Uniformed Firefighers Ass'n, **75 OCB 18 (BCB 2005)**
[Decision No. B-18-2005] (Docket No. BCB-2454-05) (A-10884-05)**.**

Summary of Decision: The City challenged the arbitrability of a UFA claim that FDNY violated the parties' collective bargaining agreement, a Stipulation known as the Roster Staffing Agreement, and existing policies when FDNY reduced the number of five-firefighter companies at the start of a tour from 60 to 11. The Board determined that because the Stipulation contained no independent dispute resolution mechanism and was not incorporated into the parties' agreement, there was no nexus between the reduction of five-firefighter companies and the agreement; nor was the complained of action reasonably related to cited policies. Therefore, the petition was granted and arbitration denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

CITY OF NEW YORK &
THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioner,

- and -

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Respondents.

DECISION AND ORDER

On February 2, 2005, the City of New York and the Fire Department of the City of New York ("City" or "FDNY" or "Department") filed a petition challenging the arbitrability of a grievance brought by the Uniformed Firefighters Association of Greater New York ("UFA" or "Union"). The request for arbitration alleges that when, on December 1, 2004, the Chief of

Operations issued a memorandum ("Memorandum") by which the Department reduced the number of five-firefighter engine companies at the start of the tour from 60 to 11, he abused his discretion and violated the parties' collective bargaining agreement ("CBA"), a Stipulation of Settlement between the parties, known as the Roster Staffing Agreement ("Stipulation"), and various Department policies. The City argues that the CBA, the Stipulation, and the policies do not provide a source of right to arbitrate the issue presented and thus the Union cannot establish a nexus between the reduction of engine companies and the cited documents. The Union counters that the Stipulation is a source of right and that the Union has established such a nexus. This Board finds that because the Stipulation contains no independent dispute resolution mechanism and is not incorporated by reference into the CBA, no nexus exists between the action complained of and the CBA. Furthermore, the complained of action is not reasonably related to the cited policies. Thus, we grant the petition challenging arbitrability and deny arbitration.

BACKGROUND

During negotiations for a successor agreement to the FDNY and UFA's 1984-1987 CBA, the City announced its intent to delete from the CBA a requirement that engine companies be staffed by no fewer than five firefighters per tour. After several months of safety impact hearings before this Board, on January 31, 1990, the Department implemented a Roster Staffing Program. On March 26, 1990, approximately two months later, the UFA filed a scope of bargaining petition (docketed as BCB-1265-90), alleging that the program as implemented differed from the proposal that the Board had ruled upon and created a threat to the safety of firefighters and an unduly burdensome workload. After more hearings were held but before the Board issued a

decision, the parties entered into the Stipulation on January 30, 1996.[1]

Under the Stipulation, the UFA agreed to withdraw its scope of bargaining petition, and the Department agreed to designate 60 engine companies (C + 60) to be staffed with five firefighters at the outset of each tour, with the rest of the engine companies staffed with four firefighters at the outset. Further, under the Stipulation, if the average rate of absent firefighters during the previous 365 days is greater than 7.5% at the beginning of a month, the Commissioner of FDNY has the discretion to reduce the number of five-firefighter engines from C + 60 to C + 11.[2] Specifically, Paragraph 6 of the Stipulation provides:

> The Department, on the first day of each month, will review firefighter availability for the preceding 365 days. In the event that firefighter average medical leave exceeds the "designated absence rate" for the preceding 365 day period, the Department will discontinue the staffing level of C + 60 and ensure only a staffing level of C + 11 effective 09:00 hours the following day (the second day of the month). Such staffing level will remain in effect for the remainder of the month. The following month another review of medical leave for the preceding 365 days will occur. When a monthly review results in a return to a level at or below the "designated absence rate," the Department will resume staffing at C + 60 effective 09:00 hours the following day (the second day of the month). For the purposes of this agreement, the parties agree that the average medical leave of 7.50% is the "designated absence rate" and includes both line-of-duty and non-line-of-duty medical leave. In the event that the "designated absence rate" for the

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[1] Previous cases connected to the Roster Staffing Program include: *Uniformed Firefighters Ass'n*, Decision No. B-41-91; *Uniformed Firefighters Ass'n*, Decision No. B-39-90; *Uniformed Firefighters Ass'n*, Decision No. B-70-89, *aff'd, Unif. Firefighters Ass'n v. Office of Collective Bargaining*, No. 1065/90 (Sup. Ct. N.Y. Co. Nov. 26, 1990); *Uniformed Firefighters Ass'n*, Decision No. B-4-89, *aff'd, Unif. Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dep't 1990).

