

City & NYFD v. UFA, 63 OCB 25 (BCB 1999) [Decision No. B-25-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration Between

CITY OF NEW YORK and the NEW YORK
CITY FIRE DEPARTMENT,

Petitioners,

-and-

UNIFORMED FIREFIGHTERS
ASSOCIATION,

Respondent.

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DECISION NO. B-25-1999

DOCKET NO. BCB-2039-99
(A-7578-99)

DECISION AND ORDER

On February 5, 1999, the City of New York (“City”) and the New York City Fire Department (“Department”) filed a petition challenging the arbitrability of a grievance filed by the Uniformed Firefighters Association (“Union” of “UFA”), on behalf of members in Rescue Squad No. 5 (“Rescue 5”), Engine Company No. 41 (“Engine 41” or “41 engine”), and all Special Operations Command (“SOC”) units. The grievance concerns the scheduling of roster staffing overtime for the members of Rescue 5, Engine 41, and other SOC units as required in All Units Circular No. 287 (“AUC-287” or “circular”). The Union asserts that the alleged violation is a continuing one.

Following a request for an extension of time, the Union filed its answer and a memorandum of law on March 4, 1999. After two requests for an extension of time, the City

filed its reply on April 5, 1999. The Union filed a surreply on April 14, 1999.¹

Background

The underlying grievance in this proceeding generally concerns the allocation of staffing - and overtime worked to achieve that staffing -- in certain units of the New York City Fire Department. “Roster staffing” refers to the allocation and assignment of firefighters throughout the Department. (AUC-287, Paragraph 1) AUC-287 describes the roster staffing system. AUC-287 specifies the minimum number of firefighters required to be on duty at the start of any given tour and the manner in which gaps in staffing levels are to be closed. (AUC-287, Paragraph 2) The Department’s Office of Staffing Assignment (“OSA”) determines the levels at which all Divisions in the Department will operate and orders adjustments to staffing to maintain the required levels. (AUC-287, Paragraph 3) Each Battalion reports to the Division Staff Coordinator (“DSC”) the number of firefighters who are scheduled to work overtime (§ 3.2.1), and the DSC, in turn, includes those scheduled for overtime when reporting staffing projections to the OSA. (§§ 3.2.2 and 7.4.3)

AUC-287 applies throughout the Department, including SOC units, which consists mainly of the Rescue companies, like Rescue 5 in the instant case, a hazardous materials (“HAZMAT”) technician unit located in Staten Island, and squad companies, like Engine 41, also a HAZMAT technician unit. The paragraph entitled “Scheduled Overtime” reads as follows:

¹ The sur-reply addresses an issue not relevant to the arbitrability issue here. Consequently, neither it nor the statement in the City’s reply concerning the *amount* of overtime which various members of the Department are scheduled to work is considered herein.

- 7.4.1 Each firefighter, except for probationary firefighters in their first six months of employment and firefighters on final leave,² will have the opportunity to work 96 hours of scheduled overtime.
- 7.4.2 The 96 hours of overtime will be worked according to a schedule established by the Department and must be actually worked by each eligible firefighter to receive the overtime compensation. Mutual exchanges of these overtime tours will only be permitted where the exchange is completed within thirty days of the scheduled overtime tour. The Department may, in its discretion, schedule the overtime during low availability periods.
- 7.4.3 Scheduled OT will be used to augment existing rosters[;] the number of members scheduled for OT will be reported by the Battalion to the DSC. The DSC will include these members when reporting projected staffing to OSA. Schedules for this overtime will be issued to OSA, DSC, Divisions, Battalions and Units.

Staffing of the Rescue companies requires that at least four Rescue-trained firefighters (RTF) be assigned to a Rescue company at the start of each tour. (§ 8.3.1) If a Rescue company has fewer than that, surplus RTFs from other Rescue companies are assigned to the deficient company, and, if no surplus exists, roster staffing overtime “will be” authorized to bring the staffing up to four RTFs in the company. (§ 8.3.1.A)

The firefighters’ collective bargaining agreement for the period from January 1, 1995, to May 31, 2000, to which the City and the Union herein are parties (“contract”), 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. . . .” (Article XVIII, § 1)

In the instant matter, the contractual grievance procedure was invoked at Step III when

² The petition states “annual” leave. The text provided as an exhibit to the petition states “final” leave.

the Union filed the group grievance on August 7, 1998. The grievance alleges a continuing violation of Article XVIII, § 1, of the contract, and AUC-287 as a result of what the Union asserts is a continuing failure of the Department “to schedule overtime for roster staffing to members assigned to [R]escue 5, 41 [E]ngine, and to all units in [S]pecial [O]perations [C]ommand (SOC).”

On November 19, 1998, a Step III hearing was held. The Step III hearing officer denied the grievance in her decision of December 16, 1998.³ She reasoned that § 7.4 provides only that firefighters will be given an opportunity to work 96 hours of roster staffing overtime according to a schedule established in the discretion of the Department. She noted that the grievance does not claim that Firefighters in the referenced companies had been denied their 96 hours of roster staffing overtime. She concluded that AUC-287 does not specify that roster staffing overtime must be scheduled on an annual basis. Thus, she found no violation of AUC-287 and denied the grievance.

On December 28, 1998, the Union filed a request for arbitration, citing AUC-287 and Article XVIII, § 1, of the contract as the provision, rule or regulation allegedly violated. The Union describes the remedy sought as the scheduling of “overtime for affected members.”

Positions of the Parties

³ The Union contends that the Step III hearing officer incorrectly stated its position.

City's Position

The City claims that the Union is contesting the Department's managerial prerogative to schedule overtime on a quarterly rather than an annual basis. The City contends, first, that the Union's complaint is not grievable under the contract because there arguably is no contractual limitation on the Department's right to assign overtime as it sees fit.

Secondly, the City argues that, even if the complaint were grievable, the Union has failed to establish the requisite nexus between the scheduling of overtime and any provisions of the contract or AUC-287. The City asserts that the Union, in its answer, interprets § 7.4.2 of AUC-287 as "impl[y]ing a yearly delineation of the [roster staffing overtime] hours," thus, placing restrictions on management's right to schedule roster staffing overtime. The City disputes the Union's argument by asserting that the circular states only that firefighters will have the opportunity to work 96 hours of scheduled overtime. The circular contains no provision mandating overtime scheduling on the basis of any particular time period, quarterly or annually, the City asserts. The Union has admitted that roster staffing in the SOC units has heretofore been scheduled on a quarterly basis, the City contends, pointing to the Union's demand that AUC-287 be read literally "to provide for the scheduling of roster staffing overtime on a yearly basis" in the same way it assertedly has been "universally applied throughout the Department with the exception of SOC units."

The City also argues that the Union has failed to articulate the requisite nexus for still another reason. Contrary to the Union's position, the City contends, §§ 7.4.3 and 8.3.1 of AUC-287 place no restrictions on the Department's right to assign roster staffing overtime to fill

manpower needs.⁴ Therefore, the City argues, the Department is within its managerial right to designate the first 24 hours of overtime worked as roster staffing overtime rather as minimum manning overtime, which is another category of overtime which firefighters may be called upon to work. The City argues that nothing in § 8.3.1 or any other section of AUC-287 prevents the Department from requiring a firefighter initially to accrue 24 hours of roster staffing overtime in each quarter before accumulating minimum manning overtime. Because nothing in that section states that management must assign minimum manning overtime, the City contends that § 8.3.1 bears no relation to the instant grievance.

Thirdly, the City argues that the request for arbitration cites only Article XVIII, § 1, of the contract as the provision allegedly violated. The City argues that the definitional section of the grievance procedure does not, by itself, support a claim.

Union's Position

The Union argues that the contractually provided grievance procedure permits it to challenge the interpretation of, not only the contract itself, but also existing policy or regulations of the Department which affect terms and conditions of employment. AUC-287 is “existing regulation” of the Department, it continues, and is a proper subject for a grievance based on the Union asserts is the Department’s failure “to universally follow its yearly schedule of roster

⁴ The City states that roster staffing overtime throughout the Department is “almost always used to fill vacancies rather than occurring when there is an excess amount of personnel on a tour.” Thus, the City asserts, there is little substantive difference between the use of roster staffing overtime and minimum manning overtime to fill vacancies.

staffing overtime opportunities.” By this, the Union asserts that “[t]he Department has modified the yearly schedule by offering it to a limited group of members, on a quarterly instead of on a yearly basis.”

It relies, in part, on Paragraphs 7.4 of AUC-287 for its assertion that roster staffing overtime need not be assigned on a quarterly, rather than on an annual, basis. The Union notes that AUC-287 provides that each firefighter will have the opportunity to work 96 hours of scheduled overtime, which admittedly will be worked according to a schedule established by the Department, but the Union contends that AUC-287 does not specify that these hours are to be worked “in blocks of 24, broken down quarterly.” The Department’s schedule “covers the year and does not create any exceptions,” the Union maintains. By its “silence” with respect to exceptions, the Union states, the language of AUC-287 “implies a yearly delineation of the hours.”

In addition, the Union relies, as well, on an affidavit by William Mirro, UFA Secretary and grievance chairman. Mirro states that, when staffing levels are low in a particular company, the Office of Staffing Assignment “details” firefighters to another company at the start of the tour in order to staff that company with the minimum number of firefighters required by AUC-287. The Department locates firefighters to fill in any temporary vacancies by a couple of methods, he explains. One, he states, is to call up (“hire”) firefighters not previously scheduled to work. These firefighters are “hired on an overtime basis,” according to § 3.3 of AUC-287, to bring the units which have insufficient staff up to the required level of staffing, on an *ad hoc* basis.

