City v. L.118,CWA, 33 OCB 5 (BCB 1984) [Decision No. B-5-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-5-84
DOCKET NO. BCB-580-82 (A-1447-82)

-and-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180,

Respondent.

DECISION AND ORDER

The City of New York, through its representative, the Office of Municipal Labor Relations (hereinafter "OMLR" or "the City"), has filed a petition challenging the arbitrability, of a grievance submitted by the Communication Workers of America, Local 1180 (hereinafter "CWA" or "the union") concerning the claimed wrongful disciplinary demotion of the grievant, Roslyn Maxwell, from the position of Principal Administrative Associate (hereinafter "PAA") Level III to that of PAA Level II, with a reduction in pay. The Union filed a verified answer to the petition, and the City submitted a verified reply.

Background

The undisputed factual allegations in this matter establish that the grievant, serving in the title of PAA Level III, was assigned as Site Manager of the Human

Resources Administration's Face-to-Face Site #3 from March, 1979 until December 17, 1980. While serving in that Position, the grievant was served with written charges and specifications of incompetence and misconduct. Following an informal conference on June 4. 1980, the grievant was informed that a penalty of "Demotion to the Title of P.A.A. I" had been recommended. On July 11, 1980, the grievant signed an agency-prepared form which advised her of the recommended penalty, of the fact that she was,

> "... entitled to a disciplinary hearing pursuant to Section 75 of the Civil Service Law ..."

and that, as an alternative,

> "the Union with my consent may elect to proceed in accordance with the Grievance Procedure set forth in its contract with the City of New York including the right to proceed to binding arbitration...."

In executing the form, the grievant indicated her refusal to accept the recommended penalty, her election to proceed under the contractual grievance procedure , and her waiver of rights under Sections 75 and 76 of the civil Service Law. The grievant's union representative also signed the form, indicating the Unions election to proceed under the contractual grievance procedure.

A Step II grievance hearing was held on July 28, 1980, at which the grievant presented her defense to each of the charges and specifications. In a Step II decision issued on November 19, 1980, the Hearing officer observed initially that:

> "It is to be noted that the charges in this matter were initiated in error. Assignment from one level to another does not constitute a demotion and is within the agency prerogative. However, since charges were brought, in fairness to the employee, we are issuing this determination."

The Hearing Officer then reviewed each of the two specifications and the 13 sub-specifications of alleged incompetence and/or misconduct included thereunder, and concluded that the grievant was "guilty" of Specification I. No finding was made as to Specification II. The Hearing Officer ruled that the grievant'S reassignment to the position of PAA Level II was warranted.

Subsequently, on December 31, 1981, while the Union's appeal to Step III was pending, an "amended" Step II Determination was issued, which stated, in pertinent part:

> As stated in the original decision, the charges brought in this matter were done so in error. Management has the right pursuant to the Glushien Impasse Panel Award [OCB Docket Numbers I-144-79 and I-151-79, dated June 24, 1980] to assign, at its discretion, an employee to a lower

assignment level in the broadbanded title with a concomitant decrease in level of pay for a period of three years and three months after the employee has entered a particular level of the broadbanded title.

Accordingly, Ms. Maxwell's reassignment to PAA II will stand.

The matter is dismissed."

The Step III Hearing officer, concurring with the finding made in the amended Step II Determination, dismissed the grievance appeal, stating that grievant's reassignment from Level III to Level II of the PAA title, with a reduction in salary, was a managerial prerogative which was not subject to appeal. Following receipt of the Step III decision, the Union filed the request for arbitration which is the subject of the City's petition challenging arbitrability herein.

Positions of the Parties

City's Position

The City contends that its decision to reassign the grievant is final and is not subject to the contractual grievance procedure. The City states that the title of PAA is the product of the consolidation or "broadbanding" of three prior titles, pursuant to Civil Service Resolution No.77-43. The broadbanded PAA title consists of three assignment levels, with distinct salary rates for each level.

The City alleges that, pursuant to the award of an impasse panel in a 1979 contractual dispute between the parties (the "Glushien award"), it has been established that:

> "... for a period of three years and three months after an employee has entered a particular level of a broadbanded title, he/she may be assigned at the discretion of the employer to a lower assignment level in the broadbanded title with a concomitant decrease in level of pay. The employer's decision to reassign the employee during this period to the lower assignment level and accompanying level of pay shall be final and shall not be subject to the grievance and arbitration procedure set forth in the applicable collective bargaining agreements."

The City argues that the provisions of the Glushien award are applicable to this case. The City further alleges that the provisions of the Glushien award were incorporated into Labor Relations order 81/1, amending the Alternate Career and Salary Pay Plan Regulations, to make applicable to all employees covered by such regulations the terms of the Glushien award. The City submits that inasmuch as the grievant did not serve as a PAA Level III continuously for three years and three months, the City has the absolute discretion to assign her to a lower level of the PAA title with a concomitant decrease in salary.