[2] "C" refers to all engine companies that have four firefighters at the start of a tour. The term "C + 60" means that 60 engine companies have five firefighters at the start of the tour, and "C + 11" means that 11 engine companies have five firefighters at the start.

> monthly review exceeds 7.50%, but is less than 7.60%, the suspension of the staffing level of C + 60 will be left to the discretion of the Fire Commissioner, or if so designated, the Chief of the Department.

The Stipulation also includes a waiver provision in paragraph 11, which states:

> By entering into this Stipulation of Settlement, the Union agrees to waive its right to file any litigation or grievance regarding the Department Roster Staffing program as set forth in the case docketed with the Office of Collective Bargaining as BCB-1265-90, or with regard to the practical impact of this agreement until January 31, 2006. Should a court of competent jurisdiction or any other administrative entity, except for enforcement purposes, grant the right to initiate any such litigation or grievance within that time, this agreement will be terminated immediately. Should litigation or a grievance commence, this agreement or any portion thereof shall not be admissible in any court proceeding or other administrative forum. . . .

Paragraph 14 reads:

> This Stipulation of Settlement shall not be offered as evidence, nor introduced for any other purpose, in any other forum, including but not limited to, judicial, administrative, and/or arbitration proceedings **EXCEPT** in judicial proceedings for the sole purpose of enforcing the obligations and restrictions as contained herein. (Emphasis in original.)

In addition, the Stipulation provides that All Units Circular ("AUC") 287, entitled "Roster Staffing," and Personnel Administrative Informational Directive ("PA/ID") 5-74, entitled "Firefighters Minimum Manning Policy Guidelines," policies that state the manner in which the FDNY deploys firefighters, must be amended to reflect the agreements in the Stipulation. A provision concerning Roster Staffing overtime is also included. The parties agreed that the terms of the Stipulation are effective from January 31, 1996, until January 31, 2006.

Since January 31, 1996, the parties have entered into two collective bargaining

agreements: one, executed on October 14, 1997, covering January 1, 1995, to May 31, 2000, and the second, executed on September 11, 2003, covering June 1, 2000, to May 31, 2002. The parties are currently in status quo pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-311(d).[3]

According to the City, on or about December 1, 2004, the Department found that during the previous 365 days the absence rate had risen above the designated rate of 7.5%, specifically to 7.5022%. On that day, Chief of Operations, Salvatore J. Cassano, issued the Memorandum directing that citywide staffing levels of firefighters be reduced from C + 60 to C + 11. The Memorandum includes policies and procedures for the deployment of firefighters.

The Union cites to the parties' CBA regarding grievance and arbitration procedures. Article XVIII, § 1, 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."

The UFA originally filed the grievance in this case at Step III on December 14, 2004. At the same time, the UFA filed another grievance, which is based on the same December 1, 2004, Memorandum but which has distinct issues and is addressed by the Board separately. *See Uniformed Firefighters Ass'n*, Decision No. B-19-2005 (finding arbitrable the question whether the Department violated the CBA and Department policies because the language in the Memorandum directs units with fewer than four firefighters to respond to alarms in a manner allegedly different from the way these units responded previously). On December 29, 2004, the

[3] NYCCBL § 12-311(d) provides for the maintenance of status quo during negotiations for a successor agreement.

Union filed a request for injunctive relief at the Supreme Court, Kings County. The Union sought an Order enjoining FDNY both from removing the fifth firefighter from 49 engine companies pending the determination of the grievances filed and from implementing procedures concerning "understaffed" units, the issue in the companion case.

On January 3, 2005, the Union filed a request for arbitration alleging that the Commissioner's reducing the number of five-firefighter engines from 60 to 11 was an abuse of his discretion. On February 1, 2005, the Department issued Order No. 10, directing that the staffing levels increase to C + 60, as per AUC 287, effective February 2, 2005, because the medical leave average was "no longer in excess of 7.5%." Also on February 2, 2005, the City filed its challenge to arbitrability.

