DC 37, L. 768, 4 OCB 2d 45 (BCB 2011)

(Arb) (Docket No. BCB-2936-11) (A-13728-11).

Summary of Decision: HHC challenged the arbitrability of a grievance alleging that it violated the collective bargaining agreement by reassigning the Grievant to a new tour. HHC argued that the Union did not establish the requisite nexus because no disciplinary charges were preferred against the Grievant and the reassignment was a proper exercise of its statutory management right. HHC additionally argued that the Union failed to establish that the Grievant's reassignment raised a substantial question as to whether it was for a disciplinary purpose. The Union argued that the Grievant's reassignment was punitive and that HHC's stated rationale was pretextual. The Union further argued that an employer's failure to serve charges does not bar the arbitration of a wrongful discipline claim when sufficient facts are alleged to raise a substantial question as to whether the act in question was disciplinary. The Board found that the requisite nexus had been established because the Union raised a substantial question as to whether the reassignment was disciplinary. Accordingly, the City's Petition Challenging Arbitrability was denied and the Union's Request for Arbitration was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

***Petitioner*,**

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 768,

Respondent.

DECISION AND ORDER

On March 3, 2011, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by District Council 37, AFSCME, AFL-CIO, Local 768 ("Union"). On January 7, 2011, the Union filed a Request for Arbitration on behalf

of Maureen Bryan ("Grievant"), claiming that HHC violated Article VI, § 1(e), of the 2005-2008 Social Services & Related Titles Agreement ("Agreement") by reassigning the Grievant to a new tour. HHC argues that the Union has not established a nexus between the act complained of and the source of the alleged right to arbitration because no disciplinary charges were preferred against the Grievant. HHC further argues that the Grievant's reassignment was a proper exercise of its management right pursuant to § 12-307(b) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). HHC additionally argues that the Union cannot establish that the Grievant's reassignment raises a substantial question as to whether it was for a disciplinary purpose. To the contrary, HHC asserts that the Grievant was reassigned to help her improve her documentation. The Union argues that the Grievant's reassignment was punitive and for a disciplinary purpose and that HHC's stated rationale was pretextual. The Union further argues that an employer's failure to serve charges does not bar the arbitration of a wrongful discipline claim when sufficient facts are alleged to raise a substantial question as to whether the act in question was disciplinary. This Board finds that the requisite nexus has been established, as the Union has raised a substantial question as to whether the reassignment was disciplinary. Accordingly, the City's Petition Challenging Arbitrability is denied and the Union's Request for Arbitration is granted.

BACKGROUND

The Grievant is employed as a social worker at Kings County Hospital Center ("KCHC"), one of the facilities that comprise HHC. The Union is the duly certified collective bargaining representative for the Grievant's civil service title, Social Worker Level III. The Union and HHC

are parties to the Agreement, which expired on March 2, 2008, and currently remains in effect pursuant to the *status quo* provision of the NYCCBL. Article VI of the Agreement sets forth the parties' grievance procedure and § 1 thereof defines the types of disputes that are arbitrable. The Union claims that HHC violated Article VI, § 1(e), of the Agreement, which states that the following type of dispute is subject to arbitration:

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

(Pet., Ex. A).

The Grievant has worked at KCHC for over twenty-five years and, according to the Union, has more than thirty years of experience as a social worker. The Union claims that the Grievant worked as a social worker at KCHC from 1980 to 1985 and then returned to KCHC in May 1990. The Union alleges that when KCHC rehired the Grievant in 1990, it understood explicitly that she also was employed at the New York City Board of Education (presently known as the Department of Education) ("DOE") and that she would continue to work at the DOE Monday through Friday from 8:00 a.m. to 3:10 p.m. The Union further claims that it was understood that the Grievant would work at KCHC from 4:00 p.m. until 12:00 a.m., a shift that is known as Tour III.

The Grievant's employment at the DOE is documented on her 1990 KCHC employment application form. Additionally, the Grievant's appointment form, dated May 14, 1990, states that she was assigned to Tour III. A memorandum from the Associate Director of the Social Work Department to the Senior Associate Executive Director of Human Resources, dated March 2, 1998,

states, among other things, that the Grievant was assigned to Tour III and that she was also employed as a social worker by the DOE. The memorandum lists the Grievant's hours at the DOE, 8:00 a.m. to 3:10 p.m., and states that "[t]here have been no difficulties with her attendance or punctuality." (Ans., Ex. C). An employment application for promotion, completed and signed by the Grievant on December 29, 2000, also documents the Grievant's employment at the DOE. The Grievant was promoted in 2000 or 2001.

