City, NYFD v. Fire Alarm Dispatchers Bene. Ass., 41 OCB 33 (BCB 1988) [Decision No. B-33-88 (Arb)]

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

THE CITY OF NEW YORK AND THE FIRE DEPARTMENT OF THE CITY OF NEW YORK

Petitioners,

DECISION NO. B-33-88

DOCKET NO. BCB-1058-88 (A-2811-88)

-and-

THE FIRE ALARM DISPATCHERS BENEVOLENT ASSOCIATION, INC.,

Respondent.
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DECISION AND ORDER

On May 19, 1988, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance involving the reassignment of two Fire Alarm Dispatchers that is the subject of a request for arbitration filed by the Fire Alarm Dispatchers Benevolent Association ("the Union") on or about April 25, 1988. The Union filed its answer on June 1, 1988. The City filed a reply on June 13, 1988.

Background

On March 22, 1987, a fatal fire occurred in an upper Manhattan high rise apartment building known as Schomburg Plaza. The Fire Department convened a Board of Inquiry to investigate the cause of the fire shortly thereafter. On June 10, 1987, before the Board of Inquiry released its report,, the Fire Commissioner ordered that the two Fire Alarm Dispatchers most

closely associated with the Fire Department's response to the fire, Supervising Fire Alarm Dispatcher Gerald Neville and Fire Alarm Dispatcher Gustave Adams, "be placed on a modified work assignment." They were both assigned to work 9:00 a.m. to 5:00 p.m. tours of duty on weekdays, and were also simultaneously transferred to two of the Department's administrative offices. On or about June 11, 1987, the Union, on behalf of the two employees, filed a grievance, claiming that the transfers were in in violation of two Articles of the collective bargaining agreement.[1] It requested that both men be returned "to their assigned borough offices and groups," and that they receive "payment for all monetary losses" incurred as a result of the reassignment.

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[1] The Articles cited provide as follows:

ARTICLE VI - PRODUCTIVITY AND PERFORMANCE
Section 1. - Performance Levels

(b) Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law.

ARTICLE VII - GRIEVANCE PROCEDURE

Section 1. DEFINITION: The term "grievance" shall mean:

(C) A claimed assignment or (sic] employees to duties substantially different from those stated in their job specifications;

The grievance was denied at Steps I and II. The Step II decision, issued on or about July 15, 1987, reads as follows:

> I am issuing this written determination on the above grievance pursuant to the Dispatcher's Unit Agreement, Article VII, Section 2.
>
> In this grievance, Supervising Fire Alarm Dispatcher Gerard Neville and Fire Alarm Dispatcher Gus Adams grieve their present assignments. They claim their present assignments remove them from dispatch duties and therefore, such assignments violate their Unit Agreement.
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> On 6/10/87 SFAD Neville was assigned to Dispatch Operations in the Bureau of Fire Communications to perform work related to dispatch operations. Mr. Neville has been on vacation since that assignment was made. Also on 6/10/87 FAD Adams was reassigned and has been performing work relating to the dispatch operation at the Manhattan Communications office. Among other duties, FAD Adams has been updating emergency reporting system circuit information. Prior to these assignments, SFAD Neville and FAD Adams were performing duties directly relating to dispatching. As of this date, no disciplinary actions have been taken against either Neville or Adams, and both are receiving full salary.
>
> Both SFAD Neville's and FAD Adam's job descriptions include performing dispatching and "performing related work." Since both grievants are assigned to performing duties related to the Fire Department's Dispatch Operations, I find no violation of Article VII of the Unit Agreement. Similarly, since no disciplinary actions have been instituted there is no violation of Article VI of the Unit Agreement.
>
> Therefore, I find against the grievants in this grievance.