The Supreme Court, in a decision issued on February 3, 2005, analyzed the waiver clause in the Stipulation and determined that the parties did not intend to give up "the right to argue" over the enforcement of the Stipulation "in the venue where labor disputes are usually resolved." *Cassidy v. Scoppetta*, No. 41983/04, slip op. at 3 (Sup. Ct. Kings Co. Feb. 3, 2005) (Douglass, J.).[4] The Court granted the Union's application to "restore and retain the ladder companies to five firefighters to respond to alarms pending the resolution of the grievance . . . ." *Id.* Furthermore, in an Order dated February 28, 2005, the Court directed that pending arbitration of the instant grievances, FDNY is enjoined from invoking the Stipulation in order to reduce the number of five-firefighter engines from the C + 60 level. On March 4, 2005, the City appealed the Supreme Court's February 3 decision to the Appellate Division, Second Department, and invoked its statutory right to stay the judgment and maintain the status quo. The Union cross-

[4] Both the Union and the City have provided the Board with the court records.

appealed. (Docket No. 2005/02283.) On March 24, 2005, the City similarly appealed the Supreme Court's February 28 order (Docket No. 2005/03062.) These cases have been consolidated, and the Supreme Court decision is stayed pending appeal.

The remedy sought by the Union before this Board is that the City return five-person engine companies to 60 as mandated under the Stipulation and the Department's policies and that the Board permit an arbitrator to decide the legitimacy of the two-month suspension of the C + 60 level of staffing.

POSITIONS OF THE PARTIES

City's Position

The City argues that the issue in this case is moot because on February 2, 2005, the Department reinstituted C + 60 staffing, which, at the time the record was closed, continued in effect. Since the only requested relief – restoration of the C + 60 staffing – was implemented, the request for arbitration should be denied as moot in the interest of sound labor relations.

The City also contends that the Union must establish a nexus between the action complained of and the source of the right being invoked. According to the City, the Union claims that the source of right is not the CBA, which simply defines "grievance," but the Stipulation. However, the City says, the Stipulation specifically gives the Commissioner of FDNY the authority to reduce the number of five-firefighter engines when absence rates go above 7.5%, and, in its request for arbitration, the Union concedes that the Commissioner has that discretion. Thus, according to the City, the Union is limiting the issue to the question whether the Commissioner abused his discretion, but the Stipulation contains no right to grieve

such an issue. Furthermore, nothing in AUC 287 or PA/ID 5-74 gives the Union a source of right to grieve the reduction of the number of five-firefighter engines at the outset of the tour.

On the contrary, the Union, by paragraph 11 of the Stipulation, waived its right to grieve any of the issues concerning the Roster Staffing Program except for enforcement. Here, the City asserts, the claim is not enforcement but abuse of discretion; therefore, the Board cannot compel the parties to arbitrate.

Union's Position

The Union argues that the case is not moot because the Union is attempting to enforce the Stipulation, and the reduction to C + 11 staffing can recur. The only question for this Board is arbitrability, and whether the City's current restoration of the number of five-firefighter engine companies moots the issue is a question for the arbitrator.

The Union also asserts that it has established a nexus between the grievance and the source of right. The CBA's definition of grievance includes a claimed "violation, misinterpretation, or inequitable application" of provisions of the CBA or of FDNY's existing policies or regulations. Here, the Stipulation has been violated or inequitably applied. The Union states that this Board has found that when a union and employer intend to "prescribe the union-employer relationship," both the supplemental agreements and the underlying contract "constitute the collective bargaining agreement." The Union does not assert that the CBA explicitly incorporates the Stipulation by reference. In its request for arbitration, the Union cites to AUC 287 and PA/ID 5-74 as existing policies that have been violated.

The Union lists the ways in which the Department, in effect, abused its discretion by applying the provisions of the Stipulation inequitably: the absence rate was only 22/1000th

higher than 7.5%, the Union does not know how FDNY calculated and used the data, December is a busy month for firefighters, the Department did not provide flu shots, the Department had recently closed several engine companies, the work force is inexperienced after September 11, 2001, and members also have anti-terrorism responsibilities. In addition, the December 1, 2004, Memorandum did not state the reasons for reducing the staffing levels. The Department has acted insensitively, and the equities lie in favor of the UFA.

Finally, the Union contends that the waiver language of the Stipulation does not preclude the Union from enforcing the Stipulation, and enforcement is what the Union requests here. Reading the waiver provision in this claim in any other manner would work a "particular hardship on the UFA," which agrees that it waived its right to file any grievance or litigation – including a practical impact claim regarding safety or other improper practice – directly challenging the agreement. The Board should adhere to public policy favoring arbitration.