In March 2008, Anthony Sookram was appointed the Assistant Director of Social Work and became the Grievant's direct supervisor. Sookram reports directly to the Director of Social Work, a position held by Esther Stern. According to the Union, beginning in 2009, the Grievant had a series of work-related conflicts with Stern, which demonstrated Stern's animus toward the Grievant. First, the Union alleges that Stern denied the Grievant's request for compensatory time for hours that she worked on a Saturday. The Grievant appealed the denial to another senior supervisor. As a result, the Union asserts that Stern raised the issue to the Labor Relations Department and unilaterally decided to investigate the Grievant's time sheets and dinner breaks. Second, the Union alleges that Stern responded in an "unprofessional" manner when the Grievant requested to move her office space due to a series of alleged break-ins at KCHC. (Ans. ¶ 28). As a consequence of this incident, the Union asserts that the Grievant complained to the Labor Relations Department and Stern was reprimanded.

Third, the Union alleges that a patient filed a complaint with the New York State Department of Health ("NYSDOH"), which resulted in an auditor's investigation on April 1, 2010. Sookram allegedly informed the Grievant that the auditor raised a concern about the Grievant's failure to

follow a federal regulation regarding the documentation of patient chart notes.[1] According to the Union, Sookram told the Grievant that it was "a bunch of bullshit," but that they would address the issue later.[2] (Ans. ¶ 37). The Union asserts that Sookram subsequently told the Grievant that KCHC could have been cited by the auditor, but that the Grievant's minutes from a related grievance meeting helped ensure that such action was not taken.

According to HHC, following the NYSDOH investigation, Stern and Sookram conducted a review of the Grievant's patient documentation. Despite the fact that the Grievant, on several occasions, allegedly was advised of improvements she needed to make, Stern and Sookram concluded that the Grievant's documentation remained deficient and did not satisfy the new requirements. Because there was no supervisor on duty for the majority of the Grievant's tour, HHC alleges that Stern and Sookram decided that the Grievant would benefit from being reassigned to a tour with greater supervision so that she could be provided with in-person guidance and the best opportunity to improve her documentation. Accordingly, on April 8, 2010, Sookram advised the Grievant, in the presence of Stern, that she was being reassigned to Tour II (9:00 a.m. to 5:00 p.m.), effective May 6, 2010. HHC alleges that the Grievant requested that the reassignment be memorialized in writing and that Sookram complied by issuing a memorandum on the same date.

On April 9, 2010, the Grievant was given a copy of the memorandum, which was dated April 8, 2010, and addressed to Denise Johnson-Green of KCHC's Human Resources Department

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[1] HHC asserts that the Grievant worked with the patient in her capacity as a social worker and that the patient filed the complaint against members of the nursing staff. HHC alleges that the NYSDOH survey was unannounced and included a review of the patient's entire medical record.

[2] HHC alleges that the surveyor expressed a concern to Stern and Sookram that the Grievant's documentation did not comply with the updated Centers for Medicare and Medicaid Services ("CMS") Conditions of Coverage.

("Reassignment Memorandum"). It states in its entirety:

> This memo is written to formally address the findings of a NYSDOH review completed on 3/30/2010 by Ms. McDaniels.[3] In her findings she indicated that the SW documentation was below par and did not reflect the needs of the patient. It should be noted that Ms. McDaniels reviewed all of the progress notes available on this patient from the electronic medical record. The notes were not sufficient and did not give all of the necessary biopsychosocial information required. She further stated that the Federal regulations V502-V515 and V552 from the CMS ESRD Interpretive Guidance version 1.1 have been in effect since October, 2009. The notes she reviewed did not meet the Federal standards.
>
> Ms. Bryan has been resistant to efforts made by her immediate supervisor to improve her documentation. She has also been informed by me of the regulations. Her documentation on chart # 0404543 reflects her inability to document correctly and has allowed the state to cite the Social Work department for inadequate documentation in the Hemodialysis program.
>
> Plan of Correction: As Ms. Bryan needs closer supervision and monitoring she will be removed from Tour II[I] duty effective May 6, 2010 or one month from today. In the interim, Ms[.] Bryan will be removed from the Hemodialysis area and assigned to units based on need. She will answer consults, complete full assessments and document her work. She will also be required to provide Ms. Stern and Mr. Sookram email reports at the end of every evening with the MR numbers of all patients seen. She will be required to meet with either Ms. Stern or Mr. Sookram every Friday afternoon for supervision and review of her activities. This supervisory schedule may be revised after May 6[,] 2010 when Ms. Bryan's tour will be changed.

