City v. L.854, UFA, 25 OCB 36 (BCB 1980) [Decision No. B-36-80] (Arb)

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

THE CITY OF NEW YORK, DECISION No. B-36-80

Petitioner, DOCKET NO. BCB-426-80
-and (A-1047-80)

UNIFORMED FIRE OFFICERS ASSOCIATION,
LOCAL 854,

Respondent.
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DECISION AND ORDER

On May 18, 1980, the Office of Collective Bargaining received a Request for Arbitration, dated May 9, 1980, in which the Uniformed Fire Officers Association, Local 854, International Association of Firefighters, AFL-CIO (the "UFOA") sought to arbitrate a grievance concerning the transfer of Lieutenant David G. Maxwell ("Lt. Maxwell") from Ladder Company 103 of the Fire Department (the "Department") of the City of New York (the "City").

The demand for arbitration was made under Article XIX of the collective bargaining agreement between the parties for the period July 1, 1978 to June 30, 1980 the "Agreement").

On May 22, 1980 the City filed a Petition Challenging Arbitrability (the "Petition") on the principal ground that the direction of employees and assignment of personnel is a management right and, hence, is not arbitrable. On June 19,

1980, the UFOA filed its Answer (the "Answer") denying the City's contentions.

Nature Of The Grievance

Based on the pleadings and annexed exhibits in this case, it appears that on or about April 17, 1980, Lt. Maxwell, an 18 year veteran of the Department and a lieutenant since 1974, together with 39 other lieutenants, was transferred from Ladder Company 103 where he had been assigned for three years. Lt. Maxwell claims that his transfer was in the nature of disciplinary punishment. An Administrative Law Judge had found Lt. Maxwell not guilty of allowing alcoholic beverages into quarters, such finding occurring at an unspecified date "immediately preceding his transfer."

The UFOA filed a grievance, dated April 18, 1980, directly at Step III of the grievance procedure, requesting primarily reinstatement of Lt. Maxwell to Ladder Company 103. A Step III hearing was conducted on April 24, 1980 before Deputy Fire Commissioner Howard R. Silver and by letter dated April 30, 1980, Deputy Commissioner Silver rendered his decision denying Lt. Maxwell's grievance on the principal ground that the decision to transfer Lt. Maxwell "was a management decision and was in no way a result of Lt. Maxwell's being found not guilty." In his decision Deputy Commissioner Silver stated that "no proof to substantiate" Lt. Maxwell's claim of disciplinary transfer was presented. On the other

hand the Department showed that on two occasions Lt. Maxwell was "not properly supervising his men, thus reducing his effectiveness as a company officer in his present assignment." In reaching his decision, Deputy Commissioner Silver stated the following:

> "Again, the decision to transfer was a management decision and was in no way result of Lt. Maxwell's being found not guilty. The Department has shown that Lt. Maxwell was not singled out for transfer; that he was part of a large group of men being transferred; and that such transfer was justified under the circumstances."

POSITION OF THE PARTIES

The City's Position

The City maintains that this dispute is not subject to arbitration under the Agreement for three reasons:

First, there has been no violation of Article XVII (Vacancies) of the Agreement which reads as follows:

> "In filling vacancies, the Department recognizes the importance of seniority (measured by time in the Rank) provided the senior applicant has the ability and qualifications to perform the work involved. However, the Department's decision is final." (Emphasis added.)

Citing the Board's decision in B-10-79, the City maintains that the emphasized language cited means "a decision made by the Department pertaining to subjects covered by this provision of the agreement is final and not subject to the

grievance procedure."

The City next asserts that there has been no violation of Article XVIII of the agreement. That provision states in part the following:

> "It is the policy of the Fire Department of the City of New York to secure for all employees their rights and privileges as citizens in a democratic society."

The provision then continues to delineate guidelines for the conduct of departmental interrogations, interviews, trials and hearings. As there is no specific mention of transfer procedures or criteria, the City maintains that "Respondent has failed to establish a relationship between the source of the alleged right and the grievance to be arbitrated."

The City's final argument is that there has been no violation of Article XIX. (Grievance Procedure) of the Agreement which in relevant part reads as follows:

> "A grievance is defined as a complaint arising out of a claimed violation, mis-interpretation 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."

Since there is no mention of a wrongful discipline, the City asserts that "[p]ursuant to the agreement between the parties, Respondent cannot grieve a wrongful disciplinary action against a member of the unit."

The UFOA's Position

The UFOA concedes that concerning the application of seniority considerations in filling vacancies under Article XVII of the Agreement, the City's decision is final. It maintains however that "A policy previously established by the City has been violated." (Answer ¶16).

Paragraph 10 of the "Policy Regarding Assignment and Transfer of Uniformed Personnel" (hereinafter referred to as the "transfer policy") provides as follows:

> "Unacceptable behavior and performance in violation of the Regulations of the Department are frequently of such a serious nature that, in the opinion of the superior officers in command of the unit, it is necessary to effect temporary reassignment pending the outcome of formal disciplinary procedures to avoid a loss of administrative and operational effectiveness in the department. In these instances, members may be reassigned pending the outcome of the trial."