DISCUSSION

As a threshold matter, we do not find that the question concerning the remedy in this case renders the arbitrability issue moot. In arbitrability cases, when the City's prior correction of a problem afforded the grievants the only apparent remedy available and the City therefore claimed that the issue is moot, we have nonetheless stated that questions of remedy are for an arbitrator to decide. *See District Council 37, Local 2507*, Decision No. B-47-97; *Social Service Employees Union, Local 371*, Decision No. B-39-89; *Communication Workers of America and Civil Service Bar Ass'n*, Decision No. B-5-74, *rev'd in part sub nom. Burnell v. Anderson*, N.Y.L.J., Nov. 26, 1975, at 8 (Sup. Ct. N.Y. Co.), *reversal rendered moot by amendment to* CSL § 100(1)(d), *see*

Rockland County v. Rockland County Unit, CSEA, 74 A.D.2d 812 (2d Dep't 1980), *aff'd*, 53 N.Y.2d 741 (1981). Questions of remedy are distinct from those of arbitrability, and "arguments addressed to questions of remedy are not relevant to the arbitrability of the grievance." *District Council 37, Local 2507*, Decision No. B-47-97 at 9; *District Council 37, Local 1549*, Decision No. B-32-96 at 6. Moreover, it is for an arbitrator to determine the propriety of a remedy sought by a union and to fashion one appropriate to the circumstances. *Social Service Employees Union, Local 371*, Decision No. B-39-89 at 18-19. In this case, the City's argument that C + 60 staffing levels have been restored and therefore no remedy can be granted is not relevant to this Board's determination of arbitrability.[5] Thus we do not find the issue moot.

Addressing the merits of the case, we find that it is not arbitrable. While the policy of the NYCCBL, pursuant to § 12-302, is to promote arbitration, we cannot create a duty if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Local 858, International Brotherhood of Teamsters*, Decision No. B-30-84 at 4. To determine arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employment Union,* Decision No. B-2-69; *see also District Council 37, AFSCME*, Decision No. B-47-99, or, in other words, "whether there is a reasonable relationship between the

[5] *Patrolmen's Benevolent Ass'n*, Decision No. B-22-79, cited by City, is an improper practice case, which, because of its procedural posture, poses different questions concerning mootness from those presented in arbitrability cases. To the extent that any arbitrability cases issued by the Board use the standard enunciated in improper practice decisions, such as *Correction Officers Benevolent Ass'n*, Decision No. B-41-98, we now clarify that for arbitrability cases, this Board follows the standard noted in the text above.

subject matter of the dispute and the general subject matter" of the agreement. *New York State Nurses Ass'n,* Decision No. B-21-2002 at 8.

Here, there is no dispute that the parties' CBA provides for grievance and arbitration procedures. Thus, the question is whether a reasonable relationship exists between the reduction of the number of five-firefighter engines and the CBA or cited policies.

Article XVIII, § 1, of the CBA defines the term "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 terms and conditions of employment." The Union argues that this definition encompasses the Stipulation and cites to two cases in which the Board found that a supplemental agreement was incorporated into the contract so that the supplemental agreement was a source of right for the purposes of arbitration. However, in one, *The Committee of Interns and Residents*, Decision No. B-6-76, the separate agreement concerning disciplinary proceedings specifically described how provisions in the CBA should be applied and thus became part of the CBA. In the other, *Social Services Employees Union, Local 371,* Decision No. B-4-72 at 3, the parties' supplemental agreement incorporated by reference the grievance and arbitration provisions of the underlying contract. Further, this Board found significant that the supplemental agreement terminated on the same date as that in the contract, thus making the agreements "interrelated." Conversely, in *Correction Officers Benevolent Ass'n*, Decision No. B-50-96, we found that a supplemental agreement concerning staffing could not be a source of right for the purposes of arbitration since the supplemental agreement was silent as to its duration and since the parties had entered into two successor bargaining agreements without incorporating the supplemental agreement. *See also Local 1320,*

District Council 37, Decision No. B-14-77.

Here, nothing in the Stipulation or CBA indicates that the parties intended the Stipulation to fall under the definition of "grievance." The Stipulation is not a policy or regulation and is not otherwise incorporated into the contract. Indeed, the parties specifically determined that the terms of the Stipulation would be effective from January 31, 1996, until January 31, 2006. During that time, two CBAs were in effect, the latter now in status quo. Unlike the situation in *Social Services Employees Union*, Decision No. B-4-72, here we do not consider the Stipulation and the CBA "interrelated." Furthermore, the Stipulation does not include an independent dispute mechanism. Thus, neither the CBA nor the Stipulation indicates that the parties intended that they employ grievance and arbitration procedures to resolve their differences on the subject matter in the Stipulation, and the Stipulation is not a source of right for the purposes of arbitration.

In addition, the Stipulation provides that the FDNY must staff engine companies at a level of C + 60 as long as the absence rate remains below 7.5%. The Union agrees that the Commissioner has discretion to reduce the staffing level to C + 11 if the absence rate rises above 7.5% but asserts that the Commissioner abused his discretion by applying the provisions of the Stipulation inequitably. Nothing in the Stipulation limits the Commissioner from acting once the absence rate goes above the designated number – no matter by how much – and nothing requires the Commissioner to give an explanation for his actions. The Union may believe that the Commissioner acted insensitively because December is a busy month for firefighters or the workforce is inexperienced; however, such action is not reasonably related to the language of the Stipulation.

Moreover, the Union complains about the decision itself to reduce the number of five-firefighter engines rather than about the implementation of staffing levels, as described in the AUC and PA/ID. Thus, while the AUC and PA/ID are policies or regulations under the CBA's definition of "grievance," *see Civil Service Bar Ass'n*, Decision No. B-5-2005 at 10-11, the record does not establish a nexus between the claim of abuse of the Commissioner's discretion and these policies.

As to the question of the waiver clause in the Stipulation, this Board has found in other circumstances that a union or its members may waive the right to arbitration by specific language in a document. *See, e.g.*, *District Council 37, Local 2507*, Decision No. B-41-2002 (stipulation of settlement of disciplinary charges waiving arbitration for future misconduct); *Communications Workers of America, Local 1180*, Decision No. B-20-2000 (provision in collective bargaining agreement providing that management's decision on a specific issue is final); *Detectives Endowment Ass'n*, Decision No. B-10-99 (Patrol Guide's finality clause stating that employer's decision is not subject to arbitral review).

Here, the Union agrees that it did waive its right to initiate litigation or grievance and arbitration procedures that directly challenge the Stipulation or raise practical impact claims. Indeed, the Stipulation specifically provides in paragraph 11 that the Union agrees to waive its right to file grievances and litigation regarding the Roster Staffing Program except for enforcement purposes. Rather, the Union says, its abuse of discretion claim is to enforce the Stipulation, and failing to read its claim in this manner would pose a particular hardship on the UFA. We find that on its face the Stipulation provides that the Commissioner has discretion to reduce the level of staffing from C + 60 to C + 11 when the absence rate of firefighters goes

above 7.5% and that the waiver provision does not include language that permits arbitration when the Commissioner does reduce the level, as he did in December 2004 and January 2005. The Union, after many years of litigation, knowingly and without coercion, signed the Stipulation agreeing to the waiver clause.

In addition, paragraph 14 of the Stipulation prohibits its introduction to "judicial, administrative, and/or arbitration proceedings except in judicial proceedings for the sole purpose of enforcing the obligations and restrictions as contained herein." (Emphasis added.) The Supreme Court in *Cassidy v. Scoppetta* stayed FDNY's actions until the arbitration procedures could be completed. This Board, having sole jurisdiction to determine arbitrability under NYCCBL § 12-309(a)(3), finds that this case is not arbitrable because the Union has not shown a reasonable relationship between the Commissioner's reduction of staffing and the Stipulation or cited policies.[6] We read the Stipulation to say that a party seeking to enforce the provisions may do so in judicial proceedings. Thus, we grant the City's petition and deny arbitration.

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[6] NYCCBL § 12-309(a) provides:
The board of collective bargaining . . . shall have the power and duty:
* * *
(3) on the request of a public employer or a certified or designated employee organization which is party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter. . . .

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 Fire Department of the City of New York and docketed as BCB No. 2454-05, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association and docketed as A-10884-05, hereby is denied.

Dated: June 20, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

M. DAVID ZURNDORFER
MEMBER