OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- - - - - - - - - - - - - - - - - x

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-8-81

Petitioner,

DOCKET NO. BCB-450-80 (A-1113-80)

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

- - - - - - - - - - - - - - - - - x

DETERMINATION AND ORDER

District Council 37 (hereinafter D.C. 37 or the Union) filed a request for arbitration dated August 15, 1980 alleging that "the punitive transfer of grievant is an arbitrary, capricious and wrongful disciplinary action in violation of the collective bargaining agreement." The City of New York through its Office of Municipal Labor Relations (hereinafter the City or OMLR) filed a petition challenging arbitrability on September 8, 1980, urging that the request for arbitration be denied as the Union had made neither a specific claim of violation of the contract or of an agency rule or regulation nor a specific claim of wrongful disciplinary action. In its answer, filed after receiving an extension of time until October 3. 1980, D.C. 37 set forth facts which it alleges demonstrate that the transfer of grievant's work location was in the nature of a disciplinary action and was wrongful. The City filed a reply on October 6, 1980 and the Union submitted a final response on October 15, 1980.

FACTUAL BACKGROUND

The following facts, provided by the Union, are uncontroverted. Joseph Acevedo, the grievant, is a motor vehicle operator (hereinafter MVO) employed by the New York City Police nepartment. The grievant was stationed in the 48th Precinct in the Bronx and, prior to the transfer which is the subject of the grievance, was the senior MVO in the precinct. Grievant is a single parent with three children. His assignment to the day tour permitted him to be at home when his youngest child was not in school.

On January 30, 1980, Mr. Acevedo was involved in an argument with a precinct lieutenant over proper assignments and duties. Later that day he was suspended and, the following day, formal written charges were issued against him. Shortly thereafter, he was reinstated.

Several months later, the grievant was involved in a second argument with the.lieutenant. Again formal charges were issued. In addition, however, Mr. Acevedo was transferred to the Midtown South Precinct in Manhattan and was assigned to the 3:00 p.m.-11:00 p.m. and 7:00 a.m.-3:00 p.m. tours. Despite the grievant's protests in meetings with his superiors that the transfer worked a hardship on his family, the transfer decision was not rescinded.

By letter dated July 17, 1980, the president of grievant's local (Local 983) informed the OMLR review officer that "our principal allegation-is that grievant's rights have been violated in that he was arbitrarily and capriciously transferred by the Police Department." By letter to the president of Local 983 dated July 25, 1980, OMLR confirmed that the grievance had been denied at Step III without a conference.[1] Subsequently, the instant request for arbitration was filed by D.C. 37.

POSITIONS OF THE PARTIES

Union Position

D.C. 37 alleges that the MVO unit contract to which the City and Union are parties was violated when the Police Department transferred the grievant for disciplinary purposes. Specifically, the Union cites Article VII, Section 1, which defines the term "grievance" to include, inter alia:

> (E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75 (1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

[1] Only the initial submission of the grievance and OMLR's Step III decision are provided. We have no other information concerning the processing of the grievance at the lower steps.

The Union notes that grievant is a permanent competitive employee, covered by Section 75 (1) of the Civil Service Law, upon whom written charges have been served. D.C. 37 concludes that the transfer must be deemed a wrongful disciplinary action since it involves penalizing the grievant by an assignment to a job site and tours of duty which create a hardship, and for the further reason that the grievant's behavior did not warrant the imposition of any disciplinary action.

The Union argues that, in any case it is wrongful to use the mechanism of transfer as a disciplinary penalty, citing in support of this proposition Rule 6.1.3 of the Rules and Regulations of the City Personnel Director. Rule 6.14.3 provides as follows:

> General Requirements
>
> Every transfer, other than a functional transfer, shall require the consent, in writing of the proposed transferee and of the respective heads of the agencies concerned therewith and the approval of the city personnel director.

The Union further asserts that arbitrators in both the public and private sectors have ruled on the question presented herein. D.C. 37 quotes Elkouri and Elkouri who state in their treatise, How Arbitration Works, that "the right to transfer as a form of discipline appears to be definitely limited."[2]

[2] F. Elkouri and E. Elkouri, How Arbitration Works (3d ed. 1973) at 531.

The Union seeks as a remedy for the grievant nullification of the transfer, reassignment to his original work location, and compensation for added travel expenses.

City Position

The City contends that the instant grievance does not state a wrongful disciplinary action within the meaning of Article VII, Section I(E) of the MVO unit contract-because that section triggers an entirely different grievance procedure from the one pursued by the grievant and Union herein. OMLR refers to the Union's conclusion that its "grievance ... may be taken to arbitration pursuant to Article VII, Sections 2 and 4 of the contract."[3] The City notes that, on the contrary, Section 2 expressly excepts wrongful disciplinary claims from the procedure prescribed therein[4] and that Section 4 sets forth the procedure to be followed for the pursuit of Section l(E) type grievances. The preamble of Section 4 reads as follows:

[3]Union answer, para. 13.

[4]The preamble to Article VII, Section 2 of the contract states:

> The Grievance Procedure, except for paragraphs (D) ("A claimed improper holding of an open-competitive rather than a promotional examination"] and M ["A claimed wrongful disciplinary action..."] of Section 1, shall be as follows: .... (Emphasis added)

> In any case involving a grievance under Section 1 (E) of this Article, the following procedure shall govern upon service of written charges of incompetency or misconduct:....

Since Section 4 prescribes preliminary steps that were allegedly not followed by the grievant or Union and requires waivers which allegedly were not provided, OMLR contends that the request for arbitration must be denied.

With respect to the Union's reliance upon Rule 6.1.3 of the Rules and Regulations of the City Personnel Director, the City notes that the contract specifically excludes disputes involving these rules and regulations from the scope of the grievance procedure or arbitration.[5]

OMLR also points to the fact that the contract is altogether silent on the subject of transfer to support its demand that the petition challenging arbitrability be granted.

---

[5]Article VII, Section 1(B) defines "grievance" as follows and makes the following exclusions:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration; .... (Emphasis added)

DISCUSSION

The sole issue for resolution in this case is whether D.C. 37 has stated a grievance under Article VII, Section l(E) of the MVO unit contract to which the City and Union are parties. In its pleadings, the Union has argued and OMLR has countered arguments concerning the propriety of the grievant's transfer. However, these arguments go to the merits of the controversy and we have long held that it is the role of an arbitrator and not of the Board to determine the merits of a dispute.[6] Our role is to decide only whether the asserted grievance is arbitrable, a question which requires a determination, first, that the parties are obligated to arbitrate their controversies and second, that the obligation, if it exists, is broad enough in scope to include the particular controversy presented.[7]

The City and D.C. 37 are parties to a collective bargaining agreement which includes a grievance procedure culminating in a provision for final and binding arbitration. It is thus evident that the parties have agreed to arbitrate controversies as defined in their contract. Insofar as applicable herein, the term "grievance" is defined as "a claimed wrongful disciplinary

[6]Decisions Nos. B-2-77; B-1-75; B-19-74.

[7]Decisions Nos. B-10-77; B-5-77; B-1-77; B-11-76; B-5-76; B-1-76; B-28-75; B-18-74; B-14-74; B-8-74; B-4-72; B-8-69; B-2-69.

action taken against a permanent employee ... upon whom the agency head has served written charges of incompetency or misconduct..."

We have previously held that the question of whether an employee was disciplined within the meaning of a contractual term is for an arbitrator to determine.[8] In City of New York v. Local 1180, Communications Workers of America, the Board held that whether the Department of Social welfare, in docking employees' pay, was merely making a deduction because of their absence from work, as the City contended, or was, as the Union urged, disciplining employees for misconduct (failure or refusal to return to the work station after protesting the alleged lack of police protection), was for an arbitrator to decide.[9] In the instant case, however, the subject of the alleged wrongful disciplinary action is not the docking of an employee's pay but the transfer of an employee from one work location to another.

Section 1173-4.3b of the New York City Collective Bargaining Law provides in pertinent part as follows:

> It is the right of the city, or any other public employer acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for

[8]City of New York v. Local 1180, Communications Workers of America, AFL-CIO, Decision No. B-25-72; City of New York v. Communications Workers of America, AFL-CIO, Decision No. B-8-74.

[9]Decision No. B-25-75.

> employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work ....

In Association of Building Inspectors v. Housing and Development Administration,[10] we recognized these management rights when we held that a proposal to substitute a pick and bid seniority system for the geographical rotation of assignments of inspectors deemed necessary by the City was not a mandatory subject of bargaining. The City had asserted that the union's proposal would "limit the City's mobility in rotating shifts, providing proper personnel at the proper time and with the proper qualifications." Agreeing with the City's position, the Board stated as follows:

> Geographical rotation of the assignments of inspectors manifestly is within the City's reserved rights to determine the method and means by which government operations are to be conducted and to maintain the efficiency of governmental operations.

[10]Decision No. B-4-71.

Similarly, we recognize that the transfer of employees is within the City's managerial rights. It should be noted, however, that it is not the right to rotate assignments, per se, or, as in this case, the right to transfer that is protected by Section 1173-4.3b, but the right to take all kinds of actions appropriate and necessary to the proper, effective, and efficient management of city government. This right to manage, and the reservation of an area in which management is free to act unilaterally in order to manage effectively and efficiently, is not a delegation of unlimited power. The protected area is not intended to be so insulated as to preclude any examination of actions claimed to have been taken within its limits. In short, it is intended as a means to enable management to do that which it should do but not as a license to do that which it should not. Section 1173-4.3b does not authorize management to abrogate the statutory or contractual rights of employees directly nor does it warrant the indirect accomplishment of such ends through acts which, in a general way, may be said to fall within the area of management prerogative. Thus, the fact that management has the right to determine methods, means and personnel for the conduct of business does not mean that government may ignore C.S.L. requirements as to the appointment and promotion of employees. The fact that it is a management prerogative to lay off employees for lack

of work does not mean that a public employer may exercise that prerogative in a manner which blatantly violates contractual seniority provisions.

We therefore take particular care here to fashion a rule which will strike a balance between these often conflicting considerations and which, in the instant case, will accommodate both the City's statutory management prerogatives and the contractual rights asserted by the Union. We shall require, first, that the grievant allege sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged right. The bare allegation that a transfer was for a disciplinary purpose will not suffice. Thus, in any case in which the City's management right to make transfers is challenged on the ground that the transfer is of a disciplinary nature, the burden will not only be on the Union ultimately to prove that allegation, but the Union will be required initially to establish to the satisfaction of the Board that a substantial issue is presented in this regard. This will require close scrutiny by this Board on a case by case basis.

Here, it is alleged that the grievant, a permanent employee twice served with formal written charges after arguing with a precinct lieutenant was, without further proceedings, transferred from a Bronx precinct to a Manhattan precinct, and from a day tour to an evening tour. The grievant claims that the transfer works a hardship on his family as he is a single parent and is, as a result

of the transfer, unable to be at home when his youngest child returns from school. Mindful of the fact that the grievant was transferred in conjunction with the service of written charges on account of an act of insubordination, we find that there is a sufficient nexus between the transfer and the contractual right to grieve a wrongful disciplinary-action to support the conclusion that this dispute is within the scope of the parties' agreement to arbitrate. This finding is in no way a determination of the merits of the underlying dispute.

Having met this threshold burden, the grievant is entitled to proceed to arbitration. In the arbitral forum, however, the burden will be upon the grievant to substantiate his claim that the transfer was related to misconduct and was for a disciplinary purpose. The City may, of course, refute any evidence offered by the grievant on this question. If the arbitrator determines that the transfer was disciplinary within the meaning of the contract between the parties, the burden shall be upon the City to establish that the discipline was justified. We note that the grievant has not alleged the right to arbitrate the department's failure to follow disciplinary procedures in instituting the transfer. The grievant shall, therefore, be precluded from alleging the city's failure to follow disciplinary procedures at the arbitration.

The City also contests the arbitrability of this grievance on-the ground that ;Article VII, Section 1 (B) of the contract specifically excludes disputes involving the Rules and Regulations

of the New York City Personnel Director from the scope of the grievance procedure and, the City contends, the Union has relied upon Rule 6.1.3 requiring, inter alia, the written consent of an employee before he may be transferred. We find that the City's objection is misplaced. The Union has not sought to allege a grievance within the meaning of Section l(B) ("a claimed violation, misinterpretation or misapplication of-the rules or regulations ... of the Employer..."). Rather, D.C. 37 cites Rule 6.1.3 to bolster its position on the merits, which is that the transfer was wrongful, This is evidence more properly presented to an arbitrator and we shall not consider it.

The City has also urged us to deny the request for arbitration on the*ground that the Union did not follow the procedure prescribed at Article VII, Section 4 for grievances concerning disciplinary matters. However, whether the Union has followed the proper procedure prior to the arbitration step is not a matter for the Board to rule on in determining the question of substantive arbitrability. The issue of compliance with the lower steps of a grievance procedure is a question of procedural arbitrability which is to be considered by an arbitrator.

In Office of Labor Relations v. Social Service Employees Union,[11] the Board held that the issue of the union's alleged failure to submit the grievance to Step III of the parties' grievance procedure was one of procedural arbitrability. In that case,

[11]Decision No. B-6-68.

we relied on and quoted the following language of the United States Supreme Court in John Wiley & Sons, Inc. v. Livingston:[12]

> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract...
>
> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration ... It would be a curious rule which required that "procedure" growing out of a single dispute and raising the same question on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.
>
> Once it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear upon its final disposition should be left to the arbitrator. 55 LRRM at 2775.

The New York Court of Appeals, addressing this issue in Long Island Lumber Co. v. Martin,[13] noted that the broad language of the Wiley decision had been "referred to several times by the federal courts [citations]" and concluded that "[i]n light of these cases, questions of timeliness and compliance with step-by-step grievance procedures, prior to formal and final binding

[12]376 U.S. 543, 55 LRRM 2769 (1964).

[13]15 N.Y. 2d 380, 259 N.Y.S. 2d 142 (1965).

arbitration, are questions of 'procedural arbitrability.' Now it is clear that such questions must be left to the arbitrator (emphasis added)."[14] The City's contention in the instant case that D.C. 37 did not follow the requisite steps of the grievance procedure set forth at Article VII, Section 4 of the contract is such a question and, accordingly, shall be left for the arbitrator to determine.

For the above-stated reasons, we shall grant the Union's request for arbitration under Article VII, Section l(E) of the contract and dismiss the City's petition.

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 challenging arbitrability be, and the same hereby is, denied; and it is further

[14]259 N.Y.S. 2d at 146-7.

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

DATED: New York, N.Y.
March 4, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

MARK CHERNOFF
MEMBER

I concur* EDWARD SILVER
MEMBER

I concur* JOHN D. FEERICK
MEMBER

* The concurring opinion of city member John D. Feerick follows on page 17.

Concurring Opinion of John D. Feerick

Today the Board announces a rule to govern cases which involve the question of arbitrability of a transfer allegedly made for a disciplinary purpose. The rule is designed to limit arbitration in recognition of the City's management prerogative in the area of transfers. Whether the precise rule articulated by the Board will accommodate the statutory rights of the City is unclear. Consequently, I withhold my own agreement with the rule awaiting its application. I agree with the result in this case, however, because the grievant was served with written charges of misconduct and then, almost immediately thereafter, transferred to another precinct.

City Member Edward Silver joins in the above concurring opinion of John D. Feerick.