City v. UFA, 47 OCB 20 (BCB 1991) [Decision No. B-20-91 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-20-91

-and- DOCKET NO. BCB-1247-90 (A-3314-90)

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Respondent.

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DECISION AND ORDER

On January 29, 1990, the City of New York ("City") filed a petition challenging the arbitrability of a grievance filed by the Uniformed Firefighters Association of Greater New York ("UFA" or "Union"), concerning Apparatus Field Inspection Duties and Apparatus Field Reinspection Duties ("AFID/AFRD"). On February 1, 1990, UFA filed an answer and memorandum in response to the City's petition challenging arbitrability. The City filed a reply and memorandum in response to UFA's answer on February 13, 1990. On October 31, 1990, the Trial Examiner requested additional information from the parties.[1] The City and the UFA submitted their responses on November 8, 1990 and February 4, 1991, respectively.

[1] See note 7, infra, at 7.

Background

On February 24, 1989, the Board of Collective Bargaining ("Board"), issued a scope of bargaining determination (Decision No. B-4-89), to resolve whether various disputed demands of the parties, made in connection with their negotiation of the collec-tive bargaining agreement for the period 1987-90 ("Agreement"), were subjects of bargaining properly before the Impasse Panel.[2] In that decision, the Board found, inter alia, that "a contrac-tual provision relating to inclement weather, or one that would otherwise impede the City from providing specific services during certain times of the day, is a non-mandatory subject of bargaining."[3] Thus, the Board held, UFA Demand No. 57, which sought to expand the scope of existing contractual restrictions on the City's ability to assign firefighters to AFID/AFRD during inclement weather, to other non-emergency outside work such as multi-unit drills, was not properly before the Impasse Panel. Additionally, and for the same reason, the Board found that the City may delete Article XV, Section 1 from the parties' Agree-ment[4] without negotiation (City Demand No. 8).

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[2] On September 6, 1988, the Board declared the existence of an impasse in bargaining between the City and UFA, and authorized the appointment of an impasse panel.

[3] Non-mandatory subjects of bargaining may not be considered by an impasse panel unless submitted to the panel by the mutual agreement of the parties.

[4] Article XV of the 1984-87 Collective Bargaining Agreement between the parties, entitled "Inclement Weather," at Section 1 provided:

> Except for the limitations set forth in Section 4 and 5 of this Article, the Fire Department shall not assign any fire company or individual firefighter assigned to a line

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However, the Board also considered whether there could be a practical impact on the safety of firefighters if the existing inclement weather policy was changed. Upon review of the UFA's pleadings, the Board found that the Union had raised a substantial issue in this regard and held:

> ... in the event the City changes, or proposes to make a change in the current inclement weather policy, a hearing will be held on [UFA's] allegations of safety impact. [See Decision No. B-4-89, at 199.]

During the impasse proceedings, the Panel was not precluded from and, in fact, did consider the cost savings that would be realized from the elimination of restrictions on the City's ability to schedule AFID/AFRD. In its Award (Case No. I-193-88, issued April 14, 1989), the Panel valued the savings at 0.026%. However, in recognition of the potential effect that removal of these restrictions might have on the safety of Firefighters, the Impasse Panel directed that the parties attempt to resolve any problems with respect to implementation of this aspect of the Award. In the event the parties failed to reach accord on "agreeable standards," the Award provided a dispute resolution mechanism "to resolve any outstanding issues."[5]

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[4](...continued)
unit to regularly scheduled outside activities: (a) when the temperature-humidity-index ["THI"] reaches 78 or above or the wind chill factor reaches 20 or below and/or (b) after 11:00 a.m. on Sundays.

[5] The Panel's opinion on this subject stated:

> Current restrictions on the scheduling and performance of AFID/AFRD inspections shall be eliminated except under severe weather conditions, such as extreme heat or cold and heavy rain or snow. The parties will resolve any problems with respect to the application of this policy between themselves. In

(continued...)

On July 5, 1989, the parties met to discuss the development of new standards for implementation of the Impasse Panel's Award concerning AFID/AFRD but failed to reach agreement on this issue. On August 25, 1989, the City issued Department Order No. 119 and Supplement to Department Order No. 119, Issue No. 69, both of which, inter alia, implemented revisions in Fire Department policy concerning AFID/AFRD. Department Order No. 119 provides, in relevant part:

> 2.5 APPARATUS FIELD INSPECTION SCHEDULE (REVISED 8/89)
>
> A supply of Apparatus Field Inspection Schedules (Rev 8/89) for the remainder of 1989 has been forwarded to all Bureau and Division Headquarters for equal distribution to all units under their command. One to each unit.
>
> 1. This revokes previously issued AFID/AFRD Field Inspection Schedule.
>
> 2. The AFID Schedule (Rev 8/89) will be effective 0900 hours Monday, August 29, 1989.
>
> 3. Units will perform 2 AFID periods per week consisting of one AM period from 0930 hours to 1230 hours and one PM period from 1300 hours to 1600 hours.
>
> 4. AFRD periods have been eliminated. Any necessary reinspections shall be done at the beginning of the AFID periods.

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[5](...continued)
the event the parties are unable to develop agreeable standards for the application of this determination, the Panel Chairman [Mr. Arvid Anderson] will retain jurisdiction to resolve any outstanding issues. We believe this obviates the need for further hearings before the Board of Collective Bargaining on this issue [emphasis added]. [See Case No. I-193-88, at 75.]

5. Supplement to this D.O. "Signal 10-51 - Suspension of Outside Activities" prescribes new guidelines for transmission of Signal 10-51.

The Supplement to Department Order No. 119, Issue No. 69, which set forth new standards for the suspension of outside activities in the event of inclement weather, provides, in relevant part:

2.1.1. SIGNAL 10-51 - SUSPENSION OF OUTSIDE ACTIVITIES

1. General.
   1.1 It is the Department's responsibility to optimize available inspection and outdoor activity time, while taking into considera-tion extreme weather conditions that might have a negative impact on our members or their capability to respond to alarms. In the past our ability to perform scheduled outside activities (AFID, MUD and Hydrant Inspection) have been impacted by the design of Fire Department apparatus. Our apparatus' have now evolved from open cabs and crew compartments to partially enclosed cabs to fully enclosed cabs and crew compartments.

2. Monitoring - In New York City all boroughs may not be impacted to the same degree by adverse weather and/or street conditions. Therefore, the following monitoring procedures prior to and during the Signal 10-51 shall be followed:
   2.1 Local conditions, where required will be evaluated by Divisions.
   2.2 Monday thru Friday (excluding holidays) from 0730 to 1630 hours, Boro Commands will make the decision for Signal 10-51 subject to the approval of the Chief of Operations. Divisions will keep Boro Commands informed of local conditions.
   2.3 At other times, Divisions will inform the Citywide Command Chief of local conditions for his decision on Signal 10-51.

3. Weather factors requiring the cancellation of scheduled outside activities are:
   3.1 Low temperatures - when the wind chill factor is 10 or less.
   3.2 High temperatures - when the Temperature Humidity Index (THI) is 85 or greater.

* * *

4. The Department will monitor the application of the foregoing policy. Changes, if appropriate, will be announced on January 1, 1990.

On September 1, 1989, counsel for UFA wrote to the Impasse Panel Chairman to invoke his jurisdiction to "resolve any outstanding issues," pursuant to the Panel's Award. The Union alleged that the City "bypassed the disputes resolution mechanism and has now unilaterally imposed new standards." A hearing on this matter was scheduled for October 26, 1989.

In the interim, on October 6, 1989 UFA filed a Step III grievance, pursuant to Article XX, Section 3 of the Agreement.[6] The Union framed its complaint as follows:

> [T]he Fire Department's plan to alter the AFID/AFRD policy, announced in Department Order No. 119 on August 25, 1989, violates or constitutes an inequit-able application of the Department's regulations and policies and the parties' practice thereunder and Firefighters' terms and conditions of employment.

The hearing before Chairman Anderson, concerning the Department's alleged unilateral implementation of the new AFID/AFRD standards, went forward on October 26, 1989. At the hearing, the parties were afforded a full opportunity to call witnesses and to present documentary evidence and argument

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[6] Article XX, Section 3 of the Agreement provides:

> It is understood and agreed by and between the parties that there are certain grievable disputes which are of a department level or of such scope as to make adjustments at Step I and Step II of the grievance procedure impracticable, and, therefore, such grievance shall be instituted at Step III of the grievance procedure.

* * *

in support of their positions. A stenographic transcript of the proceeding was made.

A hearing on UFA's Step III grievance was held on November 13, 1989.[7] According to the City, "[i]nstead of presenting their cases, the parties agreed that the hearing be adjourned pending the installation of the new administration.[8] The hearing has not been resumed." According to the Union, "at Step III, the parties presented no positions but merely agreed to go forward."

On December 4, 1989, the Impasse Panel Chairman issued his Award (Case No. A-193-88-A), which held that "the modified order 119 ... regarding the suspension of outside activities, which is reproduced as an attachment to this award,[9] shall be maintained for the duration of this agreement."[10] In his Award, the Impasse Panel Chairman observed:

> The major change in that bulletin [the Supplement to Department Order 119, Issue No. 69] was that AFID inspections would be suspended when the Temperature Humidity Index ("THI") reached 85 degrees or above or the wind chill factor was 10 degrees or less. That bulletin represented a change from the prior bulletin which provided that such inspections would be cancelled when the THI was 78 or above or the wind chill factor was 20 or below. [See Case No. I-193-88-A, at 2-3.]

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[7] In her letters dated October 31, 1990, the Trial Examiner asked the parties to confirm whether a Step III hearing was held and, if so, to summarize the positions taken at the hearing by each of the parties.

[8] The administration of the Mayor-elect of the City of New York, Honorable David N. Dinkins, was to be installed on January 1, 1990.

[9] Only the Supplement to Department Order No. 119, Issue No. 69, supra, at 5-6, was appended to the Award.

[10] The Agreement expired on June 30, 1990 and the parties are now in the process of negotiating a successor agreement.

Chairman Anderson noted that while the City and the UFA may not have reached agreement on these changes, the City was able to reach an accord on the same subject with the Uniformed Fire Officers Association.[11] The Impasse Panel Chairman also noted that "... inspections, though conducted during three hour periods, normally involve a maximum of two hours of actual physical activity and are not performed every day the Firefighter is assigned to duty." Finally, Chairman Anderson held:

> [T]here are only seven (7) months remaining of the existing term of the collective bargaining agreement. If the Firefighters conclude from actual experience that the conditions under which AFID inspections are carried out prove to be unreasonable, they have the alternative of alleging a practical impact before the Board of Collective Bargaining. If their position is sustained by the BCB, they will again have the opportunity to negotiate a modification of the provision or seek relief from the Board of Collective Bargaining. [See Case No. I-193-88-A, at 6-7.]

On January 8, 1990, UFA filed the instant request for arbitration "Re: AFID." Therein, UFA restates the nature of the controversy in the same terms as the grievance which was filed at Step III[12] and, as a remedy, seeks "[m]aintenance of AFID/AFRD policy without change." On January 29, 1990, the City filed the instant petition challenging arbitrability, claiming that the same matter was adjudicated and resolved by the Impasse Panel Chairman in Case No. I-193-88-A, and that relitigation is barred by the doctrine of res judicata. The City also argues that the grievance cannot be maintained because UFA:

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[11] The Impasse Panel Chairman found that Fire Officers are impacted by changes in the AFID/AFRD standards to the same extent as Firefighters.

[12] See Background, supra, at 7.

> ...has not executed, and cannot execute, a valid waiver of its right to submit the underlying dispute to any other administrative or judicial tribunal pursuant to the New York City Collective Bargaining Law ["NYCCBL"] and the Revised Consolidated Rules of the Office of Collective Bargaining ["OCB Rules"].

In its answer to the City's petition, UFA claims that the basis for the City's challenge is erroneous. The Union argues that at the Step III hearing, it made clear that its grievance was limited to the increase in the number of inspection periods, from three per four weeks to two per week.[13] UFA charges that had the Fire Department issued a Step III decision, "the City would have known that the UFA had only raised the issue of the number of AFID inspections." This matter, the Union asserts, was neither raised nor discussed at the hearing before the Impasse Panel Chairman.

Positions of the Parties

City's Position

The City takes the position that further prosecution of the instant grievance is precluded by the doctrine of res judicata because the very Department Order (No. 119) which the UFA seeks to challenge was already challenged and upheld by the Impasse Panel Chairman in Case No. I-193-88-A.[14] The City flatly rejects the UFA's attempt to distinguish the instant grievance from the matter adjudicated before Chairman Anderson, claiming that there is nothing in his Award to suggest that the ruling was limited to the suspension

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[13] See Department Order No. 119, Section 2.5, items 1 and 3, set forth in the Background, supra, at 4-5.

[14] In support of its argument, the City cites Decision Nos. B-25-88; B-27-82; B-16-75.

of outside activities due to inclement weather. On the contrary, the City asserts, the clear mandate of Chairman Anderson's Award was "that the Order should be maintained in its entirety" for the remaining seven months of the Agreement.

The City also objects to the arbitrability of this matter on the basis that UFA is unable to execute a waiver, as required by Section 12-312d of the NYCCBL. Because the Union submitted what is claimed to be the same underlying dispute to another tribunal for adjudication, i.e., to the Impasse Panel Chairman, the City argues that the waiver UFA submitted in connection with the instant request for arbitration cannot be valid.[15]

Finally, the City submits, since the Board held in Decision No. B-4-89 that a demand which would restrict the City's ability to assign Firefighters to AFID/AFRD or other duties is a non-mandatory subject of bargaining, such assignments do not constitute a term and condition of employment. Therefore, the City contends, there is no nexus between Department Order No. 119, which reflects a change in Department policy on this subject, and the term "grievance" as it is defined by Article XX, Section 1 of the Agreement.[16]

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[15] In support of its argument, the City cites Decision Nos. B-50-89; B-28-87.

[16] Article XX, Section 1 of the Agreement defines a grievance as:

> [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...[emphasis added].

UFA's Position

UFA contends that the "the City is entirely incorrect" in claiming that the doctrine of res judicata bars the arbitrability of the instant matter. Citing Decision No. B-25-88, the Union claims that the Board will consider the underlying cause of action to be the same only when "it is ... readily apparent that the issues are identical." In this respect, UFA argues that the only issue raised and discussed before the Impasse Panel Chairman in Case No. I-193-88-A concerned revised standards applicable to the suspension of outside activities during inclement weather. That issue, the Union contends, is clearly distinguishable from a grievance complaining of an increase in the number of AFID/AFRD inspection periods that Firefighters are required to perform. For the same reason, the Union asserts that the waiver submitted in this matter is valid.

Contrary to the City's argument that there is no nexus to the Agreement, UFA submits that the Department's plan to increase the number of AFID/AFRD inspection periods constitutes a violation of "past practice," a matter which falls within the scope their agreement to arbitrate. In this connection, UFA points out that Article XX, Section 1 of the Agreement defines the term "grievance" as a claimed "violation, misinterpretation or inequitable application of ... existing policy or regulations of the Fire Department affecting the terms and conditions of employment [emphasis added]."

Discussion

On a petition challenging the arbitrability of a grievance, this Board must determine whether the parties are in any way obligated to arbitrate their

controversies and, if so, whether the obligation is broad enough to include the particular controversy.[17] In the instant matter, it is clear that the parties have agreed to arbitrate grievances as defined in Article XX, Section 1 of the Agreement. Therefore, ordinarily, the question remaining would be whether the Union has established that the City's alleged actions fall within the categories defined in Article XX, Section 1, so as to present an arbitrable claim.

Here, however, in addition to claiming that the UFA's complaint is not within the scope of disputes subject to arbitral resolution, the City maintains that "the UFA is attempting to relitigate a matter that has been litigated previously not once, not twice, but three times."[18] Thus, primarily, the City is challenging arbitrability on the grounds that the instant grievance is barred by the doctrine of res judicata and also on the basis that UFA is unable to satisfy the waiver requirement of Section 12-312d of the NYCCBL.[19]

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[17] See e.g., Decision Nos. B-65-88; B-32-87; B-27-86; B-10-79.

[18] The City is referring to the Scope of Bargaining proceeding before this Board (Decision No. B-4-89), the Award of the Impasse Panel (Case No. I-193-88) and the Award of the Impasse Panel Chairman (Case No. I-193-88-A).

[19] Section 12-312(d) of the NYCCBL provides:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, 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

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In considering whether the UFA should be prevented from pursuing this dispute further, we must first determine whether the legal doctrine of res judicata, a matter of issue preclusion, is applicable.[20] Similarly, since a matter of compliance with the statutory waiver requirement imposes a condition precedent to arbitration, we must also address this claim at the outset.[21]

We have previously held that the doctrine of res judicata and the NYCCBL's waiver requirement are "closely related in purpose."[22] The intention of both is to provide a means of achieving a speedy resolution of labor-management disputes by preventing unnecessary or repetitive litigation and ensuring that a grievant who elects to seek redress through the arbitration process will not attempt at another time to relitigate the matter in another forum.

In determining whether the doctrine of res judicata should apply to bar arbitrability, we have held that the following "essential elements" need be met: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an

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[19](...continued)
judicial tribunal except for the purposes of enforcing the arbitrator's award.

[20] Decision Nos. B-34-90; B-65-88; B-25-88; B-27-82.

[21] Decision Nos. B-7-90; B-72-89; B-10-82; B-8-79; B-7-76; B-6-76; B-11-75.

[22] See Decision No. B-13-76.

identity of the parties or their privies in the two suits."[23] In Decision No. B-34-90, we stated:

> In order for a party to be precluded from raising a claim, we must be persuaded that the identity of the causes of action is clear and obvious [footnote omitted]. We have held that "when the claims, though factually close, are not identical, the doctrine of res judicata will not be applied as a bar to arbitrability [footnote omitted]." It is well settled that we resolve doubtful issues of arbitrability in favor of arbitration [footnote omitted].

However, even if we find that the precise issue was not litigated in another forum and, thus, the doctrine of res judicata does not apply, we must nevertheless turn to an employer's claim that a union has violated Section 12-312d of the NYCCBL, since an otherwise arbitrable dispute may not be submitted to arbitration if the statutory waiver provision has been violated.[24]

A union will be unable to satisfy the waiver requirement "where the proceedings in both forums arise out of the same factual circumstances, involve the same parties, and seek the determination of common issues of law."[25] We have found that the same underlying dispute has been submitted to two forums even where a union has neither cited the same statute, rule, regulation or contract provision,[26] nor requested the same remedy.[27]

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[23] See Decision No. B-22-86, at 9. See also, Decision Nos. B-17-90; B-35-88; B-25-88.

[24] Decision Nos. B-28-87; B-8-79; B-7-76.

[25] See Decision No. B-50-89, at 11. See also, Decision Nos. B-7-90; B-60-89; B-28-87.

[26] Decision Nos. B-50-89; B-10-82; B-10-74.

[27] In this regard, we have held that the fact that the remedy requested in each forum differs does not establish by

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Furthermore, we have denied the request for arbitration even where the party raised additional matters in the other forum beyond those asserted in the request.[28]

Generally, the proponent of arbitration will be found to lack the capacity to submit a valid waiver if that party commenced an action invoking a remedy for redress of the same underlying dispute and made a deliberate choice of forum with knowledge of all of the facts necessary to make an election of remedies. If the forum chosen had jurisdiction to render the relief requested and the matter was allowed to proceed to the point of judgment, a statutory condition to the right of that party to invoke impartial arbitration of the dispute cannot be satisfied.[29]

Applying these principles to the instant matter, we find that the doctrine of res judicata does not impair the arbitrability of the instant dispute. Although the City has alleged facts which satisfy the first and third elements of this doctrine, the remaining question, whether there is an identity of issue among the causes of action dealt with in the scope of bargaining dispute (Decision No. B-4-89), the impasse panel proceedings (Case

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[27](...continued)
itself that the two proceedings involve different underlying disputes. See e.g., Decision Nos. B-50-89; B-8-71.

[28] If success in the other forum would have provided all of the relief obtainable from an arbitrator, this fact alone would constitute basis for denial of arbitration under Section 12-312d of the NYCCBL. See Decision Nos. B-21-85; B-7-76; B-15-75; B-11-75.

[29] Decision Nos. B-50-89; B-28-87; B-19-86; B-21-85; B-10-82; B-7-76; B-15-75.

Nos. I-193-88 and I-193-88-A), and the case now before us has not been proved for the following reason:

The precise issue in all of the above proceedings, to the extent AFID/AFRD was addressed, concerned the City's policy of suspending outside activity during inclement weather. The issue before this Board in Decision No. B-4-89 involved a demand to expand upon an "Inclement Weather" provision already in the Agreement.[30] The issue before the Impasse Panel in Case No. I-193-88 was the cost savings realized from the elimination of restrictions on the scheduling and performance of AFID/AFRD, "except under extreme weather conditions."[31] Finally, the issue before the Impasse Panel Chairman in Case No. I-193-88-A was whether the City unilaterally could impose new THI and wind chill standards for the suspension of outside activities such as AFID/AFRD.[32]

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[30] In that decision we held that "the City cannot be required to negotiate a demand that would require the City to withhold services which it deems appropriate for the performance of its mission" and, therefore, found that the City could remove the current "Inclement Weather" provision without bargaining.

[31] In this connection, the Impasse Panel retained jurisdiction over implementation of that aspect of its Award specifically to resolve any outstanding issues concerning the development of agreeable standards, i.e., the determinants of "extreme heat or cold" such as THI and wind chill.

[32] Our review of the transcript of the hearing before Chairman Anderson reveals that the discussion focused mainly on those terms of the Supplement to Department Order No. 119, Issue No. 69, having to do with changes in THI, wind chill factor, and at what level of command the decision to call off outside activities should be made. There is nothing in the record which indicates that the revised schedule of AFID/AFRD inspection periods, set forth in the Department Order itself, was ever raised.

We find that the issue addressed in each of those cases, i.e., the negotiability and potential effect of changes in the Fire Department's inclement weather policy, is not the issue before us now. In the instant matter, UFA asserts a claimed contract violation, challenging that aspect of Department Order No. 119 which violates an alleged "past practice" of assigning Firefighters to a certain number of AFID/AFRD inspection periods to be performed by them on a routine basis, regardless of inclement weather. Since the issues presented in the former proceedings are clearly distinct from the controversy at issue in the instant claim, we shall dismiss the City's petition insofar as it is founded upon principles of res judicata.

Additionally, we do not find that the Union lacks the capacity to comply with the statutory waiver requirement for the following reasons:

Although the underlying dispute can be traced back to the Fire Department's desire to eliminate any restrictions on its ability to schedule AFID/AFRD, clearly UFA could not have had knowledge of the facts sufficient to claim an alleged breach of "past practice" until the Fire Department issued Department Order No. 119 on August 25, 1989. Therefore, the Union cannot be charged with having commenced an action, seeking redress of a grievance concerning an increase in the number of routinely scheduled AFID/AFRD inspection periods, in the scope of bargaining dispute before this Board (Decision No. B-4-89, issued on February 24, 1989), or in the case before the Impasse Panel (Case No. I-193-88, issued on April 14, 1989).

Although the Union did have notice of the instant claim prior to the hearing before the Impasse Panel Chairman in Case No. I-193-88-A, it can be argued that his jurisdiction did not extend to a grievance concerning an

alleged breach of contract. In this connection, we note that the Panel, in retaining jurisdiction over AFID/AFRD, refers only to the development of "agreeable standards" for the suspension of outside activities.[33] In any event, we do not find that the Impasse Panel Chairman either examined the issue, ruled on its merits, or directed that Department Order No. 119 was to remain in effect for the remainder of the term of the Agreement (as he did with respect to the Supplement.) The most that can be said is that Chairman Anderson observed that inspections "are not performed every day the Firefighter is assigned to duty."

Furthermore, we do not find that resolution of the instant dispute involves the determination of common issues of law. Scope of bargaining questions are decided on the basis of rights which vest in the parties under Section 12-307 of the NYCCBL.[34] An impasse panel will issue a report and recommendations based on the criteria set forth in Section 12-311c of the NYCCBL.[35] In contrast, questions of contract interpretation and application involve rights derived solely from the express language of the parties' collective bargaining agreement.[36] Accordingly, even though one aspect of the

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[33] See, note 5, supra, at 4.

[34] Section 12-307a of the NYCCBL sets forth all matters which are deemed mandatory subjects of bargaining. Section 12-307b sets forth a myriad of actions reserved to management, subject only to questions concerning the practical impact that decisions on these matters have on employees.

[35] Decision Nos. B-12-75; B-12-74; B-23-72.

[36] It is well-settled that resolution of these questions are matters for an arbitrator. See e.g., Decision Nos. B-29-85; B-1-84; B-36-80.

underlying dispute, i.e., the removal of inclement weather restrictions on the City's ability to assign Firefighters, was considered in the scope of bargaining proceeding (Decision No. B-4-89) and the impasse panel pro-ceedings (Case Nos. I-193-88 and I-193-88-A), this Board, the Impasse Panel and the Impasse Panel Chairman did not consider, nor was it within their jurisdiction to consider, the rights of the parties under the terms of the Agreement.

For all these reasons, we find that the waiver UFA submitted in connection with the instant request for arbitration is valid for purposes of Section 12-312d of the NYCCBL.

Finally, we turn to the City's argument that, assuming, arguendo, arbitration of this matter is not barred by the doctrine of res judicata or because of an invalid waiver, UFA's complaint is not arbitrable "because there is no nexus between the claimed violation and the contract provision cited." The City submits that because the gravamen of the dispute concerns a non-mandatory subject of bargaining, the challenged action does not affect a term and condition of employment. The Union maintains that the Fire Department's "past practice" of assigning Firefighters to three AFID/AFRD inspection periods per four weeks constitutes an "existing policy" that was violated when the Fire Department revoked the previously issued "1989 AFID/AFRD Field Inspection Schedule" and implemented the "AFID Schedule (Rev 8/89)."

There is no dispute that the City's right to schedule and/or assign its employees, an action which on its face falls within an area of management prerogative, may be circumscribed by rights granted employees in a collective

bargaining agreement.[37] In this regard, UFA claims that Article XX, Section 1 of the Agreement, which defines a grievance as an alleged "violation, misinterpretation or inequitable application of ... existing policy or regulations of the Fire Department affecting terms and conditions of employment," limits statutory management rights in this area.

In Decision No. B-27-86, in interpreting an identical provision of the meaning of the term "grievance," we considered, inter alia, whether the City's failure to maintain an operative emergency radio system violated the Fire Department's "policy and practice to equip fire marshals with operating emergency radios when they are investigating fire scenes."[38] Therein, we held that the UFA:

> ... does allege a violation of a specific policy or practice: that of equipping fire marshals with effective emergency radios. Thus, the claimed violation falls within the contractual definition of a grievance. [See Decision No. B-27-86, at 5.]

We also held in that case, whether the employer has the right to change an "existing policy" is a question involving interpretation of the contract.[39] Thus, we concluded that the grievance was arbitrable.

Accordingly, contrary to the City's contention in the instant matter, an "existing policy" need not be limited to matters which are within the scope of mandatory bargaining in order to be subject to arbitral consideration under

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[37] See Decision Nos. B-33-90; B-19-89; B-47-88; B-4-87; B-5-84.

[38] It is well settled that a demand that management provide specified equipment does not constitute a mandatory subject of bargaining. See Decision Nos. B-4-89; B-43-86; B-16-74; B-3-73.

[39] See also, Decision No. B-6-69.

the terms of the parties' Agreement. Limitations concerning a permissive subject of bargaining, once agreed to and reduced to a term of a collective bargaining agreement, are binding and enforceable for the duration of that agreement (and for any period of status quo thereafter).[40] Article XX, Section 1 of the Agreement herein arguably constitutes such a limitation. Inasmuch as there is no dispute that the Fire Department unilaterally changed an existing policy or practice of assigning Firefighters to three AFID/AFRD inspection periods per four weeks to two AFID/AFRD inspection period per week, the UFA has demonstrated a nexus to the Agreement. In other words, the allegation that the City's plan to alter the AFID/AFRD policy (with respect an increase in the number of inspection periods that Firefighters could be assigned to perform on a routine basis) violates an existing policy of the Fire Department states an arbitrable claim.

For all of these reasons, we shall deny the City's petition challenging the arbitrability of this matter in its entirety.

ORDER

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

[40] E.g., in Decision No. B-68-90, we observed that the effect of the inclusion or incorporation of a job description in a collective bargaining agreement (a permissive subject of bargaining) may be that the work it describes is reserved to the bargaining unit for the duration of the agreement. See also, Decision Nos. B-76-90; B-7-72; B-7-69; B-11-68.

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association of Greater New York be, and the same hereby is, granted; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, denied.

DATED: New York, N.Y.
April 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

GEORGE B. DANIELS
MEMBER

ELSIE A. CRUM
MEMBER