The City also contends that the disciplinary provisions of the collective bargaining agreement, relied upon

by the Union, are inapplicable to the present grievance. While conceding that disciplinary charges of misconduct were served on the grievant, and that the penalty recommended for such misconduct was demotion to the title of PAA Level I the City asserts that the charges were initiated in error and were eventually dismissed. Thus, the City alleges that the issue of discipline no longer exists in this case.

For the above reasons, the City requests that its petition challenging arbitrability be granted.

Union's Position

The Union submits that the issue to be arbitrated in this matter is whether the demotion of the grievant from the position of PAA Level III to PAA Level II with a reduction in pay, constituted a wrongful disciplinary action within the meaning of Article VI, Section 1(E) of the collective bargaining agreement. This section of the agreement provides:

> "DEFINITION: The term 'Grievance' shall mean:
>
> (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 Pules and Regulations of the Health and Hospitals Corpo-

> ration 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."

The Union alleges that the grievant, a permanent employee covered by Section 75(l) of the Civil Service Law, was served with written charges of incompetency and misconduct, elected to proceed under the contractual disciplinary grievance procedures in lieu of the statutory procedures under Section 75, was given a hearing on the merits of the charges, and received a decision on the merits which included a finding that she was guilty and should be demoted or "reassigned" to the lower-paying position of PAA Level II. The Union argues that this action constituted wrongful disciplinary action, which is subject to arbitration under the parties, collective bargaining agreement.

The Union acknowledges that the original decision of the Step II hearing officer alleges that the charges against the grievant were initiated in error. However, the Union points out that the decision proceeds to discuss the merits Of the charges, to make a finding of guilt, and to impose a penalty. The Union contends that the City’s subsequent attempts, in an amended Step 11 decision issued more than a year after the original one, and in the Step III

decision, to nullify its prior actions and to justify the grievant's demotion by reliance upon the Glushien award, cannot be permitted to obscure the disciplinary action taken against the grievant. The Union submits that the grievant has alleged facts showing the imposition of discipline within the meaning of the contract, and that she possesses a clear right under the contract to arbitrate her claim that the disciplinary action taken was wrongful. For those reasons, the Union requests that the City's petition be denied and that this matter be submitted to arbitration..

Discussion

It is well established that in determining disputes concerning arbitrability, this 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 at issue in the matter before the Board.[1] It is clear in the present case that the parties have agreed to arbitrate grievances, as defined in Article VI of their collective bargaining agreement, and that the Union's claim of wrongful disciplinary action, on its face, is expressly within the

[1] See, e.g., Decision Nos B-1-84; B-6-81; B-15-79, and decisions cited therein.

contractual definition of an arbitrable grievance.[2] However, the City argues that the management action complained of herein, i.e., the reassignment of the grievant to a lower level of the PAA title, is a management prerogative which cannot be considered discipline and thus does not fall within the scope of the cited provision of the contract.

Ordinarily, the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator.[3] But, where, as here, it is alleged that the disputed action is within the scope of an express management right, this Board is careful to fashion a test of arbitrability which strikes a balance between often conflicting considerations and which accommodates both the City's management prerogatives and the contractual rights asserted by the union.[4]

The City contends that the right to reassign employees to any of the three levels of the broadbanded PAA title is a management prerogative, limited only by the terms of the Glushien impasse panel award and of Labor Relations Order No. 81/1 (hereinafter "LRO 81/1"). Since the grievant

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[2] Article VI, Section 1(E), quoted supra at pp.6-7.

[3] Decision Nos. B-8-74; B-25-72; see B-8-81.

[4] See, Decision Nos. B-8-81; B-9-81.

did not serve in a Level III position for three years and three months, as provided in the Glushien award and in LRO 81/1, the City submits that it was free to reassign the grievant to a lower level of the title at will.

We have recognized that the statutory management rights provision contained in 51173-4.3 (b) of the New York City Collective Bargaining Law (hereinafter "NYCCBL") guarantees the City's right, inter alia, to assign its employees.[5] However, we have held that the reserved area of management rights is not intended to be so insulated as to preclude any examination of actions claimed to have been taken within its limits. We have stated,

> "...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."[6]

In a case analogous. to the present one, this Board was faced with an arbitrability dispute which required the balancing of another claimed management prerogative, the

[5] Decision Nos. B-4-83; B-5-75; B-3-75; B-18-74; B-16-74; B-2-73; B-7-69.

[6] Decision No. B-8-81.

right to transfer, against a union's claim of wrongful disciplinary action.[7] In that case, we attempted to accommodate the competing interests by fashioning a test which we believe to be equally appropriate in the present one with some slight modification. The test may be stated as follows: The grievant is required to 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 reassignment to a lower level of a broadbanded title (with a concomitant reduction in salary) was for a disciplinary purpose will not suffice. Thus, in any case in which the City's management right to assign its employees is challenged on the ground that the assignment (or reassignment) 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.

In the present case, it is undisputed that the grievant a permanent employee covered by Section 75(1) of the Civil Service Law, was served with written charges of

[7] City of New York V. District Council 37, AFSCME, Decision No. B-8-81.

incompetency and misconduct, was advised of her right to proceed under the contractual disciplinary grievance procedure, was given a hearing on the merits of the charges, and received a decision on the merits which included a finding that she was "guilty" and should be "reassigned" to a lower-paying level of the PAA title. Based upon these facts, we are satisfied that there is a sufficient nexus between the reassignment 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 grievance.

We are not convinced by the City's argument that the disciplinary charges were initiated in error and that the charges as well as the decision on the merits of the charges were subsequently nullified. Clearly, the grievant's reassignment to a lower-paying level of the PAA title, as recommended in the agency's proposed "penalty" and approved in the original step II decision on the merits of the charges, was not nullified. Were we to accept the City's contention on its face, we would be acknowledging that management could insulate its actions from review, despite the existence of a contractual disciplinary grievance procedure, merely by the withdrawal of previously served disciplinary charges. This

we are not prepared to do. We have previously held that a failure to serve charges does not bar the arbitration of a claim of wrongful disciplinary action, where sufficient facts are alleged to create A substantial issue that the action taken was for a disciplinary purpose.[8] A withdrawal of charges cannot be given a greater effect.

We also find that the City's reliance on our Decision No. B-19-81 is misplaced. In that case, the Union sought arbitration based upon an alleged violation of the terms of the Glushien impasse panel award. While that case did involve a disputed reassignment to a lower level of the PAA title, there was no allegation that the reassignment constituted wrongful disciplinary action nor was violative of any other provisions of the contract. Rather, the Union relied solely upon the Glushien award and LRO 81/1. This Board, in determining arbitrability, held that the clear terms of the Glushien award were contrary to the Union's claims, and in fact, precluded arbitration. That decision in distinguished from the present case, for here the Union has not alleged any rights under the Glushien award and LRO 81/1, but has relied instead upon the disciplinary grievance provisions of the contract. To the extent that

[8] Decision No. B-9-81, annulled on other grounds, sub nom. City of New York v. Board of Collective Bargaining, N.Y.L.J. Oct. 23, 1981, p.6, col.5-6 (Sup. Ct., N.Y. County, Sp. Term Pt.1), further appeal pending.

there is any inconsistency between the management discretion granted in the Glushien award and the management limitation contained in the contract's wrongful discipline clause, that inconsistency is to be resolved by an arbitrator, not this Board. Therefore, our prior ruling in Decision No. B-19-81 is not dispositive of the present matter.

Finally, we note that, contrary to the City's contention that a "reassignment" can never constitute a disciplinary measure, it has been held that under certain circumstances an alleged reassignment to other duties, accompanied by a reduction in salary grade, can constitute a demotion within the meaning of the Civil Service Law, requiring compliance with the disciplinary procedures of Section 75 of that Law.[9] We do not suggest that such is the case under the circumstances of the present matter. But, we believe that the cited case demonstrates that the determination of whether an act constitutes discipline is dependent upon a consideration of the circumstances surrounding the disputed act. In the present case, it is the function of an arbitrator to consider the circumstances and determine whether the grievant's reassignment constitutes discipline within the meaning of the parties' agreement.

[9] Borrell v. County of Genesee, 73 A.D. 2d 386, 426 N.Y.S. 2d 361 (4th Dept. 1980).

Having met its threshold burden, the Union is entitled to proceed to arbitration. In the arbitral forum, however, the burden will be on the grievant to substantiate her claim that her reassignment was related to charges of incompetency or misconduct and was for a disciplinary purpose. The City may, of course, attempt to refute any evidence offered on this question. If the arbitrator determines that the reassignment was disciplinary within the meaning of the parties' collective bargaining agreement, the burden will shift to the City to establish that the discipline was justified.

Our ruling in this case does not ignore the City's management right to assign its employees with maximum effectiveness, nor will we assume that an arbitrator will ignore this essential power of management. But, we also recognize that some limitation of that right arguably has been imposed through the disciplinary grievance provisions of the contract. If this is so, management must exercise its right with due regard for any contractual limitations; and where it is alleged that management has failed to do so, an arbitrable issue may be presented.

For the reasons discussed above, we will direct that this dispute be submitted to arbitration.

DECISION AND 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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

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

DATED: New York, N.Y.
March 5, 1984

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTOM FRIEDMAN
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER