City & NYFD v. L.854,UFA, 49 OCB 50 (BCB 1992) [Decision No. B-50-92 (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 and THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,
Petitioners,

Decision No. B-50-92

DOCKET NO. BCB-1524-92
(A-4347-92)

--and--

THE UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO,
Respondents.
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DECISION AND ORDER

The City of New York ("the City") filed a petition on September 8, 1992, 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 6, 1992. The City filed a reply November 23, 1992.

Background

By memorandum dated June 17, 1992, from John J. Stickevers, Chief Fire Marshal, a new work chart was scheduled to be implemented starting June 21, 1992. Squad 6, the squad due to work a 4 x 2 tour, was scheduled to work a 6 x 9:30 tour, in addition to the 6 x 9:30 tour by Squad 5, giving double coverage on the 6 x 9:30 tour. The next day, June 22, 1992, Squad 2 was scheduled to work a 9 x 6 tour; Squad 7, a 6 x 9:30 tour; and Squad 6, a 10 x 8 tour. The new work chart was said to continue

from June 22, 1992, forward.

On June 8, 1992, the union filed a Step III grievance on behalf of Supervising Fire Marshals who were ordered and required to abide by the new work chart schedule. The grievance alleged that Supervising Fire Marshals were being assigned to duty schedules in violation of Article III, Section 5,[1] and

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[1]The pertinent collective bargaining agreement is the 1987-1990 agreement between the parties ("the Agreement"). Article III, Section 5, provides, in pertinent part, as follows:

> 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.
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> (i) The Fire Department shall have the right to schedule Supervising Fire Marshals assigned to Headquarters Special Squads such as Juvenile Firesetters, Modified Red Cap, Day Squads and other similar squads or administrative functions to duty schedules that do not conform to the Supervising Fire Marshal duty schedule referred to in this Article III.
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> (ii) Prior to an involuntary assignment, the Fire Department shall endeavor to obtain qualified volunteers. The determination of such Supervising Fire Marshal's qualifications shall be made at the discretion of the Fire Department, whose decision shall be final. The involuntary assignment of a Supervising Fire Marshal shall be limited to one year, but may be extended to two years in such cases where unique and extraordinary skills or functions are required and where such assignment is of critical importance to the Fire Department.
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> (iii) Notwithstanding the foregoing no such assignment shall be made on a punitive basis.
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> B. ordered overtime authorized by the Commissioner or the Chief Fire Marshal as his designated representative which results in a Supervising Fire Marshal's working in excess of his normal tour shall be compensable in cash at time and one-half.

Article VIII, Section 1,[2] of the parties' collective bargaining agreement.

On August 8, 1992, before receiving a response to the Step III grievance, the Union filed a Request for Arbitration, relying on Article III, Section 5, and Article VIII, Section 1, of the Agreement. The Union's grievance seeks rescission of the allegedly improper assignment, payment of overtime compensation for off-the-chart assignment, payment of a night duty differential for additional night and weekend assignments, and such other relief as may be appropriate.

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[2]Article VIII, Section 1, of the collective bargaining agreement provides, in pertinent part, as follows:

> (a) There shall be a 10% differential continued for all work actually performed by ... Supervising Fire Marshals (Uniformed) between the hours of 4 p.m. and 8 a.m., provided that more than one hour is actually worked after 4 p.m. and before 8 a.m.
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> (b) In lieu of payments to Fire Officers (line) required by Article VIII, Section (a), above, the Employer shall pay all Fire officers (line) and Supervising Fire Marshals pro-rata an annual amount equal to 5.4 percent of the sum of each such employee's base annual salary rate plus longevity and adjustments.
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> This benefit shall be continued on the basis of the rates set forth in Article V, plus longevity adjustment for all Fire Officers (line) and Supervising Fire Marshals.

Positions of the Parties

The City's Position

The City challenges the arbitrability of the Union's grievance on two grounds. First, the City says the Union has failed to establish a nexus between the cited provisions of the collective bargaining agreement and the allegations which are the subject of the grievance. Specifically, the petition alleges that the UFOA has failed to include facts in its request for arbitration which specify how the Agreement has been violated. The City notes that the Department has changed neither the average number of hours per week which are worked by Supervising Fire Marshals nor the length of their tours. Since no Step III decision issued, the City contends the grievance history is devoid of any justiciable issue.

Secondly, the City challenges the arbitrability of the Union's grievance by saying work chart scheduling is a management prerogative, subject to unilateral change, adding that the Union has not demonstrated how the City has acted in violation of its managerial prerogative concerning work charts. To support this point, the City cites Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL") which permits a public employer the right to direct its employees and to determine the methods, means and personnel by which government operations are

to be conducted.[3] The City also cites case law, albeit an improper practice petition brought by the Uniformed Firefighters Association and dismissed as not violating the requirement that hours be mandatorily bargainable.[4] There, the work chart at issue was found not to have increased the length of work day or number of annual appearances.[5]

In its Reply to the Union's Answer, the City reiterates its contention that the contract does not contain an express or implied work chart limiting its management prerogative to schedule work which prerogative the City says is non-arbitrable.

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[3]Section 12-307b of the NYCCBL provides, in pertinent part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

[4]Decision No. B-21-87.

[5]Id. at 33.

In addition, the Reply states:

> It is not clear whether the Union is grieving Article XVIII, Section 1, definition of a grievance (contained in the Step III submission) or Article VIII, Section 1, (contained in the request for arbitration as the provision under which arbitration is sought). The Respondent, in its Answer, for the first time, treats this Article as the provision on night shift differential.

Finally, the City attempts to distinguish a decision by this Board cited by the Union finding a similar grievance arbitrable. That case concerned non-payment of overtime for hours worked by Supervising Fire Marshals in a temporary "flop" of duty schedules which varied from regular chart assignments. The City says the earlier case is inapposite in that "[t]here was no discussion in that case whether the contract incorporated a set work chart." The City notes, "[T]he claim [in the instant matter] is whether the chart can be changed ...." The City also distinguishes the earlier case by saying it "examined solely whether a temporary scheduling off the chart created the right to overtime compensation," whereas in the instant matter, "the union is protesting the right to change the tour (presumably permanently] ...." The City describes the grievance here as "clearly distinguishable."

The Union's Position

The UFOA contends the City fails to set forth any valid

challenge to the arbitrability of the Union's grievance. The Union maintains the City presents issues that pertain only to the merits of the grievance, not to substantive arbitrability. These are matters, the Union points out, which are to be considered by an arbitrator, not by this Board.

The Union posits that it has established the requisite nexus between the grievance and the Agreement cited in its Request for Arbitration. First, it says Article III, Section 5, of the collective bargaining agreement clearly addresses the work chart which is the subject of the grievance. It argues that the City agreed in the contract that it had the right to schedule Supervising Fire Marshals in designated squads[6] to duty charts that do not conform to the schedule referred to in Article III; however, for Supervising Fire Marshals not in the designated squads, the Union contends that the Fire Department negotiated away its right to assign them to non-conforming duty charts and is therefore bound to assign them to the contractually negotiated work chart at the contractually specified work rates.

Secondly, the Union contends that those rates include time-and-a-half for overtime, found in Article III, Section 5(B) and a night differential, found in Article VIII, Section 1, calculated as a percentage of base salary predicated upon the

[6]These squads include Juvenile Firesetters, Modified Red Cap, Day Squads and other similar squads or administrative functions assigned to duty schedules that do not conform to the Supervising Fire Marshal duty schedule referred to in Article III.

work chart agreed upon in Article III. Thus, the UFOA says, the right to receive compensation for working the contractually negotiated work chart "emanates directly from ... the collective bargaining agreement."

The Union further contends that the issue of whether the City is permitted to change the work chart unilaterally without additional compensation is for the arbitrator, not this Board,[7] to decide, because whether management prerogative exists to set work assignments unilaterally allegedly goes to the merits of the grievance and requires construction of the collective bargaining agreement, a function of the arbitrator, not this Board.

Having set forth its contention that the City's Petition attempts to argue the merits of the case which more properly are the province of the arbitrator, the Union

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[7]With respect to requests for arbitration, the NYCCBL authorizes the Board to determine the suitability of the issue for resolution by arbitration. It does not authorize the Board itself to decide the merits of a grievance sought to be arbitrated.

The Administrative Code of the City of New York, Section 12-301 et seq., ("New York City Collective Bargaining Law," or "NYCCBL"), as amended, 1980, and as recodified, 1986, at Section 12-309 (Powers and duties of the board of collective bargaining), provides, in pertinent part, as follows:

> a. Board of collective bargaining. The board of collective bargaining ... shall have the power and duty: (3) ... to make a final determination as to whether a dispute is a proper subject for grievance and arbitration ....

nonetheless also proceeds to set forth its own position on the merits.

DISCUSSION

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[8] When challenged to do so, a party requesting arbitration has the burden of showing that the provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[9] Furthermore, when a statutory management prerogative is relied upon, this Board requires the Union to allege sufficient facts to establish a prima facie relationship between the acts complained of and the source of the alleged right.[10] We find that the Union has met its burden here.

Initially, the City argues that its Petition challenging arbitrability of the Union's grievance must be upheld, because the contract clause providing for an average work week of 40.25 hours has not been violated. The City says the

[8]Decisions No. B-47-92 and B-15-90

[9]Decisions No. B-47-92 and B-29-91.

[10]Decisions No. B-19-92, B-75-90 and B-33-88.

Department has made no change in the average number of hours per week or length of tour. The City contends that any changes made in the scheduling of those hours involve matters of management prerogative. Further, the City's Reply denies that the parties' collective bargaining agreement contains an express or implied work chart which would limit its statutory management prerogative to change work schedules.

While we concur that the City possesses management prerogative to make unilateral work assignments within the constraints of a collective bargaining agreement,[11] we note that City's right to make such unilateral changes is tempered by any limitation which the parties themselves may have promulgated in their collective bargaining agreement.[12] When a provision of a contract, such as the one relied upon by the Union herein, refers to "the work chart," and specified exceptions thereto, the use of such an article may arguably express an intent on the part of the drafters to limit management prerogative.[13] The City's contention that the Union failed to demonstrate "how the City has acted in violation of its managerial prerogative concerning work charts" inaccurately states the issue at hand. If, by this, the City means to say that the Union has failed to establish a

[11]Section 12-307b of the NYCCBL.

[12]Decision No. B-65-88.

[13]Id.

contractual limitation on management's right to make unilateral work chart assignments, then reference must be made to the parties' agreement. Again, contract interpretation is the proper function of an arbitrator, not of this Board.

The City's reliance upon a prior Board decision upholding management's right to change work schedules unilaterally is inapposite.[14] There, the Board found that a proposed work chart would change only the starting and finishing times of two tours of duty, that it would not change the length of the tours.[15] Here, the Union alleges the length of tours would indeed change under the new chart. The facts are clearly distinguishable. We find the decision which the City cites to be unpersuasive on the matter of the arbitrability of the present case. In the cited decision, we held, "If [the Union] believes that its members are required by the new chart to work hours in excess of limits prescribed by the contract ... it may challenge such a violation through the grievance and arbitration procedure."[16] The facts of the instant matter do not compel us to change the rule.

The City further contends that the Union has failed to cite a specific clause in the parties' collective bargaining

[14]Decision No. B-21-87.

[15]Id. at 33.

[16]Id. at 34.

agreement which was violated. Despite that, the City's Petition suggests that the clause at issue must be Article III, Section 5, which, in part, spells out the number of hours of an average work week for Supervising Fire Marshals. However, we note that the City's Petition stops short of citing one of the very provisions which the Union expressly alleges was violated, Subsection B of Article III, Section 5, which says that "[o]rdered overtime ... shall be compensable in cash at time and one-half."

The City, in its Reply, speculates on whether the Union is grieving Section XVIII, Section 1, of the contract, which the City describes as the "definition of a grievance," or Section VIII, Section 1, which the City notably fails to describe by its written title, "Night Shift Differential."[17] The City is incorrect when it says, "The Respondent, in its Answer, for the first time, treats this Article as the provision on night shift differential." In fact, the Union's Request for Arbitration cites this Article and seeks, as a remedy, inter alia, payment of night shift differential.