(Ans., Ex. F).

The Union alleges that the Reassignment Memorandum contradicts the results of the NYSDOH investigation and Sookram's prior statements to the Grievant regarding the seriousness of the issue. A letter from the NYSDOH, dated April 11, 2010, stated: "No deficiencies were noted

[3] The actual date of the auditor's review was April 1, 2010.

at the time of the survey and no Plan of Correction is needed." (Ans., Ex. E). The letter enclosed an official report regarding the Title 18 End Stage Renal Disease ("ESRD") Allegation Survey conducted on April 1, 2010, and stated: "The facility was found to be in substantial compliance with all conditions of participation." (*Id.*).

Upon notice of her reassignment, the Grievant also was ordered to provide daily email reports and to attend weekly meetings with Sookram or Stern. The Union asserts that, prior to receiving the Reassignment Memorandum, she had never been warned or disciplined by her supervisors regarding a need to improve her documentation.[4] HHC disputes this contention, alleging that the Grievant was advised on several occasions by Sookram and Barbara Nicolas, a Social Work Supervisor, that her documentation was not in compliance with new federal requirements. HHC explains that, in 2008, CMS released updated Conditions of Coverage, which set forth new standards that End Stage Renal Disease facilities–like the unit to which the Grievant was assigned–were required to meet in order to receive Medicare reimbursement. These new standards, effective October 2009, made certain changes to the required information and documentation that was to be included in patient medical records. According to HHC, the Grievant and other members of the clinical staff in the KCHC Dialysis Unit were advised of these changes and received in-service training.

For approximately twenty years, from the effective date of the Grievant's appointment, May 14, 1990, until the effective date of her reassignment, May 6, 2010, the Grievant was assigned to Tour III. During this time, the Grievant continued to work at the DOE. However, due to the

[4] The Union alleges that in the twenty-four years that the Grievant worked at KCHC between 1980 and 2009, all of the Grievant's performance evaluations were either "satisfactory," "satisfactory-plus," or "superior." The Union further alleges that the Grievant has never been disciplined for issues arising out of her dual employment. HHC denies such allegations but admits that the Grievant does not have a formal disciplinary record.

Grievant's reassignment to Tour II, the Union alleges that the Grievant has been unable to appear at both jobs and, in fact, has not appeared at KCHC. HHC asserts that, since May 6, 2010, the Grievant has failed to report to KCHC as scheduled. Consequently, HHC served the Grievant with disciplinary charges for being "Absent Without Leave" ("AWOL") and is seeking her termination.

On April 30, 2010, the Union filed a Step IA grievance, alleging that the Grievant's reassignment to Tour II violated Article VI, § 1(e), of the Agreement.[5] The Step IA grievance stated that the Grievant was transferred to another tour because HHC alleged that "she has not complied with NYSDOH rules and regulations related to documentation." (Pet., Ex. B). The Union requested, as a remedy, that the KCHC "reverse the shift transfer back to her 4-12 tour which she has worked consistently for the past 20 years and to make her whole in every way." (*Id*.). The Union also requested the "withdrawal of [an] employee's evaluation prepared by Supervisor[] Anthony Sookram, and reviewed [and] signed by Director, Esther Stern." (*Id*.). According to the Union, this evaluation was dated April 13, 2010.

On May 14, 2010, the Union requested a Step II review of the grievance. On June 28, 2010, a New York City Office of Labor Relations ("OLR") review officer denied the Step II grievance, finding that the Union's claim must be denied because "the Facility has not served the Grievant with written charges[.]" (Pet., Ex. D). On June 23, 2010, prior to receiving the Step II decision, the Union requested a Step III review. On November 3, 2010, an OLR review officer denied the Step III grievance, finding that "no contractual violation has been established" because "the parties agree that no written charges were served upon Grievant; therefore [Article VI, § 1(e), of the Agreement]

[5] The instant grievance does not concern the disciplinary charges preferred against the Grievant for being AWOL.

is inapplicable here." (Pet., Ex. E).

On January 7, 2011, the Union filed a Request for Arbitration, which set forth the following statement of the issue to be arbitrated:

> Whether the employer, the Health & Hospitals Corporation, violated the collective bargaining agreement by wrongfully disciplining the grievant, and if so, what shall be the remedy?

(Pet., Ex. F). The Union is seeking the "[e]xpungement of all disciplinary records, return to original tour, and any other remedy necessary to make the grievant whole." (*Id.*).

