City v. UFA, 53 OCB 5 (BCB 1994) [Decision No. B-5-94 (Arb)]

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

-between-

DECISION NO. B-5-94

THE CITY OF NEW YORK,

Petitioner,

-and-

DOCKET NO. BCB-1620-93
(A-5211-93)

UNIFORMED FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK,

Respondent.
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DECISION AND ORDER

By letter dated September 2, 1993, the Uniformed Fire-fighters Association of Greater New York ("the UFA" or "the Union") submitted a request for the expedited arbitration of a grievance to Milton Rubin, the contractually designated Impartial Chairman. The grievance concerns the deployment of Fire Department medical officers at certain fire emergencies. By letter dated November 15, 1993, the Union again wrote to the Impartial Chairman, urging him to schedule a hearing on its grievance at his earliest convenience. On December 2, 1993, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of the grievance with this Board. On December 17, 1993, the Union filed an answer and memorandum in opposition to the City's petition. The City did not submit a reply.

BACKGROUND

Article XVIII of the parties' collective bargaining agreement contains the grievance procedure. A grievance is defined 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.

Under Section 3. of the grievance procedure, the Union has a right to bring a contractual dispute directly to arbitration when it involves safety and health:

> 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 [arbitration]. . . . If the Impartial Chairman determines that the grievance may be properly filed at Step IV, the City retains its right to assert all defenses which may be properly raised at Step IV.

Fire Department Regulation 31.3 concerns the duties and authority of the Fire Department's medical officers. Section 31.3.1 of the Regulations reads as follows:

> Medical officers on emergency duty shall respond to all third or greater alarms within areas assigned, and to any other emergency requiring the immediate presence of a medical officer. They shall report to the officer in command, obey his orders, and remain on duty until dismissed.

On August 31, 1993, a serious fire broke out on Staten Island requiring three alarms. A number of firefighters were injured while fighting the fire and no medical officer was present at the scene. The Union's grievance relates directly to this event. It asserts its right to bring the matter of the absence of a medical officer directly to arbitration because of the "irreparable harm concerning safety and health of . . . firefighters" due to the City's "failure to send a physician to the scene of a three-alarm fire on Staten Island on August 31, 1993."

POSITIONS OF THE PARTIES

City's Position

The City challenges the arbitrability of the Union's grievance on the ground that the assignment of medical officers involves management's statutory right, under Section 12-307b. of the New York City Collective Bargaining Law ("NYCCBL"), to decide staffing matters and job assignments.[1] It notes that in Decision No. B-4-89, this Board held that levels of staffing was a nonmandatory subject of bargaining, and that a minimum staffing provision in the parties' previous collective bargaining agreement involved a management right that could be deleted from the successor agreement. The City expresses its concern that if the UFA was to prevail in arbitration, the decision on whether to assign an emergency duty medical officers to emergencies or to three alarm fires would be automatic, taking away management's discretion on

[1] NYCCBL Section 12-307b. reads, in part, as follows:

> b. It is the right of the city ... to maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; ... 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... .

when to order such deployments.

The City concludes that the collective bargaining agreement has not, in any way, circumscribed its right to make job assignments. Therefore, according to the City, the instant grievance is non-arbitrable.

Union's Position

The UFA contends that its grievance has nothing to do with the minimum staffing provisions that this Board permitted the City to delete from a previous agreement in Decision No. B-4-89. Instead, according to the Union, the grievance is based upon an alleged violation of a departmental regulation, which assertedly is within the contractual definition of an arbitrable grievance.

The Union does not deny that the City possesses certain statutory managerial rights, including the discretion on how to assign personnel, but it contends that this right can be restricted by contract or by the Department's own regulations. In this case, according to the Union, the provisions of Regulation 31.3.1 amount to just such a restriction. In the Union's view, the regulation required the appearance of a medical officer at the Staten Island fire.

Justifying its application to take the grievance directly to arbitration instead of first exhausting the lower steps of the contractual grievance procedure, the Union argues that there can be no dispute that the absence of a doctor at the scene of a serious fire emergency "creates a potential irreparable harm concerning health and safety." In the UFA's opinion, once it has identified a viable grievance involving safety and health, it assertedly has the right, under Section 3. of the contractual grievance procedure, to seek the Impartial Chairman's authorization to file the grievance with him directly.

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.[2] 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.[3] Thus, we must decide whether there exists a nexus between the absence of a medical officer at a three alarm fire, and a provision in the parties' collective bargaining agreement that relates to such an absence.