On or about July 23, 1987, the Union appealed the grievance to Step III. Despite the introduction of documentary evidence by the Union purporting to show that the reassignments were actually disciplinary transfers, the appeal was denied by the Office of Municipal Labor Relations in a decision which reads, in pertinent part, as follows:

> Regarding their reassignment, the grievants failed to cite a violation of the rules, regulations or orders of the Employer pursuant to the contractual definition of that term.
>
> Article VII, Section 1.(C), defines a grievance as "a claimed assignment of employees to duties substantially different from those stated in their job specifications" (Emphasis added). In the case herein, the grievants were assigned to duties appropriate for their respective titles and there is no violation of this section of Article VII as alleged either. Moreover, the issue is moot since the grievants have returned to full duty.[2]

With no satisfactory resolution of the grievance having been reached, on or about August 7, 1987, the Union filed a request for arbitration. The request continued to claim that the Department was in violation of Articles VI and VII of the Agreement,

[2] The grievants remained in their "modified work assignments" until December, 1987, when they both were returned to their former work stations and duties. Although the Step III appeal was filed in July, 1987, a decision was not issued until March 30, 1988, several months after the reassignments had been rescinded.

but a second subsection of Article VII was also added.[3] As a remedy, the Union requested "[p]ayment of FLSA premium, holiday pay and lost overtime pay during the period of involuntary reassignment."

POSITIONS OF THE PARTIES

City's Position

The City maintains that the Fire Department acted out of necessity when it reassigned the two Dispatchers, because it had come under close public scrutiny after the Schomburg Plaza fire, and a preliminary inquiry had indicated that "there were some 'breakdowns' in communication and shortcomings regarding the performance of Fire Alarm Dispatchers during the incident." According to the City, the Department was merely attempting to remedy any possible shortcomings in its operations pending completion of the full investigation of the fire, and it asserts that the Dis-

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[3] In addition to Section 1.(C), supra, the Union contended that Section 1.(E), which reads as follows, had also been violated:

> ARTICLE VII - GRIEVANCE PROCEDURE
>
> Section 1. DEFINITION: The term "grievance" shall mean:
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> (E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law 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.

patchers were only "temporarily reassigned," not "transferred."

Further, the City contends that, under Section 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL"),[4] a department has the "unfettered" right, as a managerial prerogative, to direct, assign, and transfer its employees as it sees fit, unless it has limited or relinquished part of its right through collective bargaining. In this case, according to the City, the collective bargaining agreement places absolutely no limitation upon the Fire Department's managerial prerogative to transfer its employees as it deems necessary.

The City denies that the two Dispatchers were ever the subjects of disciplinary proceedings. It contends that no charges were ever filed against them, and the very fact that they were subsequently transferred back to their former duties

[4] NYCCBL Section 12-307(b) reads, 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 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.

demonstrates that, upon investigation, they were found not to have acted in a manner which would have necessitated the service of disciplinary charges.

The City asserts that a bare allegation that a transfer or reassignment was for a disciplinary purpose provides an insufficient basis for allowing a grievance to be placed before an arbitrator. Rather, the Union must show that a substantial issue of discipline was involved in a re-assignment or transfer, and it must also establish a prima facie relationship between the reassignment and a cited provision of the collective bargaining agreement.

The City then goes on to contend that even if, arguendo, the Union is able to satisfy all of these requirements, it still does not matter because the New York Supreme Court has held that unless a grievant is actually disciplined pursuant to Civil Service Law, the employee has no right to proceed to arbitration.[5]

Finally, the City argues that the remedy requested by the Union, overtime and holiday pay, is inappropriate. It points out that the Agreement does not entitle employees to collect overtime compensation unless they have actually worked overtime, nor does

[5] City of New York v. Board of Collective Bargaining and District Council 37, AFSCME, AFL-CIO, N.Y.L.J., Oct. 23, 1981, at 6, col. 5-6 (N.Y. Sup. Ct. Oct. 15, 1981) [hereinafter cited as Pecora decision].

it entitle them to collect holiday pay unless they actually worked during the holiday.

Union's Position

The Union contends that "it is clear beyond a reasonable doubt that the grievants were [re]assigned for disciplinary purposes," in violation of Article VI, Section 1.(b), and Article VII, Section 1.(E) of the Agreement. It denies that the transfers were merely temporary reassignments, and it cites several Board of Collective Bargaining ("Board") Decisions in support of its position that the City does not have the "unfettered" right to transfer employees as it sees fit.[6] The Union maintains that the Board has held that both misconduct and incompetency are bases for disciplinary action,[7] and the fact that no written charges were ever served on either of the two grievants does not disprove that disciplinary measures had been taken against them.[8]

The Union then refers to several documents issued by the Department following the Schomburg Plaza fire which show, according to the Union, that there was a substantial relationship between the reassignments and disciplinary actions.

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[6] Decision Nos. B-8-81; B-9-81; B-4-87; B-14-87; and B-31-87.

[7] Decision No. B-9-81.

[8] In its answer to the City's petition challenging arbitrability, the Union withdrew its out of title work grievance, because "the agency has revoked the 'modified assignments.'"

The first memorandum that the Union refers to was issued by the Department on June 10, 1987, and reads, in pertinent part, as follows:

> Pending the findings of the Board of Inquiry, with regard to the Schomburg Plaza Fire, Fire Commissioner Spinnato has ordered that the following members of the dispatch force be placed on a modified work assignment:
>
> Supervising Fire Alarm Dispatcher
> Gerard Neville
> Fire Alarm Dispatcher Gustave Adams
>
> Supervising Dispatcher Neville shall be ordered to report to the Bureau of Fire Communications operations at 0900 hours on June 15th, 1987. He shall work 0900 to 1700 hours daily, Monday to Friday.
>
> Fire Alarm Dispatcher Adams shall be ordered to report at 0900 hours on Friday June 12th, 1987, work 0900 to 1700 hours that day, be off Saturday and Sunday and resume 0900 to 1700 hours Monday to Friday thereafter.

The Union next refers to a five page memorandum sent by the Fire Commissioner to the Mayor on July 27, 1987, summarizing the major findings of the preliminary report of the Board of Inquiry. The memorandum, as it relates to communications during the fire and action taken by the Department thereafter, reads as follows:

> Communications
>
> The Board of Inquiry determined that our communications office dispatchers failed to relay to the Command Chief at the fire scene the number and nature of phone calls

> indicating the possibility of a serious fire condition at 1295 5th Avenue.
>
> As transcripts of the Communications tapes show, (attached) Dispatchers, in a few instances, were insensitive and unresponsive to the emergency calls of the public.
>
> The two dispatchers (one of whom was a supervisor) responsible for most of the radio traffic pertaining to the Schomburg Plaza fire, have been removed from line duties and are on modified assignment. Formal disciplinary action may be taken against these two individuals, after additional investigation and interviews. This aspect of the Boards on-going investigation should be completed by next week.

The Union contends that the final paragraph of this memorandum, by itself, is sufficient to show that there was a substantial issue of discipline associated with the reassignments.

The Union also refers to copies of a press release and of prepared remarks by the Fire Commissioner, issued by the Fire Department at a news conference held on July 27, 1987, in conjunction with the memorandum's release. The press release reads, in pertinent part, as follows:

> The Commissioner said shortcomings have been uncovered in the Department's operations and procedures as regards . . . the performance of fire alarm dispatchers at the time of the Schomburg Plaza fire . . .

The Commissioner's prepared remarks read, in pertinent part, as follows:

> The Board of Inquiry did find instances of insensitive treatment of callers from

> Schomburg among the Manhattan dispatchers. Such unprofessional behavior is intolerable to the administration of the Fire Department, and we have taken administrative action against those specific dispatchers and are considering further disciplinary measures against them.
>
> I am determined that no one who is found to be at fault in this tragic incident goes unpunished.

In the Union's view, these documents, in whole and in part, present overwhelming evidence that the grievants were reassigned for disciplinary purposes.

The Union alleges that there is a clear connection between disciplinary action and the collective bargaining agreement in Article VII, noting that, within the definition of "grievance," is included "a claimed wrongful disciplinary action." It adds that the language of Article VI, Section 1.(b) distinctly requires that charges be specified before disciplinary action may be taken for incompetency.

Concerning the City's reference to the Pecora decision, the Union points out that the ruling is not binding on the Board

because no judgment in that case was ever entered.[9] If it ha been, according to the Union, the decision would have been reversed under applicable Court of Appeals decisions relating to arbitrability. The Union goes on to assert that, in any event, the Board has ignored the Pecora decision in many of its more recent decisions.[10]

DISCUSSION

In determining questions of arbitrability, it is the function of the Board to decide whether the parties are in any

[9] On October 15, 1981, Justice Pecora issued an Article 78 proceeding decision in favor of the City. He found that the Board abused its discretion when it granted a grievant the right to proceed to arbitration over his involuntary transfer from one location to another. The decision stated that neither the contract nor the statute (supra note 5) granted such a right to the grievant.

On December 28, 1981, the City served the respondents, District Council 37 and the Board of Collective Bargaining, with a proposed judgment. Respondents agreed to accept the proposed draft, and it was submitted to the Court by the City on January 4, 1982.

Seven months later, the Board had still not received a signed judgment or notice of entry. on August 11, 1982, the Board prepared and served its own proposed judgment and notice of settlement, identical in form to that submitted by the City, on both the City and District Council 37. The documents and affirmation were submitted to the Court on August 20, 1982.

On September 24, 1982, the Court refused to enter the proposed judgment, terming it "far from complete" and "devoid of meaning." No further actions were taken by the parties in this case until June 26, 1985. At that time, the Board again moved the Court, over the City's objection, to sign the proposed judgment. On August 13, 1985, the Court again refused to sign the proposed judgment, citing the three year lapse between submission of the respondent's first and its second proposed judgments, and refusing to accept its explanation for the delay.

[10] E.g. Decision No. B-4-87.

way obligated to arbitrate their controversies, and, if so, whether the controversy presented is within the scope of that obligation.[11] In the present case, the Union alleges that an arbitrable dispute exists in that the Fire Department violated two related provisions of the collective bargaining agreement when it transferred two unit members for disciplinary purposes. The City denies that the transfers were in any way related to discipline and it urges that arbitration be denied.

It is clear that the parties have agreed to arbitrate grievances, as defined in Article VII of their collective bargaining agreement, and that the Union's claim of wrongful disciplinary action, on its face, appears to lie within the contractual definition of an arbitrable grievance (supra note 3.) It is also clear that if disciplinary measures are taken in order to correct unsatisfactory levels of performance, they may be subject to arbitration under Article VI of the Agreement (supra note 1.) The City insists, however, that the reassignments pending the outcome of the Schomburg fire investigation were neither disciplinary nor performance-related. Rather, they were part of management's right to determine how its operations are to be conducted, and, thus, do not fall within the scope of either of the cited provisions of the contract.

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[11] E.g., Decision Nos. B-23-86; B-46-86; B-10-77; B-5-76; B-14-74; B-4-72; and B-2-69.

Ordinarily, the question of whether an employee has been disciplined within the meaning of a contractual provision would be determined by an arbitrator.[12] But we have also recognized, in a number of earlier transfer and reassignment cases, that a competing interest exists within the statutory management rights provision contained in NYCCBL Section 12-307(b), which guarantees the City's right, inter alia, to assign or reassign its employees.[13] This is not the first time that these interests have clashed and have required us to balance the conflict between management's right to transfer against a union's claim of wrongful disciplinary action.[14] In each of these cases, we have held that the right to manage is not an unlimited delegation of power, and that a management prerogative does not shield the City from an examination of the actions it claims to have had the authority to take. Most importantly, and contrary to the City's assertion, we have never said that management has the "unfettered" right to transfer or assign employees as it sees fit.

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[12] See Decision Nos. B-8-81; B-40-86; and B-4-87.

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

[14] See Decision Nos. B-36-80; B-8-81; B-9-81; B-5-84; B-40-86; and B-4-87.

Rather, our response to a conflict between management prerogatives and asserted contractual rights has been to fashion a test which seeks to strike a balance between the two and accommodate both. We have stated this test as follows:

> The Union must allege sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged right. A bare allegation, without supporting facts, will not suffice.[15]

Thus, in a case where the City's management right to assign or reassign its employees has been challenged on the ground that the assignment is associated with discipline, we require that an intermediate step must be satisfied before the Union will be permitted to attempt ultimately to prove the allegation to an arbitrator. This step requires us to weigh the facts and issues asserted by the parties, and to estimate the probability that the action complained of was arguably disciplinary in nature.

After carefully considering the pleadings of the parties in the present case, we are satisfied that the dispute herein falls within the parties' definition of an arbitrable grievance. It is evident that the work performed by the two grievants played a role of some significance during the Schomburg Plaza fire. It is undisputed that, shortly thereafter, they both were transferred

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[15] See Decision Nos. B-8-81; B-40-86; and B-4-87.

involuntarily from one duty station to another, and from one set of duty tours to another. It is also undisputed that the transfers occurred during a period when the Department was suffering severe adverse publicity, and that they were coincident with an internal investigation over the Department's response to the fire. Yet, these bare facts, by themselves, would probably not have been sufficient to establish a nexus between the reassignments and employee discipline.

We fully recognize that there are times when it is appropriate and, perhaps, necessary for management to act, by reassigning personnel or otherwise, pending the outcome of an inquiry or investigation into a serious incident. In the present circumstance, however, the Department's action went beyond the realm of simple administrative reassignments. The Board of Inquiry found that the grievants had been derelict in their duty, and the Department announced so publicly through its own memoranda, without giving them the benefit of a fair hearing. It is these memoranda, taken together with the other circumstances surrounding the grievants' reassignments, which, in our view, make out a prima facie case of discipline.

The memorandum of June 10th leaves no doubt that the transfers were a direct consequence of the fire investigation.[16]

[16] "Pending the findings of the Board of Inquiry . . . [the grievants will] be placed on modified work assignment . . .” (supra page 9.)

The memorandum of July 27th states that the grievants were placed on modified assignments and notes that "formal disciplinary action may be taken" against them. [Emphasis added.] On July 27, the Fire Commissioner said that there were "shortcomings" in the performance of fire alarm dispatchers at the time of the Schomburg Plaza fire, that "such unprofessional behavior is intolerable," and that "we have taken administrative action against [them] and are considering further disciplinary measures." [Emphasis added.][17]

Through the Department's own memoranda, the Union has established that the transfers were related to management's dissatisfaction with some aspects of the Department's response to the Schomburg fire, and its attempt to correct a perceived problem by taking administrative action of an arguably disciplinary nature against two of its dispatchers. We conclude, therefore, that the Union has demonstrated the existence of a sufficient nexus between the transfers of the two grievants and their contractual right to grieve a claimed wrongful disciplinary action, to allow this matter to be placed before an arbitrator. The fact that no formal misconduct or incompetency charges were served on the grievants does not alter our finding.

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[17] Press release and prepared remarks of the Fire Commissioner (supra pages 10-11.)

Upon reaching this conclusion, our inquiry is at an end. We emphasize that this in no manner reflects the Board's view on the merits of the Union's claim, nor do we suggest that it would be inappropriate for the city to exercise its managerial prerogative to reassign or transfer its employees in other cases. That is not the question presented to us, however. The issue here is whether the City has placed a limitation on the exercise of its prerogatives through the collective bargaining agreement. We have examined the merits of the parties' claims only to the minimum point necessary in order to make this determination. The final qualitative analysis, decision, and appropriate remedy, if any, will be left to the arbitrator.

Finally, with regard to the Pecora decision, the Union cites no cases in support of its claim that "it would clearly have been reversed under applicable Court of Appeals' decisions," and we are unwilling to join in so sweeping a conclusion. We do agree, however, that the Pecora judgment was apparently never entered, and, therefore, any precedential standing that it might otherwise be entitled to is very much in doubt. Moreover, the facts in the present case are distinguishable from those in Pecora, and it is probable that the decision would be neither necessarily controlling nor decisive in any event.

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 City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Fire Alarm Dispatchers Benevolent Association be, and the same hereby is, granted.

DATED: New York, N.Y.
July 27, 1988

MALCOLM D. MacDONALD

GEORGE NICOLAU

DANIEL G. COLLINS

EDWARD F. GRAY

JEROME E. JOSEPH

EDWARD SILVER

DEAN L. SILVERBERG