City v. UFA, 49 OCB 8 (BCB 1992) [Decision No. B-8-92 (Arb)]

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

-between-

DECISION NO. B-8-92

THE CITY OF NEW YORK,

DOCKET NO. BCB-1457-92

Petitioner, (A-4046-92)

-and-

UNITED FIREFIGHTERS ASSOCIATION,

Respondent.
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DECISION AND ORDER

On January 22, 1992, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance brought by the Uniformed Firefighters Association of Greater New York ("the Union" or "the UFA"). In its request for arbitration filed on January 3, 1992, the Union described the grievance as a disagreement between the parties on the economic value of decreased City contributions to the Fire Department Pension Fund. The Union filed an answer on February 7, 1992. The City filed a reply on February 18, 1992. As part of its reply, the City moved to strike the Union's answer as untimely. On February 21, 1992, the Union filed a letter opposing the City's motion.

BACKGROUND

The Uniformed Firefighters Association and the City are negotiating a successor contract to a collective bargaining agreement covering the term July 1, 1987 to June 30, 1990. The status quo provision of the New York City Collective Bargaining Law ("NYCCBL")[1] requires that the terms and conditions

[1] NYCCBL Section 12-311d. provides that during the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, the employer shall refrain from unilateral changes in wages, hours, or working conditions.

of the prior contract continue during these negotiations. Article XVIII, Section 1 of the Agreement defines the term "grievance" as:

> [a] complaint arising out of a claimed viola-tion, misinterpretation or inequitable appli-cation of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment.

In its request for arbitration, the Union cited a "Letter agreement dated July 3, 1991" as the contract provision, rule or regulation that it claims the City violated. A copy of a letter from the City's then First Deputy Commissioner of Labor Relations to the UFA President, dated July 3, 1991, was attached to the request. The letter reads as follows:

> As you know, A.8619 is pending in the Senate and Assembly. The enactment of A.8619 into law will decrease the City's contribu-tion into the Fire Pension Fund. The com-mencement date of the availability of the portion of the savings attributable to your union realized by the City from the enactment of A.8619 into law, and thereby available for collective bargaining, will be the same as the commencement date of your successor con-tract, July 1, 1990. If we cannot agree as to the translation of those savings into an amount which is available for collective bar-gaining, this issue of the amount of savings attributable to your union from the enactment of A.8619 into law may be submitted to impasse pursuant to the New York City Collective Bargaining Law.

Governor Cuomo signed pension bill A.8619 into law on July 26, 1991.[2] An accompanying legislative memorandum[3] reported that the then-current 8¼% actuarial interest rate assumption for the Fire Department Pension Fund would expire on June 30, 1991. The new law retroactively increased the interest rate assumption from 8¼% to 8½% for the period July 1, 1990 to June 30, 1995. Citing the Chief Actuary of the City's actuarily funded retirement system and pension funds, the memorandum estimated that the resulting reduction in

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[2] 1991 N.Y. Laws Ch. 610, deemed effective July 1, 1990.

[3] 1991 N.Y. Laws Ch. 610 (McKinney, p.A-469).

employer contributions would save the City $9 million during the 1990-1991 fiscal year.

The parties themselves, however, have been unable to agree on the value of savings generated by the passage of A.8619. The Union requests that an arbitrator designated by the Office of Collective Bargaining establish the value of these savings.

POSITIONS OF THE PARTIES

City's Position

According to the City, estimating the value of changes in pension system interest rate assumptions is a managerial right. As such, bargaining over changes in value allegedly involves a subject that is permissive rather than mandatory.

The City claims that it sent the Commissioner's letter to the Union for a limited purpose: to express its willingness to allow this allegedly nonmandatory subject of bargaining to be submitted to an impasse panel with other unresolved issues, should current contract negotiations fail. The City notes that the parties are continuing to meet and bargain with one another, and have not yet reached impasse. Focusing on the letter's final clause ("the amount of savings ... may be submitted to impasse pursuant to the [NYCCBL]"), the City stresses that the Commissioner, a seasoned labor relations expert, would not write the word "impasse" when he actually meant something else. The City insists that it did not and would not agree to adjudicate the value of an interest rate assumption before an impasse is declared in any forum, including arbitration.

In the City's view, the Union's request for arbitration is a disguised attempt to create a single-issue, advance impasse panel. It maintains that such a request is premature, because bargaining has not been exhausted. In addition, the City contends that since the parties are engaged in "package bargaining," it would be improper to divorce one issue from the rest of the package for early submission to an impasse panel.

The City's core argument is that the Commissioner's letter was a unilateral communication and not an agreement. As such, the City contends that the letter cannot form a basis for arbitration on its own, nor does it form a nexus with any other contractual provision or existing departmental

policy or regulation necessary to sustain arbitration. The City buttresses this contention by pointing out that the Union itself could not link the letter to the arbitration procedure. It notes that the UFA answered "N/A" in the section of the request for arbitration form where the moving party is required to state the section of the agreement, rule or submission under which the demand for arbitration is made. Similarly, although the Union answered "yes" when asked whether the parties use a designated contract arbitrator, it added the following footnote:

> While the parties utilize a designated arbitrator for the CBA, this dispute is not covered by the CBA, but by the separate letter agreement submit-ted herewith. Accordingly the UFA requests that OCB designate an arbitrator by means of the selection procedure set forth in Part 6 of the [Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules")].

With respect to its motion to strike the Union's answer, the City refers to Rule 7.8 of the OCB Rules, which requires the responding party to file an answer within ten days after a petition has been served. The City affirms that it served its petition on the UFA by mail on January 22, 1992. Thus, the Union assertedly was required to serve its answer by February 4, 1992. It did not do so, however, until February 7, 1992.

In the City's opinion, the Union could have taken the appropriate step of requesting an extension of time within which to file its answer. Instead, the Union "willfully and blatantly" disregarded the OCB Rules and filed an answer "at their own pleasure." The City argues that this Board should preserve the integrity of the Rules, striking the UFA's answer as untimely. Although it acknowledges that under compelling circumstances an agency may waive its rules, here, according to the City, the Union has advanced no reason, compelling or otherwise, for the rule covering time limits to be waived.

Union's Position

In the Union's view, the Commissioner's letter represented an agreement by which the City would submit a dispute in the value of pension savings to "impasse" voluntarily if the parties could not agree on the amount of money saved by pension bill A.8619. This "agreement," the Union argues, shows that the City was willing to sever the question of value of interest rate assumptions from other issues still being negotiated, and to submit it to an outside third party for early resolution.

The Union acknowledges that the Commissioner's letter contains the term "impasse," which has a specific meaning under the NYCCBL, and it concedes that the law's impasse procedures contemplate the submission of all outstanding matters to an impasse panel at once. It contends, however, that although the parties are willing to continue bargaining on other issues, without resolution of the valuation question, they are negotiating "in a vacuum." This situation, according to the Union, inhibits effective bargaining. It insists that the valuation question must be resolved in order for fruitful negotiations to continue. In the Union's opinion, the most expeditious and administratively economic means of resolving this dispute is to appoint an arbitrator pursuant to Part 6 of the OCB Rules.

The Union concludes by arguing that doubtful issues of arbitrability should be resolved in favor of arbitration. It maintains that arbitration would not be prejudicial to the City, since the Commissioner's letter "clearly indicates the City's willingness" to sever the value of the pension legislation from the rest of the items in bargaining.

Concerning the City's motion to strike its answer, the Union's counsel states that she did not receive the City's petition until January 28, 1992. Her office then personally delivered the Union's answer to the City within ten days. Acknowledging that "technically" the answer may have been two days late, the Union argues that strict compliance with OCB Rule 13.5 is inappropriate, because it received the City's petition six days after it was

mailed, rather than the three days presumed by the Rule. The Union points out that the City has not, and presumably could not, argue that it has suffered any prejudice. It also points out that, "given the current state of the mails," had it chosen to mail its answer on February 4, 1992, in all likelihood the City would not have received the papers until after February 7, 1992. In these circumstances, the Union contends, it did not willfully or blatantly disregard the OCB Rules.

DISCUSSION

Motion to Strike the Union's Answer

Section 7.8 of the OCB Rules requires that "[w]ithin ten (10) days after service of the petition, respondent shall serve and file its answer upon petitioner ...." Rule 13.5 provides that when "service is by mail, three (3) days shall be added to the time period." Saturdays, Sundays, and legal holidays are included in the computation when the period of time to respond is five days or more (Rule 13.4). The City affirms that it mailed its petition to the UFA on January 22, 1992. Thus, Rule 7.8, in conjunction with Rule 13.4 and Rule 13.5, requires the Union to have answered by February 4, 1992. Although the Union served its answer on the City in person rather than by mail, it did not do so until February 7, 1992. As a result, the City asks that we construe the OCB Rules strictly to "preserve their integrity," and strike the Union's answer as untimely.

Considering the relatively short periods of time provided by the rules of practice before this Board, we often and routinely accommodate parties when they request extensions of time for filing papers. On occasion, we have even accepted responsive pleadings that technically may have been a few days late without benefit of an extension request. Often as not, the City has been the party responsible for making a technically late submission. Thus, if we accept the City's position, we recognize that it may fall early victim to the

strict application of the time limits that it is asking us to enforce.

More to the point, we are reluctant to allow a delay of only three days to bar the adjudication of a serious issue on the merits, unless the delay is egregious or that it prejudices the interests of a party. No such harm is apparent here. It is significant that the City opted to serve both its original petition and reply on the Union by regular mail rather than by personal service. Personal service would have shortened the Union's time to answer by three days, and it would have placed the petition in the Union's hands that much sooner.

In its letter opposing the motion, the Union explained that its answer was delayed due to its late receipt of the City's petition. Because of the delay, if the Union had applied for a three day extension of time in which to file an answer, the request could have been, and almost certainly would have been granted.

Under these circumstances, we decline to grant City's motion. This ruling is consistent with our policy, with due regard for due process considerations, to apply our rules liberally and in such fashion as will promote the resolution of real issues rather than the application of technical rules of procedure.[4] We caution the parties, however, that this ruling does not signal our willingness to relax or overlook the OCB Rules. Good practice requires prompt responses to time-limited pleadings, and we will, in an appropriate case, disallow any pleading that is egregiously late or that is shown to prejudice the interests of a party.

[4] Decision No. B-73-88.

Arbitrability

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 question is, does the Commissioner's July 3, 1991 letter to the Union, concerning submission of a pension fund savings dispute to "impasse" if the parties cannot agree on the value of the savings, qualify as a basis for arbitrating that disagreement. For several reasons, we find that it does not.

First, we find that the Commissioner's letter does not qualify as a "provision of this contract or of existing policy or regulations of the Fire Department affecting terms and conditions of employment" [Art. XVIII, Sec. 1]. The City's explanation that the letter was meant to be a unilateral expression of its willingness to submit an allegedly nonmandatory issue to an impasse panel is plausible. The Union's contrary, unsupported declaration that the letter was an "agreement" does not make it so. The UFA submitted no evidence that the parties negotiated the contents of the letter; or that they intended the letter to augment the existing terms of the collective bargaining agreement; or that the letter was the equivalent of an existing policy or regulation of the Fire Department.

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[5] Decision Nos. B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[6] Decision No. B-60-91; B-24-91; B-11-90; B-41-82; and B-15-82.

Second, even if the Union could convince us that the Commissioner's letter was an "agreement," the letter's final clause, by its very terms, limits the forum to which the pension fund savings issue may be submitted. As the City and the Union both realize, the term "impasse" has a very specific meaning under the NYCCBL. The Union offered no support for its belief that the Commissioner of Labor Relations, a recognized expert in the field of public sector labor relations, would have written "impasse" when he actually meant something else. Even if it had, we would be disinclined to permit extrinsic evidence to contradict, vary or modify the meaning of a document where its intent is unambiguous. We will not ignore express terms in a written agreement where the language is clear on its face, as it is in this case.[7]

Finally, we note that our findings thus far are not to be construed as adoption of the City's view that estimating the value of changes in pension system interest rate assumptions is a managerial right that is outside the scope of collective bargaining. We need not reach that question, since the Commissioner has expressed the City's willingness to place the matter before an impasse panel.

For all the above reasons, we find that the dispute herein is not arbitrable. We shall grant the City's petition challenging arbitrability and we shall deny the Union's request for arbitration.

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, and docketed as BCB-1457-92, be, and the same hereby is, granted;

[7] Decision Nos. B-25-90; B-37-80; B-10-79; and B-19-75.

and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association of Greater New York is denied.

DATED: New York, N.Y.
March 26, 1992

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

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MEMBER

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