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the Union cannot establish a nexus between the Grievant's reassignment and Article VI, § 1(e), of the Agreement. HHC maintains that the controversy presented does not bear a reasonable relationship to the cited contractual provision because Article VI, § 1(e), of the Agreement concerns claims of wrongful disciplinary action and it is undisputed that disciplinary charges have not been preferred against the Grievant.

HHC contends that the Grievant's reassignment was a proper exercise of its management right, as NYCCBL § 12-307(b) reserves to public employers the right to supervise and direct employees. HHC alleges that no provision of the Agreement places a contractual limitation on the exercise of this managerial right. When a statutory managerial right is implicated, the Board has held that a union has the burden of establishing that a substantial issue is presented by the grievance. The Board has held that this showing must be closely scrutinized on a case-by-case basis.

HHC alleges that the Union cannot establish that the Grievant's reassignment raises a

substantial question as to whether the reassignment was disciplinary in nature because no facts or circumstances exist that are characteristic of disciplinary action. No charges of incompetence or misconduct have been preferred against the Grievant and the Grievant has neither experienced any change in salary level nor been terminated, suspended, demoted, formally reprimanded, or fined. Aside from the Union's conclusory allegation of a wrongful disciplinary action, HHC contends that the Union has failed to present any evidence that would signify a punitive motive. HHC argues that the Union's bare allegation that the Grievant's reassignment was for a disciplinary purpose will not suffice. Without more, HHC maintains that the proximity in time between the events alleged by the Union and the Grievant's reassignment does not establish a causal connection and is insufficient to establish a *prima facie* showing that the reassignment was for a disciplinary purpose.

According to HHC, the Grievant was reassigned to ensure HHC's compliance with the updated CMS Conditions of Coverage and HHC's continued receipt of Medicare reimbursement. HHC alleges that the Grievant's documentation was deficient despite the fact that the Grievant was trained and advised, on several occasions, to make necessary improvements. Stern and Sookram concluded that reassigning the Grievant to a tour with greater supervision would provide her with the best opportunity to improve her documentation.

Union's Position

The Union argues that the Petition Challenging Arbitrability should be denied because it has alleged sufficient facts to establish a *prima facie* claim that the Grievant's reassignment was disciplinary and that HHC's stated rationale was pretextual. Specifically, the Union contends that HHC's allegations of a history of problems with the Grievant's paperwork are completely unsupported by the facts and are flatly contradicted by the Grievant's work history, evaluations, and

discussions with her supervisors. According to the Union, at no time in the three years that Sookram supervised the Grievant did he ever make any efforts to help her improve her documentation. Furthermore, the Union alleges that at no time in the Grievant's twenty-five years of service was she ever disciplined or formally warned regarding problems with her documentation. A NYSDOH report was cited in the Reassignment Memorandum and relied upon by HHC despite the fact that the report was issued three days after the Reassignment Memorandum and the report's findings do not reach the conclusions that are claimed by HHC.

Given the profound gap between HHC's stated reasons for reassigning the Grievant and the actual evidence, the Union submits that the Grievant's reassignment was motivated by the personal animus of the Grievant's supervisors due to an acrimonious relationship between them. The Union submits that a history of conflict between the Grievant and Stern led to resentment towards the Grievant for questioning Stern's supervisory skills. According to the Union, the series of incidents support its contention that Stern sought punitive retribution for the Grievant's actions.

The Union argues that the Grievant's reassignment is a classic example of pretext because a twenty-five year employee with no history of past discipline and whose evaluations have always been satisfactory or better does not suddenly develop inconsistent work habits. Accordingly, the Union claims that it has sufficiently demonstrated that the decision to reassign the Grievant was not made for a legitimate business reason separate and apart from its punitive intent, and, therefore, the reassignment rises to the level of purposeful discipline.

DISCUSSION

NYCCBL § 12-302 provides that it is the statutory policy of the City to favor the use of

impartial arbitration to resolve disputes. *See ADW/DWA*, 4 OCB2d 21, at 10 (BCB 2011); *NYSNA*, 69 OCB 21, at 6 (BCB 2002). The "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

To determine whether a grievance is arbitrable, the Board ordinarily employs a two-prong test, which considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

UFOA, 4 OCB2d 5, at 8-9 (BCB 2011) (citations and quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969).

Here, it is undisputed that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance procedure, which provides for final and binding arbitration of specified matters, and there is no claim that the arbitration of the grievance would violate public policy. Thus, we must determine whether the parties' obligation to arbitrate grievances is broad enough in scope to include the present controversy.

Where, as here, a "management right to [reassign] personnel is challenged as a disciplinary measure . . . the burden is on the Union to present a substantial issue" by alleging facts, which, if proven, would establish that the act complained of was disciplinary in nature. *Local 141, IUOE*, 49

OCB 30, at 9 (BCB 1992); *see also UFA*, 75 OCB 29, at 7 (BCB 2005); *Local 375, DC 37*, 51 OCB 12, at 13 (BCB 1993), *affd.*, *Matter of N.Y.C. Dept. of Sanitation v. MacDonald*, Index No. 402944/93 (Sup. Ct. N.Y. Co. Dec. 20, 1993) (Ciparik, J.), *affd.*, 215 A.D.2d 324 (1st Dept. 1995), *affd.*, 87 N.Y.2d 650 (1996). Under this standard, an employer action may be challenged as wrongful discipline notwithstanding the fact that it falls within the scope of an employer's management rights pursuant to NYCCBL § 12-307(b). *See Local 375, DC 37*, 51 OCB 12, at 12, n.12; *UFA*, 45 OCB 57, at 9 (BCB 1990); *UFA*, 39 OCB 4, at 5 (BCB 1987). As we have ruled, and the New York Court of Appeals has upheld, the fact that an employer did not serve charges does not bar the arbitration of a claim of wrongful discipline even where the contractual provision upon which the grievance is based requires the service of written charges. *Local 375, DC 37*, 51 OCB 12, at 13, *affd*., 87 N.Y.2d at 658; *Local 924, DC 37*, 1 OCB2d 3, at 13-14 (BCB 2008). "Whether an act constitutes discipline depends on the circumstances surrounding the act" and, therefore, the Board examines whether specific facts have been alleged that show that the employer's motive was punitive. *Local 375, DC 37*, 51 OCB 12, at 13; *see also UFA*, 75 OCB 29, at 7. The "bare allegation that a [reassignment] was for a disciplinary purpose will not suffice." *Local 375, DC 37*, 51 OCB 12, at 12-13.

Here, we find that the Union's factual allegations raise a substantial question as to whether the Grievant's reassignment was disciplinary in nature. The Union alleges that the Grievant's reassignment followed a series of work-related conflicts between the Grievant and Stern, which demonstrated Stern's animus towards the Grievant. In addition, the Union alleges facts, which, if true, belie HHC's claim that the reassignment was based on the Grievant's need to improve her documentation. The Union maintains that the Reassignment Memorandum misrepresents that the NYSDOH found deficiencies in the Grievant's documentation. The NYSDOH report states that

"[t]he facility was found to be in substantial compliance with all conditions of participation," and its accompanying cover letter explicitly states that no deficiencies were noted and no plan of correction was needed. (Ans., Ex. E). The Union alleges that, prior to receiving the Reassignment Memorandum, the Grievant was never informed of a need to improve her documentation. In fact, according to the Union, all of the Grievant's performance evaluations that were issued prior to her reassignment were either "satisfactory," "satisfactory-plus," or "superior." It is undisputed that the Grievant was never formally disciplined over the course of her twenty-five years of employment.[6]

Finally, the Union notes that the inevitable consequence of the Grievant's reassignment was that the Grievant would no longer be able to appear at both of her jobs. For twenty years, HHC had knowledge of the Grievant's dual employment and accommodated her situation by assigning her to Tour III. The Union asserts that HHC knew that the Grievant's reassignment would impact her dual employment situation and cause her to lose one of her jobs.

Based on the factual allegations, the Union has raised a substantial question as to whether the Grievant's reassignment was disciplinary in nature. Accordingly, the requisite nexus between the Grievant's reassignment and Article VI, § 1(e), of the Agreement has been established. Having met its threshold burden, the Union is entitled to proceed to arbitration. It is for an arbitrator to determine whether the Grievant's reassignment was a proper exercise of HHC's managerial authority or, rather, an alternative form of discipline.[7] Consequently, we deny the City's Petition Challenging

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[6] Following the Grievant's reassignment, however, the Grievant was served with disciplinary charges for being AWOL.

[7] In the arbitral forum, the Union will have the burden of establishing its claim that the Grievant was reassigned for a disciplinary purpose and that the reassignment was wrongful. *See Local 375, DC 37*, 51 OCB 12, at 14-15.

Arbitrability and grant the Union's Request for Arbitration.

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 New York City Health and Hospitals Corporation, docketed as BCB-2936-11, hereby is denied; and it is further

ORDERED, that the Request for Arbitration filed by District Council 37, AFSCME, AFL-CIO, Local 768, docketed as A-13728-11, hereby is granted.

Dated: August 18, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES MOERDLER
MEMBER

PETER B. PEPPER
MEMBER