Apart from this method of providing for staffing at the required levels in staffing is what

Mirro calls a “different provision, Section 7, [wherein] the administration of roster staffing is discussed.” Mirro draws a distinction between § 7.4, which he asserts addresses “the opportunity to work 96 hours of [roster staffing] scheduled overtime, *as opposed to* immediate availability to meet minimum manpower levels” for which he refers to § 3 (Staffing Needs and Details). (Emphasis supplied.) He cites § 7.4.3 specifically as supporting the Union’s contention that roster staffing overtime is intended to be used only to *augment* existing rosters and § 3 as documenting “how the Department will find firefighters to meet minimum manning levels.”

Mirro contends that roster staffing overtime is not intended to be used to fill “expectant vacancies,” but he contends that is the practice with respect to SOC operations. He points to an order, dated January 4, 1999, from Raymond Downey, Chief of Rescue Operations, to SOC company commanders directing that “the first 24 hours of overtime in each quarter will be credited to Roster Staffing Overtime” and further directing that “minimum manning overtime” [“MMOT”] would be offered to a member of a SOC unit only after the member has completed the 24 hours of roster staffing overtime in each quarter. Mirro contends that § 3 of AUC-287 “contains no exclusions for SOC members and should be applied universally throughout the Fire Department.” He further states that, on limited basis, there would be no problem with detailing firefighters to SOC units to meet the minimum manning requirement. “[U]sing roster staffing to fill manpower before MMOT,” Mirro asserts, “is what the UFA is complaining about in this grievance.” Mirro states the Union’s position as requesting that the Department adhere to the RSOT schedule printed for the “*entire*” Fire Department. (Emphasis provided.)

The Union does not contest the City’s right to schedule overtime. It objects to what it

contends are unilaterally imposed limitations for a “select” group of firefighters. In its response to the City’s reply, the Union asserts that the City “does post each year, and has posted for the past several years,” a yearly schedule but that SOC units allegedly “have previously been excluded from following the yearly schedule.”

As the remedy, the Union seeks to have AUC-287 applied according to a literal reading of the circular.

Discussion

It is public policy, expressed in the New York City Collective Bargaining Law (“NYCCBL”), 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 Moreover, the resolution of disputes concerning contractual intent and application must be left for an arbitrator to decide.⁷

Here, we must decide whether a nexus exists between the act complained of, the Department’s decision to assign firefighters at issue here to work roster staffing overtime on quarterly rather than annual basis, and certain provisions in departmental regulations and in the

⁵ See *City of New York v. Uniformed Firefighters Association of Greater New York*, Decision No. B-33-93 at 7 and cases cited therein at n. 2.

⁶ *Id.*

⁷ *Id.* at 8 and cases cited therein at n. 5.

parties' collective bargaining agreement, which are the sources of the Union's asserted right to arbitrate.⁸ The Union argues that, in the SOC units, scheduled, roster staffing overtime is being used to fill expectant vacancies rather than to "augment" existing rosters. The import of this appears to be an asserted loss of opportunity for certain firefighters to earn MMOT in SOC units.

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.⁹ In a recent decision, we said that, where the contractual definition of a grievance encompasses a claimed violation, misinterpretation or misapplication of "existing policy" of the employer affecting terms and conditions of employment, a change by the employer in its past practice may be grievable under the contractually provided grievance procedure.¹⁰

In this case, the City does not deny that the references to roster staffing overtime assignment in AUC-287 exist. It contends, however, that AUC-287 does not contain any requirement that roster staffing overtime must be assigned on an annual basis as the Union would have it. The Union, on the other hand, asserts that the Department has restricted its discretion in

⁸ With respect to the City's argument that the Union failed to cite a source of a substantive right to arbitrate, we note that the Union does in fact cite AUC-287 as such a source, in the request for arbitration.

⁹ *Id.* at 8 and cases cited therein at n. 4.

¹⁰ *See, e.g., City of New York and Health and Hospitals Corporation, Decision No. B-39-98* (grievance regarding a change in past practice of the employer to one requiring physician unit members to pay for automobile parking, determined arbitrable where contract defined grievance as, *inter alia*, claimed violation, misinterpretation or misapplication of existing policy or orders of the employer).

the manner in which it may assign overtime to its firefighters in the SOC units. It has done so, the Union maintains, by the practice referenced in the Mirro affidavit, which in turn references the Downey order allocating the first 24 hours of overtime worked in SOC commands to roster staffing overtime rather than to minimum manning overtime.

In this case, the provisions in AUC-287 cited by the Union here, most notably, § 7.4 (“Scheduled Overtime”), as well as the departmental practice referenced in the Mirro affidavit arguably narrow the statutory right of management to assign overtime.

In conclusion, for the above reasons, we find that the Union has met its burden of establishing an arguable relationship between the subject of this grievance, the scheduling of roster staffing overtime and minimum manning overtime assignments, and AUC-287. Whether AUC-287 was intended to limit the assignment of RSOT to “augment existing rosters” rather than to meet minimum staffing levels is a question for an arbitrator, and not this Board. 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-2039-99, 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 the matter docketed as A-7578-99, be, and the same hereby is, granted.

Dated: July 12, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER