliminary interviews," and, as such, they would be non-mandatory subjects of bargaining.[3] The City notes that in the private sector, the U.S. Supreme Court upheld the right of an employee to be accompanied by a union representative when the employee is the subject of disciplinary measures or is the target of discipline.[4] In its view, Article XIX follows the holding of Weingarten, in that it grants employees representation rights when they are "the subject" of disciplinary measures or are "suspect" in an investigation.

The City characterizes the Union's interpretation of Article XIX in this case, however, as one that would require the presence of a union representative whenever an employer interviews an employee, regardless of the disciplinary context. The City maintains that this clearly is an exaggeration, and represents an unwarranted attempt to broaden the right to union representation beyond the holding of the Supreme Court, the contract, and arbitral interpretation. According to the City, management has the right to exclude preliminary steps in the discipline process from collective bargaining because allegedly they are non-mandatory subjects of negotiation. It claims that management has preserved this exclusion under the terms of the

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[3] The City cites a number of decisions in support of this proposition: Judith A. Levitt and City of New York v. Board of Collective Bargaining, 140 Misc.2d 727, 531 N.Y.S.2d 703 (1988) [hereinafter cited as Levitt decision]; Scarsdale PBA, 8 PERB ¶3075 (1975); Rochester Police Locust Club, 12 PERB ¶3010 (1979); and Decision No. B-37-86.

[4] NLRB v. Weingarten, 420 U.S. 251 (1975).

UFA-City of New York Agreement.

The City concludes that, because the Union's position is not within the four corners of the Agreement, the Union cannot establish a prima facie relationship between the right to representation conferred by Article XIX and the Department's new medical leave usage policy. It insists that management should not be forced to arbitrate an issue "specifically excluded" from the contract.

Union's Position

The Union argues that the language of Article XIX is broad and sweeping. It maintains that the provisions in no way limit the situations in which Department employees have the right to representation, and that the December 27, 1989 Rubin Opinion supports its position. According to the Union, Arbitrator Rubin ruled that there need not be a disciplinary aspect present for an employee to have a right to union representation. The Union argues that the City has taken an arbitrator's confirmation of broad representational rights and has attempted to turn it into a narrow doctrine that would apply only when a member has been called as a witness.

The Union also denies the assertion that medical leave usage interviews are not related to discipline. It contends that the City's claim does little more than beg the question of whether the interview itself is a form of discipline, or whether steps taken following the interview would constitute disciplinary action.

With respect to the City's second objection to arbitrability, the Union argues that, because the employee being interviewed is the subject of the interview, and because the Chief of Operations' memorandum implies that the interview could result in an assignment other than to a line unit, there is a

clear impact on terms and conditions of employment. The Union notes that the City unsuccessfully attempted to persuade Arbitrator Rubin that the Levitt decision required him to find that the representation of members called as witnesses was not a term and condition of employment, and thus, the subject was not properly grievable and arbitrable. The Union contends that, just as Arbitrator Rubin did not accept the City's argument in the 1989 case, the City's claim should be rejected in this case as well.

The Union concludes with the assertion that it has demonstrated a clear nexus between Article XIX of the Agreement and the Department's new sick leave usage policy. It maintains that in light of this nexus, and because of the well-established policy of this Board to promote and encourage arbitration as the selected means for adjudicating and resolving grievances, the City's challenge to arbitrability should be denied.

DISCUSSION

It is public policy, expressed in the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[5] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[6]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement. The parties also agree that alleged violations of Article XIX (Individual Rights) of their collective bargaining agreement are within the scope of their agreement to arbitrate. The City contends, however, that the Union has not established a nexus between the Fire Department's new sick leave

[5] E.g. Decision Nos. B-35-89; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[6] Decision No. B-41-82 and B-15-82.

usage interview policy and Article XIX, either because the policy is not "connected in any way to the disciplinary process" or because, at most, the interviews are "preliminary" and "as such, they would be non-mandatory subjects of bargaining."

If we were to accept the City's first contention, that the sick leave usage interviews are unrelated to discipline, the Department could avoid the "Individual Rights" provisions of the Agreement at will, simply by adding a disclaimer to the effect that a particular employment interview or interrogation is "not to be considered or conducted as a disciplinary interview." Whether an interview triggers Article XIX protections depends upon the circumstances surrounding the interview, and not upon disclaiming language in an employer's order.

The results of sick leave usage interviews leave open the express possibility that "members with an unusual number of medical leave requests . . . [may have] continued assignments to a line unit [discontinued]." We have often said that employee transfers taken to correct unsatisfactory levels of performance may be disciplinary in nature and may subject to arbitration, despite management's insistence to the contrary.[7] In the absence of any words of limitation in Article XIX that specifically exclude sick leave usage interviews, whether "preliminary" or otherwise, from the "Individual Rights" provisions of the Agreement, we find at least an arguable relationship between Article XIX and the claim that the interviews are violative of the rights created in this section. Whether sick leave usage interviews actually are disciplinary in nature, precipitating a right to union representation, is a question of contract interpretation that must be decided by an arbitrator.[8]

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[7] Decision Nos. B-57-90; B-37-90; B-33-90; B-52-89; B-5-87 and B-40-86.

[8] Decision Nos. B-69-90; B-58-90; B-2-89; B-71-88; B-6-88 and B-4-85.

With respect to subjects excludable from bargaining, the parties have gone to great length debating the scope of union representation under the constructs of both the Weingarten doctrine and the Levitt decision. For purposes of the case now before us, however, the debate is of no significance in this context. Once the parties arguably incorporate a provision into their collective bargaining agreement, it does not matter whether the subject of that provision is mandatory or non-mandatory, or whether the agreed upon language goes beyond the scope of a legal doctrine such as Weingarten. If an agreement has been reached on a voluntary subject of negotiation, and the agreement becomes embodied in the collective bargaining agreement, the obligation is then contractual and may be enforced as such during the life of the contract.[9]

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. We emphasize that this in no manner reflects the Board's view on the merits of the Union's claim, nor do we suggest that the Department's right to interview firefighters with numerous medical leave requests should be circumscribed. That is not the question presented to us. The issue here is whether the City has placed a limitation upon the Department's right to conduct interviews through the collective bargaining agreement. We have examined the merits of the parties' claims only to the minimum point necessary to make this determination. The final qualitative analysis, decision, and appropriate remedy, if any, will be left to the Impartial Chairman.

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

[9] Decision Nos. B-16-74; B-6-74; B-4-74; B-7-72; B-4-71; B-7-69 and B-11-68.

ORDERED, that the petition challenging arbitrability filed by the City of New York, and docketed as BCB-1320-90, 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-1320-90 be, and the same hereby is, granted.

DATED: New York, N.Y.
December 19, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER