City v. UFA, 51 OCB 40 (BCB 1993) [Decision No. B-40-93 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the matter of
THE CITY OF NEW YORK,
Petitioner,

Decision No. B-40-93

and

Docket No. BCB-1577-93
(A-4775-93)

UNIFORMED FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK,
Respondent.

DECISION AND ORDER

By letter dated April 21, 1993, the Uniformed Firefighters Association of Greater New York ("the Union") petitioned its contract arbitrator for leave to file a grievance directly at Step IV of the arbitration procedure, alleging an improper change in sick leave procedure. On May 6, 1993, the City of New York and the Fire Department ("the Department"), appearing by the New York City office of Labor Relations, filed a petition challenging the arbitrability of the grievance. The Union filed an answer on May 17, 1993.

BACKGROUND

The Union is the certified bargaining representative of firefighters employed by the Department. In January 1988, the Department issued a policy statement which specified medical

leave reporting requirements for full-duty firefighters.[1] The Department also established a Possible Medical Leave Abuse Program ("PMLA Program") which reviews medical leave taken by firefighters who have taken more than five medical leaves within a twelve-month period. Firefighters placed in the PMLA Program had different medical leave reporting requirements than other, full-duty firefighters.[2]

---

[1] Section 2 of the "Absence Control Policy for Firefighters/Fire Marshals," promulgated in January 1988, provides, in relevant part:

ELIGIBILITY FOR FULL DUTY WITHOUT CLINIC EXAMINATION

2.1 This section is not applicable to members in the Possible Medical Leave Abuse (PMLA) program....

2.3 If a member has less than forty-eight (48) scheduled hours lost to medical leave during the past twelve months, the (City-Wide Medical Leave Desk ("CWMLD")] will advise member that he may forego examination at the Bureau of Health Services. (This privilege is only available for full duty members.) ....

2.4 If a member has forty-eight (48) or more scheduled hours lost to medical leave during the past twelve months for all incidents from home and non-service connected from field or any combination, the CWMLD will inform member to report to the Bureau of Health Services on the next clinic day....

2.7 Without exception, the Bureau of Health Services will retain the right to require members to report for examination regardless of medical leave profile.

[2] Section 4 of the "Absence Control Policy for Firefighters/Fire Marshals," promulgated in January 1988, provides, in relevant part:

POSSIBLE MEDICAL LEAVE ABUSE (PMLA) PROGRAM

4.5.6.1 A member scheduled to work at 0900 hours requesting medical leave shall report to the

(continued...)

On April 16, 1993, the Fire Commissioner ordered a change in sick leave reporting procedure. Previously, non-PMLA firefighters who called in sick were required to report to the Department of Health Services on the following day. Under the new procedure, firefighters who call in sick are required to report immediately to the Bureau of Health Services. Believing that the Department was required to give a week's notice before it instituted such a change, and that it posed potential irreparable harm and a threat to the health and safety of its members, the Union petitioned its contract arbitrator for leave to file a grievance directly at the arbitration step of the grievance procedure.[3]

---

2 (...continued)
Bureau of Health Services not later than 1100 hours of the same day.

4.5.6.2 A member scheduled to work at 1800 hours and requesting medical leave after 0900 hours shall report to the Bureau of Health Services not later than 2000 hours of the same day.

4.5.6.3 A member not working the two platoon system, subject to the provisions of this program, will report to the Bureau of Health Services on the same day of the medical leave request.

4.5.6.4 Any PMLA member unable to report as defined above must contact the Bureau of Health Services ... Clinic Supervisor for <u>each</u> day the member is unable to report.

[3] Article XVIII, § 2 of the collective bargaining agreement, entitled "Grievance Procedure," provides, in relevant part:

> The Union may petition the Impartial Chairman for leave to file a grievance involving potential irreparable harm concerning safety and health directly at Step IV. The
> (continued...)

POSITIONS OF THE PARTIES

City's Position

The City argues that the challenged sick leave reporting procedure was already embodied in section 2.7 of PA/ID 1-88, the January 1988 policy notice on sick leave, which states:

> [w]ithout exception, the Bureau of Health Services will retain the right to require members to report for examination regardless of medical leave profile.

The City also cites Section 4.5.6.1 of the policy notice, which requires "firefighters in the PMLA program requesting sick leave who are scheduled to work at 0900 hours to report to the Bureau of Health Services not later than 1100 hours of the same day." The City further cites Department Order No. 136, dated October 1984, which provides that "off-duty firefighters reporting ill from home ... shall be ordered to report to the Bureau of Health Services forthwith for examination."

The City maintains that since the challenged directive was already embodied in existing policies, no change in policy occurred, no notice was required and no contract provision was violated. For this reason, it contends, the Union has failed to

---

3(...continued)
Impartial Chairman shall have the power to permit such grievance at Step IV for good cause shown or direct said grievance to be instituted at Step III. If the Impartial Chairman determines that the grievance may be properly filed directly at Step IV, the City retains its right to assert all defenses which may properly be raised at Step IV.

establish the required nexus between a provision of the contract and the change in procedure.

The City asserts that the right of the Department to require firefighters to report to the Bureau of Health Services has been determined to be a right reserved to management under the New York City Collective Bargaining Law ("NYCCBL").[4] In support of its argument, the City cites an arbitrator's decision dated November 30, 1988 which states that "the right .... of the Department to monitor the attendance of its members cannot be gainsaid."

Union's Position

The Union claims that the Department directive is a change or alteration of an existing policy or program for which notice was required under the collective bargaining agreement. Since it did not receive a week's notice before the directive was issued, the Union contends, the City has violated Article XVIII, § 7 of the collective bargaining agreement,[5] and a grievance under

---

[4] Section 12-307b of the NYCCBL provides, in relevant part:

> It is the right of the city, or any other public employer ... to ... direct its employees ... and ... maintain the efficiency of governmental operations....

[5] Article XVIII, § 7 of the collective bargaining agreement provides, in relevant part:

> Whenever the Department intends to alter an existing Citywide or Borough policy or program or to establish a new policy or program, the Department shall give the Union at least one week's notice of the intended change or new. implementation, except in

(continued...)

Article XVIII, § 1 of the collective bargaining agreement has been presented. [6]

The Union maintains that implementation of the new directive would constitute an "inequitable application of ... existing policy or regulations of the Fire Department affecting the terms and conditions of employment." It asserts that the new procedure has had an adverse impact on the health and safety of its members and that the new procedure has already had an adverse affect on some firefighters injured in the field. It alleges that "a firefighter who was injured at the scene of a fire went to the hospital with a strained lower back and was told to stay off his feet but was later directed by the Department's doctor to return to work immediately."

Discussion

When a public employer challenges the arbitrability of a grievance, we must first determine whether the parties have obligated themselves to arbitrate grievances and, if they have,

---

5 (...continued)
situations when the Department must act more quickly because of emergency or other good cause....”

[6] Article XVIII, § 1 of the collective bargaining agreement provides, in relevant part:

A grievance is defined as a complaint arising out of a claimed violation ... 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....”

whether that contractual obligation is broad enough to include the act complained of by the Union.[7] Here, the parties do not dispute that they have agreed to arbitrate grievances. The question before us is only whether the instant dispute falls within the scope of their agreement to arbitrate. The burden is on the Union to establish an arguable relationship between the City's actions and the contract provision it claims has been breached.[8]

The Union alleges that the Department violated a provision of the collective bargaining agreement by failing to give one week's notice before implementing a change in an existing procedure. It cites Article XVIII, § 7 of the contract, which requires the Department to give the Union a week's notice when it "intends to alter an existing .... policy or program." The Union argues further that this change represents an inequitable application of an existing policy or regulation under Article XVIII, § 1 of the contract. The only question for us here is whether the Union has demonstrated an arguable relationship between Article XVIII, § 7 and the challenged action.

The City argues that because the cited contract provision is inapplicable, the Union has not established the requisite nexus between the contract provision and the instant dispute. It

[7] Decision Nos. B-55-91; B-20-89; B-19-89; B-65-88.

[8] Decision Nos. B-55-91; B-58-90; B-1-89; B-47-88.

maintains that the directive issued on April 16, 1993 articulated policy that was already in existence and that, since the Union has not cited a rule or regulation that has been changed, there is no contract violation and no nexus.

To demonstrate that its directive was a pre-existing policy, the City cites Section 2.7 and Section 4.5.6.1 of its January 1988 policy statement. Upon examination of the cited provisions, we find that Section 2.7 does not specify when firefighters are required to report for medical examination, but only that the Department retains the right to require them to do so. Moreover, although Sec. 4.5.6.1 specifies that members requesting sick leave must report for examination by 1100 hours on the same day, it applies only to firefighters in the PMLA Program.

The City claims that its challenged policy is also contained in Department Order No. 136, which requires firefighters requesting medical leave to report "forthwith" for examination. We find that the order is not relevant to the instant dispute because it applies to off-duty firefighters at home, while the Union claims that the new directive applies to firefighters who are injured on duty.

The City argues that the disputed policy has previously been determined to fall within a managerial right granted under § 12-307 of the NYCCBL. In support of its argument, it cites a previous arbitration award, which states that "the right and responsibility of the Department to monitor the attendance of its

members cannot be gainsaid..." While such an award may be helpful in guiding the parties and their contract arbitrators, it is not binding on this Board. Furthermore, in the instant case, the Union does not seek to limit a management right, but to establish a nexus between the challenged action and a contract provision which it contends gives it the right to a week's notice before the exercise of certain management rights.

In their collective bargaining agreement, the parties have agreed that the Department will give the Union one week's notice before it alters an existing policy or program. The contract does not specify what constitutes a "change"; whether such notice must be given in oral or written form; or if it is necessary for the Union to specify which rule or regulation is earmarked for "intended change" when claiming this right, as the City's petition argues. To grant the City's petition, we would be required to decide whether a change in procedure may constitute a change in policy under the language in the agreement. This is a matter of contract interpretation, which should be decided by an arbitrator. We find that the Union has demonstrated an arguable nexus between the disputed action and the cited provision of the contract. Accordingly, the instant petition is dismissed.

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 New York City Office of Labor Relations be, and the same hereby is, denied; and it is further

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

Dated: New York, New York
September 22, 1993

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS GIBLIN
MEMBER

STEVEN H. WRIGHT
MEMBER