UFA v. City, 7 OCB 8 (BCB 1971) [Decision No. B-8-71 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, I.A.A.F.F.,
Petitioner

DECISION NO. B-8-71

DOCKET NO. BCB-75-70

vs .

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

The Petitioner Union, as exclusive representative, invokes the contractual remedy of arbitration, seeking redress of the claimed grievances personal to three named grievants. Issue was joined by the service of respondent's answer and petitioner's reply thereto. Oral argument on the the issues raised by the pleadings was had before the Board of Collective Bargaining. Both petitioner and respondent filed briefs in support of their respective positions.

The pleadings, briefs, and oral arguments of the parties may be summarized as follows:

By a Notice of Petition, dated September 25, 1970, and a Petition, verified the same day, the grievants, in their capacity as individuals, instituted an Article 78 proceeding in the Supreme Court, New York County, against the Fire Commissioner and the Comptroller, alleging inter alia, "a direct violation" Of "Article XII (sic) of an Agreement dated June 12, 1968, between the Fire Department, City of New York, and the Uniformed Firemen's Association, representing the uniformed forces of the Fire Department," the claimed violation resulting "to the prejudice and detriment of petitioners." (Paragraphs Twenty-third and Twenty-fourth of Petition) (emphasis supplied).

Specifically, the alleged violation of the collective bargaining agreement consisted in receiving in evidence over objection, at a departmental disciplinary hearing, the transcripts of the interrogation of the individual grievants obtained during an investigation prior to the disciplinary hearing. The relief requested by the individual grievants in such action (now pending in the Appellate Division, First Judicial Department) is vacatur of the dismissal and fine determinations made by the Fire Commissioner and a judicial decree that two of the petitioners be reinstated with back pay and that the fine imposed upon the third petitioner be reimbursed to him.

It may further be noted that the Article 78 petition refers to the following: That each of the petitioners was served with departmental charges and specifications in August 1969 (Paragraph Fourteenth of Petition); that the hearings were conducted in March 1970 (Paragraph Twenty-second of Petition); and that the Fire Commissioner's determinations, affecting all three grievants, were made on May 29, 1970 (Paragraphs Thirty-fourth through Thirty-eighth, inclusive, of Petition).

Approximately one month following the commencement of the Article 78 proceeding -- and many months following the service of departmental charges, the conclusion of departmental hearings, and the Fire Commissioner's determination -- the Union, by a petition dated October 21, 1970, requested arbitration claiming the existence of a dispute concerning "a breach" of "Article XXI"[1] of the collective bargaining agreement "relating to a violation of the right of a fireman to representation by counsel."

[1] Though the Article 78 Petition refers to a breach of "Article XII" there is no question that "Article XXI" is intended the former being an obvious inadvertence. In fact, it is Article XXI of the collective bargaining agreement that refers to "Right of Representation," the article allegedly violated.

It is conceded that neither the Union nor any of the three named grievants have filed a written waiver with the Director of the Office of Collective Bargaining. Section 1173-8.0(d) of the NYCCBL provides as follows:

> "As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."
>
> (Emphasis added)

The City, in the brief supporting its answer, argues the requirement that each of the grievants sign written waivers, waiving their right to submit the underlying dispute to another forum, is a condition precedent to securing arbitration (§1173-8,Od of NYCCBL; §8(a)(4), Executive Order No. 52; and Rule 6.3b of the Consolidated Rules), and that absent such waivers the Board lacks jurisdiction to entertain the Union's petition requesting arbitration.

The City also contends, that an employee having availed himself of a statutory remedy seeking judicial relief, may not thereafter, or simultaneously, avail himself of the benefit of the contractual remedy.

The Union, in its brief, in urging that the dispute is arbitrable, concedes that: "We have a situation in this case of a breach of a contract with a specific remedy for such a breach also provided for in the contract," (Page 7 - emphasis supplied)

The Union contends that the Article 78 remedy and the contractual arbitral remedy will afford different forms of relief. The former would involve a review and possible reversal of the disciplinary determination while the latter would involve a determination concerning "the content of the record which was the basis for the decision of the Fire Department Trial Examiner" and a correction of that record by "expunging" the departmental pre-hearing, questions put to the grievants. The distinction pin-points the fact that the grievants made a deliberate choice between different forums with knowledge of all the facts necessary to make an election as between the statutory remedy and the contractual arbitral remedy. Success in the Article 78 proceeding may mean the reinstatement of two of the grievants and reimbursement of the fine to the third grievant, while success in the arbitration proceeding may mean the correction of the record upon which the decision of the departmental trial examiner was based. It follows that, if the record is corrected by an arbitrator's award, and the alleged objectionable parts expunged, it may be that the Fire Commissioner's disciplinary determination will have lost its underpinnings -- the record.

While we have noted the waiver requirement and the respective contentions of the parties thereto, we do not pass upon the question of the failure of the grievants to file waivers herein because we decide this case on a different ground.

The grievants in the Article 78 proceeding elected to plead, in part, a breach of the contract as a basis for obtaining reversal of the Commissioner's

determination, and in the arbitration request, while the same breach of contract is pleaded, a result is sought which, on its face, is different than the result sought in the Article 78 proceeding. This is a classic illustration involving the doctrine of election of remedies (cf. Terry et al v. Manger, 121 NY 161). Having commenced an action invoking a statutory remedy for redress of an alleged contractual breach prior to commencing the arbitration proceeding, they may not now be permitted, through their representative, to invoke the arbitral remedy. The commencement of the Article 78 proceeding, with knowledge of the contractual remedy known to the grievants, is an election of remedies concerning the alleged breach of contract.

The relief sought in the Article 78 proceeding encompasses all the relief being requested in the arbitration proceeding with respect to the alleged breach of contract and is totally sufficient to grant the grievants everything they are requesting by way of relief.

Accordingly, we find and conclude that the matter is not arbitrable.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York city Collective Bargaining Law, it is hereby

O R D E R E D , that the petition herein be, and the same hereby is, dismissed.

DATED: New York, N.Y.
August 6, 1971.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

TIMOTHY W. COSTELLO
M e m b e r

EDWARD SILVER
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HARRY VAN ARSDALE, JR.
M e m b e r

N.B. Mr. Schmertz did not participate in the decision herein.