Since this provision authorizes only "temporary reassignment pending the outcome of formal disciplinary procedures," the UFOA asserts that Lt. Maxwell's permanent reassignment in the absence of formal disciplinary procedures constituted a violation of the transfer policy. (Answer ¶18). Such an alleged violation of policy, asserts the UFOA, is grievable under Article XIX, quoted above, which specifically includes as grievances claimed violations of "existing policy or regulations" of the Department.

The UFOA also argues that Article XVIII's individual rights

provisions have been violated as well as Chapter 26 of the Regulations for the Uniformed Force of the Fire Department of the City of New York (hereinafter referred to as the "Regulations"). Article XVIII, although previously quoted, again states that,

> "It is the policy of the Fire Department of the City of New York to secure for all employees their rights and privileges as citizens in a democratic society."

Contrary to the City's position, the UFOA maintains that Article XVIII does deal with matters of discipline, including disciplinary hearings and disciplinary records. (Answer ¶23). Such matters of discipline are covered in detail in Chapter 26 of the Regulations which, according to the UFOA, provide that "disciplinary action may be taken only following presentation of charges and opportunity for hearing." (Answer ¶24). Here no charges were brought nor was a hearing conducted. The transfer of Lt. Maxwell thus was a penalty in violation of Chapter 26 of the Regulations and Article XVIII.

DISCUSSION

Preliminarily it is noted that Section 1173-2.0 of the New York City Collective Bargaining Law ("NYCCBL") states that:

> "It is hereby declared to be the policy of the city to favor and encourage final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

However, while it is the policy of the NYCCBL and this Board to

favor arbitration of grievances, the Board cannot create a duty to arbitrate where none exists, nor "can it enlarge a duty to arbitrate beyond the scope established by the parties in their Contract." B-10-79.

In determining arbitrability, the Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy in question. Thus, the authority of the Board to find a matter arbitrable rests upon the contractual obligation incurred by the parties to arbitrate such disputes.

Here, there is no question that the parties have included a grievance procedure in their collective bargaining agreement culminating in final, binding arbitration, (See Article XIX). It is also clear, however, that the parties have agreed in Article XVII that the Department's decisions concerning the filling of vacancies is "final" and, hence, is not subject to the grievance arbitration procedure.

In addition, the parties have agreed in Article XIX that a claimed violation of "existing policy or regulations of the Fire Department affecting the terms and conditions of employment" is subject to such procedure. Here, Lt. Maxwell claims that the Department violated both its transfer policy and its disciplinary Regulations both of which affect the terms and conditions of employment.

The City's argument rests primarily on our decision in B-10-79. There the Board ruled that the Department's right to adopt a transfer policy under the contract between the City and the Uniformed Firefighters Association ("UFA") and the content of that policy was not subject to arbitration because that contract contained a vacancy clause which read as follows:

> "In filling vacancies, the Department recognizes the importance of seniority (measured by the time in the Department) provided the senior applicant has the ability and qualifications to perform the work involved. However, the Department's decision is final. (Emphasis added)

The UFA vacancy provision is thus substantially identical to the UFOA provision here at issue. As the two vacancy clauses are substantially identical, the City asserts that if the adoption of a transfer policy is non-arbitrable because of contract language reserving such a decision to management, the alleged violation of that policy is also non-arbitrable.

The Board held in B-10-79 that the City properly exercised its right under the contract to act unilateral on the matter of vacancies and validly adopted certain written policy with regard to vacancies. The Board did not rule, however, that the Department may, with impunity, ignore and violate that written policy. Moreover in this case the parties have agreed and the contract clearly states that where it is alleged that the Depart-

ment has ignored or violated written policy, that allegations presents an arbitrable grievance.

In the exercise of rights granted it under contract language substantially similar to that dealt with in B-10-79, the Department has adopted a written policy with regard to vacancies. The UFOA here does not complain, as the UFA did in B-10-79, that the Department his refused to bargain over the content of that policy. In the instant case, the UFOA complains that the action taken with regard to Lt. Maxwell is in violation of the then current written transfer policy of the Department, specifically ¶10. Whether or not the allegation is true is not a matter for the Board to decide. The parties have provided in this collective bargaining agreement that such issues are to be decided in arbitration. We will accordingly direct that this matter be submitted to arbitration.

Similarly, the UFOA has stated a proper grievance under Article XIX by asserting violation of Chapter 26 of the Department's Regulations concerning discipline. The UFOA's allegation of a nexus between the prior disciplinary proceeding and the transfer of Lt. Maxwell is sufficient to raise an arbitrable issue as to the possible violation of Chapter 26 of the Department's Regulations on discipline, specifically those sections of Chapter 26 that call for formal preparation of charges and the granting of an opportunity for hearing. Since

the Department chose to adopt such written or not they have been violated is a matter for an arbitrator to decide.

The Board, therefore, concludes that Department violated either its transfer policy or its Regulations on discipline when it transferred Lt. Company 103 are matters that are arbitrable under the grievance-arbitration clause contained in the Agreement.

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

ORDERED, that the petition of the City arbitrability should be, and the same hereby is it is further

ORDERED, that the UFOA's request for arbitration should be, and the same hereby is granted.

DATED: October 11 1980
New York, New York

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLLINS
MEMBER

JOHN D. FEERICK
MEMBER

FRANKLIN J. HAVELICK
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD J. CLEARY
MEMBER