[17]Apparently, the source of the City's confusion here is the Union's Step III grievance submission, which indicated Article XVIII as a partial basis for the Union's claim. The Union's Request for Arbitration, however, twice specifies Article VIII, Section 1, as one of the contractual provisions allegedly violated. It also describes the remedy sought as, in part, payment of overtime and night differential for off-the-chart, night and weekend assignments. Whether or not the Union's reference to Article XVIII is a typographical error, the City has not demonstrated any prejudice which would warrant granting its Petition.

See, also, B-29-89.

The Union appears to base its request for arbitration on the right of its members to receive compensation for work done as a consequence of management's exercise of its right to make assignments as limited by contract. Specifically, the Union's Answer alleges violation of two contract provisions. It states: "The UFOA's Request for Arbitration cited two separate sections in the collective bargaining agreement as having been violated, Article III, Section 5 and Article VIII, Section ...."

As to the first contractual provision, the Union argues that:

> Article III, Section 5 incorporates a contractually agreed upon work chart for Supervising Fire Marshals .... The Fire Department expressly agreed [in Subsection A(i)] that '[t]he Fire Department shall have the right to schedule Supervising Fire Marshals [assigned to certain designated squads] to duty schedules that do not conform to the Supervising Fire Marshal duty schedule referred to in this Article III.' For all other Supervising Fire Marshals, the Fire Department bargained away that right and is bound by the contractually-negotiated work chart.

We are persuaded that this argument by the Union is based upon an interpretation of the agreement which is sufficiently plausible to establish an arguable nexus to the grievance. The merit of that interpretation is a question for an arbitrator.

As to the second contractual provision, the Union clearly presents its argument as to why it is management's duty to compensate for hours worked:

> Article VIII, Section 1, provides for a night differential calculated as a percentage of base salary which is predicated upon the work chart agreed to in Article III. Thus, the right to work the contractually-negotiated work chart and to receive a related nighttime differential in the specified situations emanates directly from those provisions of the collective bargaining agreement.

The City is correct in stating that "[a] mere allegation that the contract was violated is insufficient to create a nexus between the claim and the collective bargaining agreement." Here, however, the Union has stated specific provisions which it believes have been violated. It also describes circumstances which allegedly constitute violations, such as the Fire Department's failure to compensate Supervisory Fire Marshals not assigned to special squads for work performed which varied from "the work chart" so described in Article III, Section 5, of the parties' collective bargaining agreement. We find, therefore, that the Union has established a sufficient nexus between Article VIII and the subject of its grievance.

As to the City's contention that it has a management prerogative to make unilateral work assignments, we reiterate that this prerogative may be limited by contractual provisions. The Union argues that such a limitation exists. The existence of such a limitation is a matter of contract interpretation for the arbitrator, not this Board.

We find that the Union has established a nexus between the City's actions which are the subject of the Union's grievance and the alleged right of Supervising Fire Marshals to receive compensation under Article III, Section 5, and Article VIII, Section 1, of the parties' collective bargaining agreement.

Finally, the City maintains that the Union failed to await a Step III determination. It is well settled that a union cannot be made to return to a level of dispute resolution prior to arbitration if the City has not been deprived of a chance to resolve the matter at an earlier stage.[18] The record clearly indicates that both parties had a chance to resolve this matter earlier in this dispute. While we have long upheld objections to arbitrability based on a failure to adhere to prescribed grievance procedures, those objections can be upheld only where a significant procedural defect deprived the other party of notice of the claim and an opportunity to discuss and resolve the

[18]Decision No. B-6-75.

dispute at an early stage of the labor-management structure.[19]

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

[19]Decision No. B-13-87. Moreover, we note that pursuant to the contractual grievance procedure, the designated management representative "shall" hold a conference within ten days of receipt of a Step III grievance, and the Commissioner "shall" serve his determination, in writing, upon the Union and the grievant within five days after such conference. The grievance procedure further provides that: "In the event that the Department fails to comply with the time limits prescribed herein, the grievance automatically shall be advanced to the next step." Having filed its Step III grievance on June 8, 1992, and not having received any response thereto, it would appear that the Union was expressly authorized under the contract when it submitted its grievance to Step IV on August 8, 1992.

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
December 16, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

STEVEN H. WRIGHT
MEMBER

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MEMBER