The City does not deny that Regulation 31.3.1 concerns the deployment of Fire Department medical officers, and that the regulation is in effect currently. It contends, however, that their deployment involves matters of staffing and job assignments, and, as such, is within the City's managerial prerogative to direct its employees and to determine how its governmental operations are to be conducted. The Union counters that the parties have restricted the Fire Department's discretion in the manner in which it must deploy medical officers by incorporating a reference to violations of departmental regulations in their contractual definition of a grievance.

In arbitrability decisions concerning the more general question of management's right to deploy personnel, we often have said that the parties to a collective bargaining agreement may agree voluntarily to restrict management's prerogative when ordering assignments and transfers.[4] In this case, Regulation 31.3.1, which, on its face, requires medical officers to respond to all third or greater alarm fires within their assigned areas, arguably narrows the statutory right of management to assign or not assign

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[2] Decision Nos. B-33-93; 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.

[3] Decision Nos. B-24-91; B-76-90; B-73-90; B-52-90; B-31-90; B-11-90; B-41-82; and B-15-82.

[4] See Decision Nos. B-33-93; B-23-92; B-19-89; B-47-88; B-24-88; B-4-87; B-10-86; and B-7-67.

medical officers at its sole discretion. Because the parties' contractual definition of a grievance includes complaints arising out of a claimed violation of a departmental regulation, the UFA has provided a sufficient nexus between the act complained of, the Department's failure to assign a medical officer to the three alarm fire on Staten Island, and a departmental regulation concerning the deployment of medical officers to such fire scenes.

Whether the Department, in fact, violated Regulation 31.3.1 under the circumstances surrounding the Staten Island fire is a question that goes to the merits of the dispute. We have long held that it is not our function to decide the merits of a grievance.[5] Thus, consistent with our well-established policy, we hold that the UFA is entitled to have this dispute heard by the Impartial Chairman, who will decide whether a violation of Regulation 31.3.1 occurred.

In passing, we note that the City, in its petition challenging arbitrability, informs us that the Impartial Chairman has not yet ruled on whether this grievance concerns potential irreparable harm, which would allow the grievance to be filed at Step IV directly. It is not clear whether the City's purpose in doing so was to create an issue of noncompliance with the lower steps of the grievance procedure, because it makes no further reference to this point. Since the City has not pursued this aspect of the case, we need not dwell upon it, other than to point out that this, too, would involve a matter of contract interpretation. We would leave it for the arbitrator to decide whether, under the circumstances of a particular case, a sufficiently serious safety and health issue is at stake to warrant the grievance being filed directly at Step IV, according to the parties' evident intent to hasten the final resolution of certain kinds of disputes.[6]

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[5] Decision Nos. B-23-92; B-70-90; B-33-90; B-17-90; B-33-87; B-27-84; B-1-84; B-18-83; B-20-79; B-10-77; B-19-74; and B-12-69.

[6] Decision No. B-33-93.

Finally, we note the striking similarity between the instant case and the question of the arbitrability of an earlier UFA grievance concerning chauffeur training that we decided in Decision No. B-33-93, issued on September 22, 1993. In that case, the Union based its position on the fact that references to chauffeur training appeared in both the job description for firefighters, appended to the contract, and in a departmental regulation, AUC-254R. The City's main argument was that its statutory managerial rights authority allowed it to decide unilaterally the quality and quantity of training for its employees. We said that although the City generally enjoys discretion in deciding how to assign and train its personnel, the parties to a collective bargaining agreement may agree voluntarily to restrict management's prerogative in such matters. Thus, we held that the inclusion of the firefighters' job description in the contract, and the reference to chauffeur training in departmental regulation AUC-245R, arguably narrowed the statutory right of management to assign non-supervisory firefighters to train other firefighters as chauffeurs, and provided a sufficient nexus for arbitration.

Here, as in the previous chauffeur training case, we find that the Union has met its burden of establishing an arguable relationship between the subject of this grievance, medical officer deployment, and Fire Department Regulation 31.3.1. We emphasize that our finding in no manner reflects this Board's view on the merits of the Union's underlying claim.

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-1620-93, 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, in Docket No. BCB-1620-93 be,

and the same hereby is granted.

DATED: New York, N.Y.
March 24, 1994

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

ANTHONY COLES
MEMBER

DENNISON YOUNG, JR.
MEMBER