City v. UPOA, 41 OCB 47 (BCB 1988) [Decision No. B-47-88 (Arb)]

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

DECISION NO. B-47-88

THE CITY OF NEW YORK, DOCKET NO. BCB-992-87
Petitioner, (A-2649-87)

-and-

UNITED PROBATION OFFICERS
ASSOCIATION,
Respondent.
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DECISION AND ORDER

On August 14, 1987, 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 transfer of a group of Supervising Probation Officers, that is the subject of a request for arbitration filed by the United Probation Officers Association ("the Union" or "UPOA") on or about August 7, 1987. This matter was docketed as BCB-992-87. The Union filed its answer on August 26, 1987. The City filed a reply on September 4, 1987. The Union filed a sur-reply on September 24, 1987.

Background

In the latter part of July, 1987, the Department of Probation ("the Department") either transferred, or announced that it was about to transfer, a group of approximately thir-

teen Supervising Probation Officers from various parts of the city to various new locations on or about July 24, 1987, the Union, an behalf of the transferred employees, filed a grievance, claiming that the transfers were in violation of five separate Articles of the collective bargaining agreement.[1] 'The Union requested that the transfers not be initiate, or, If already initiated, that they be rescinded at least until

[1] The Articles cited provide, in pertinent part, as follows:

ARTICLE 1, Section 1. (Union Recognition and Unit Designation), which provides that the UPOA is the exclusive bargaining representative for the described bargaining unit; and that it represents the title, among others, of Supervising Probation Officer.

ARTICLE V, Section 2. (Productivity and Performance; Supervisory Responsibility), which recognizes the right of the employer to establish and/or revise standards for supervisory responsibility for achieving and maintaining performance levels, but which also provides that:

> . . . the practical impact that decisions on [these] matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility.

ARTICLE VI, Section 1.(E) (Grievance Procedure; wrongful disciplinary action), which incorporates a claimed wrongful disciplinary action taken against a permanent covered employee under the definition of the term "Grievance."

ARTICLE XII (Labor-Management Committee), which provides for a joint committee to meet and consider and recommend changes in working conditions affecting members of the bargaining unit.

ARTICLE XIII (Financial Emergency Act), which provides as follows: The provisions of this Agreement are subject to applicable provisions of law, including the New York State Financial Emergency Act for the City of New York as amended.

the Department and the Union could bargain over their impact.

On or about July 31, 1987, the grievance was denied at Step III by the Office of Municipal Labor Relations, after it found that "[t]he contractual provisions which the Union alleges have been violated are in no way related to the grievants' complaint."

With no satisfactory resolution of the grievance having been reached, on or about August 7, 1987, the Union filed a request for arbitration, wherein it continued to claim that the Department was in violation of the same five Articles. In this connection, the Union also cited a Department memorandum, which, the Union claimed, reflected an agreement by the Department to place limits on its freedom to transfer employees. The full text of the memorandum reads as follows:

Executive Memorandum No. 49-79

Subject: Policy on Involuntary Interborough Transfer of Assignment for Sub-managerial Staff

Policy: The New York City Department of Probation has City-wide responsibility for the legislatively mandated functions of Intake, Investigation and Supervision which represent services to the Family, criminal and Supreme (Criminal Part) Courts. Therefore, all members of the Department of whatever rank or position must be cognizant of their membership in a Department of City-wide responsibility and hence are subject to the demands imposed on our agency resources.

In order to make the most effective use of the resources of the Department within any of the five boroughs which comprise the City of New York and to maintain an equitable balance in the deployment of staff, it becomes necessary on occasion for the Department to make involuntary or unrequested transfers of personnel. [Emphasis in original.]

When it is perceived and determined that there is a need to reassign personnel on an interborough basis, the Deputy Commissioner for Management Services, after consultation with the Deputy Commissioners for Family and Adult Court Services and Assistant Commissioners, will give direction to the Assistant Commissioners to effect the necessary transfer(s).

Assistant Commissioners have the ultimate responsibility of specific designation of persons to be transferred in instances where involuntary or unrequested transfers are required by the Department. [Emphasis in original.]

Procedure: 1. Assistant Commissioners may wish to consider among others the following factors in implementing the process of involuntary transfers: (These factors are not presented in any order of priority and do not reflect any predetermined measure of ranking.)

A - Review of existing voluntary transfer list
B - Canvass for volunteers not on transfer list
C - Seniority in job title
D - Travel distance from home to job
E - Documented health problems
F - Documented child care problems
G - Documented prior educational commitments
H - Prior History of Involuntary Transfers

II. Assistant Commissioners should observe the following guidelines in implementing the aforementioned policy:

1 - Any staff member who is under consideration for an involuntary transfer shall be given an opportunity before a final decision is made, to discuss the transfer ramifications with the Assistant Commissioner making the transfer decision.

2 - At the time when a transfer decision is made, a special performance evaluation report shall be prepared by the employee's immediate supervisor in the branch of origin. The evaluation report shall be shared with the receiving branch and also made part of the employee's personnel file.

3 - It must be emphasized that the over-riding consideration in effecting involuntary transfers is

concern for the administrative needs of the Department.

> 4 - All transfer decisions made by the Assistant Commissioners on behalf of the Department shall be final.

The Union requested a remedy as follows:

1. Rescind transfers.

2. Cease and desist from initiating transfers of Supervising Probation officers without notifying UPOA, bargaining with UPOA over the decision and its effects.

3. Cease and desist from impinging on the rights of UPOA members to engage in union activities.

4. Restore the status quo as to all transferred SPOs.

5. Adhere to Human Rights Law (Executive Law, Section 296) as to disabled persons.

6. Enter Labor Management Committee meetings so as to ameliorate the effects of proposed transfers of SPOs who have aged parents or young children to care for.

POSITIONS OF THE PARTIES

City's Position

The City claims that it simply reassigned the Supervising Probation Officers to various locations where their skills were most needed. It contends that, under Section 12-307(b)

of the New York City Collective Bargaining Law ("NYCCBL"),[2] a department has the affirmative right, as a managerial prerogative, to reassign its employees for the purpose, among other things, of meeting operational exigencies. The City cites Board of Collective Bargaining ("Board") Decision No. B-16-87 to support its contention that this right has been held to be "unfettered," absent a statutory or contractual limitation.

The City further argues that the Union has failed to state any provision of the collective bargaining agreement that arguably is related to the grievance that the Union seeks to arbitrate. It cites numerous decisions to show that we have held that where arbitrability is challenged, we will

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[2] 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.

inquire whether there exists a nexus between the alleged wrong complained of and the cited contractual provision.[3]

Although the City acknowledges the existence of Executive Memorandum 49-79, it contends that the memorandum merely delineates a transfer policy unilaterally instituted by the Department, and that it was not the consequence of an agreement by the parties. Moreover, according to the City, the language contained in the memorandum is completely permissive. It maintains that the Department is therefore under no obligation to consider any of the factors enumerated in the memorandum when making transfer decisions.

The City concludes by arguing that the memorandum should be totally disregarded, and that the request for arbitration should be dismissed, because there is no relationship between reassignment or transfer of employees and any of the contractual provisions cited by the Union.

Alternately, the City contends that the Union's request for arbitration should be dismissed because the arbitral remedy that it requested, an order directing the Department to bargain over the transfer of Supervising Probation officers, lies within the exclusive, non-delegable jurisdiction of the Board. The relief sought, therefore, cannot be granted by an arbitrator.

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[3] Decision Nos. B-1-76; B-3-78; B-7-79; B-21-80; B-8-82; B-41-82; B-9-83; and B-16-87.

Finally, the City has withdrawn its previous assertion that the waiver filed by the Union, which is a condition precedent to arbitration under NYCCBL Section 12-312 d., is ineffectual because the Union previously submitted allegedly the same dispute to the improper practice forum.[4] The City emphasizes that its withdrawal of its objection to arbitrability on this basis should not be construed to have any precedential effect.

Union's Position

The Union characterizes the transfers as an "arbitrary, whimsical re-shuffling of personnel in complete disregard for the impact on the individuals." The Union complains that many of the affected Supervising Probation Officers are long time employees whose daily commuting time will be significantly increased. It goes on to allege that many of the officers have health problems "which are likely to be exacerbated by the added travel and stress," and that many have family responsibilities which "they will be unable to discharge if they are transferred." The Union also contends that two of the transferred officers "are Union Executive Board members

[4] On July 24, 1987, the union filed an improper practice petition alleging that the Department was in violation of the NYCCBL when it involuntarily transferred the same group of Supervising Probation Officers because it failed to bargain over the impact of the transfers and, because two of the transferees were Union officials, their transfers were "an attempt to undermine the Union's status and effectiveness."

who will be unable to service the needs of their constituents because of the transfers," concluding that "[u]nilateral mass transfers reflect adversely on the Union's ability to represent and protect the members: thus they undermine the union."

The Union also denies the City's assertion that there is no nexus between the transfers and a specific contractual provision. It contends that the dispute should be submitted to arbitration because the violation alleged relates, not only to numerous cited contract provisions, but to a written policy of the Department as well.

According to the Union, Article I, Section 1, of the Agreement was violated because the transfers represent "the City's efforts to undermine the Union." Article V, Section 2, was allegedly violated because it "compels the City to give notice of certain management decisions and bargain over their impact," which the Department did not do in this case. Article VI, Section 1.(E) was allegedly violated because the transfers were punitive, yet the contractual procedure for disciplinary action was not followed.[5] Article XII was allegedly violated because the transfers amounted to a change in working conditions, and thus, the issue should have been

[5] In support of this allegation, the Union cites Decision No. B-4-87, wherein the Board found arbitrable a grievance concerning the transfers of seven fire fighters to firehouses distant from their residences as a disciplinary measure.

brought before the labor-management committee. Finally, Article XIII was allegedly violated because this Article requires that "provisions of the Agreement are subject to applicable provisions of law . . ," and the transfers violated laws designed to protect the aged and the handicapped.

DISCUSSION

The Union alleges that an arbitrable dispute exists because certain contractual provisions were directly violated, and, inasmuch as a claimed violation of a written policy is included under the parties' definition of a "grievance," the Agreement was also indirectly violated because the Department allegedly failed to follow its written involuntary transfer policy. The City's position is founded upon the asserted management right to determine where and how employees shall work. The City maintains that it has the "unfettered" right to transfer employees as it sees fit. At the heart of the matter, therefore, are two competing claims: management's right to act unilaterally and a contractual limitation placed upon such right.

This Board has never held that management has the "unfettered right" to transfer or assign employees as it sees fit. Rather, we have held on several occasions that, although the right to assign, reassign, and transfer employees falls within the scope of management rights defined in NYCCBL

12-307(b) and reserved to management therein,[6] these rights constitute permissive subjects of negotiation which the parties may discuss and agree to include in a collective bargaining agreement.[7] Where such subjects are discussed and agreed to, any rights and obligations created by such agreement are contractual and may be enforced by means of a grievance procedure, including arbitration.[8]

In previous similar cases, where a disputed action has fallen within the scope of an express management right, we have fashioned a test of arbitrability which endeavors to balance the competing interests of the parties.[9] Under this rubric, where challenged to do so, the Union is required to establish the prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[10] Thus, we must now determine whether the provisions relied upon by the Union, i.e., Articles 1, V, VI, XII, and XIII of the agreement, and Executive Memorandum No. 49-79, are arguably related to the

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[6] Decision Nos. B-8-81; B-5-84; B-10-85; B-4-87; and B-5-87.

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

[8] Decision Nos. B-11-68; B-7-69; and B-2-71.

[9] See, Decision Nos. B-8-81; B-9-81; B-5-84; B-27-84; and B-40-86.

[10] E.g, Decision Nos. B-5-88; B-16-87; B-35-86; B-4-86; B-8-82; B-15-79; and B-1-76.

subject of the Union's claim.

To the extent that the Union's claim is based upon the specified Articles in the collective bargaining agreement, we find that the Union has failed to establish the required nexus.

Article I of the Agreement contains the union recognition clause. The bare allegation that, because two of the approximately thirteen transferees were union officials, their transfers were designed to undercut the Union's ability to represent and protect its members, will not suffice. Rather, the Union must establish, to the satisfaction of the Board, that specific and substantial reasons exist whereby the Union's representational rights have been adversely affected.

Similarly, the bare allegation that the transfers were for disciplinary purposes, in violation of Article VI, is insufficient. The Union has not produced a scintilla of evidence to demonstrate that the transfers were even remotely related to punishment. There is no mention of disciplinary action, low performance evaluations, or any other negative condition which could lead us to question whether the transfers may have been punitive in nature.

The alleged violation of Article V (Productivity and Performance) is almost as tenuous. The section complained of, Section 2, reads as follows:

> (a) The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise standards for supervisory responsibility in

> achieving and maintaining performance levels of supervised employees for employees in supervisory positions listed in Article I, Section 1 of this Agreement. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility hereunder.
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> (b) Employees who fail to meet such standards may be subject to disciplinary measures in accordance with applicable law.

The Union has asserted that the transfers increased commuting times, aggravated health problems, or complicated the discharge of family responsibilities. It would require a quantum leap in order for us to conclude on the basis of any of these assertions, even if true, that the City actions herein constitute the establishment or revision of supervisory standards. This we are unwilling to do.

We also reject the claimed violation of Article XII (Labor-Management Committee). We note that Section 2 of this Article provides that "[m]atters subject to the Grievance Procedure shall not be appropriate items for consideration by the labor-management committee." Because the Union has made the transfers the subject of its grievance, in so doing it would appear that it has removed them from any potential jurisdiction of the labor-management committee.

Finally, we reject the claimed violation of Article XIII, the Financial Emergency Act provision. The Union would have

us ignore the title of this Article and asks us to consider the language to mean, in effect, that an alleged violation of any applicable provision of law should be subject to arbitration. However, we base our determinations as to arbitrability and as to the applicability of cited contract provisions to a given grievance, on the clear intention of the parties when, as here, it is manifest. On its face and by the title bestowed upon it by the parties themselves, Article XIII is patently addressed to the applicability of the Financial Emergency Act. We note, parenthetically, that every provision of the Agreement is subject to applicable provisions of law, and the parties are always free to use the appropriate judicial or administrative forums whenever they believe that a conflict exists between the contract and an external statute.

The final claim raised by the Union concerns the alleged violation of Executive Memorandum No. 49-79, pertaining to the Department's policy on involuntary transfers of sub-managerial staff from one borough to another. The Union argues that, when the Department promulgated the memorandum, it abrogated a part of the City's managerial prerogative under Section 12-307(b) of the NYCCBL regarding the transfer of employees. The City replies that the memorandum merely reflects the Department's general transfer policy, and, in any event, its provisions are permissive and in no way restrict the ability of management to make transfers as operational needs require.

As we have already stated, the right to manage is not a

delegation of unlimited power. When an action falls within an area of management prerogative, but also may conflict with the rights granted to an employee under the collective bargaining agreement, the City is not insulated from an inquiry into the actions by claims of management prerogative.[11]

In their Agreement, the parties in the instant matter defined grievance as "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer . . . affecting terms and conditions of employment . . ." [Emphasis added.] In citing Executive Memorandum No. 49-79, the Union cites such written policy as is contemplated by the contractual definition of grievances. This Memorandum concerns the subject of the Union's grievance, i.e., transfers, and can be read arguably to place procedural limitations on the exercise of the City's prerogatives in this area. We find that the Union has established a sufficient nexus between Executive Memorandum No. 49-79 and its grievance.

We note, however, that the closing paragraph of the Memorandum provides that "[a]ll transfer decisions made by the Assistant Commissioners on behalf of the Department shall be final." In a number of decisions dealing with comparable contract provisions containing similar impositions of finality, we have consistently held that where contracts have

[11] See, Decision Nos. B-8-81; B-27-84; and B-4-87.

provided expressly that certain actions or decisions of management are final, such actions and decisions are not subject to arbitration.[12] We have also held, however, that submission to arbitration of the question whether management followed the procedural steps contained in its own policy in taking such action or making such decision, is not precluded by the finality imposed by contract on the decision or action itself.[13] In other words, while an arbitrator may not upset the substantive result of a managerial action or decision that has been insulated by contractual prescription of finality, the arbitrator may rule on whether or not the procedure itself had been followed.

Hence, we conclude that insofar as the Union seeks arbitration for purposes of challenging and/or overturning management's decision to institute transfers, its request must be denied and the City's petition challenging arbitrability must be granted. To the extent that the Union alleges that compliance with the procedural provisions of Executive Memorandum No. 49-79 was required, and that the Department's failure to comply constitutes a violation of the Memorandum, the matter is arbitrable and, to that extent, the City's petition shall be denied.

In holding this matter arbitrable, we emphasize that this

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[12] See, Decision Nos. B-19-81; B-10-79; and B-24-86.

[13] See, Decision No. B-31-82.

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. The issue here, however, is whether the City has placed limitations on the exercise of its prerogatives, either through the collective bargaining agreement or through the policies promulgated by one of its departments. It is the latter issue which we submit to arbitration herein.

Accordingly, we shall grant the request for arbitration solely as to the issues of whether the Department was obliged to comply with the procedural steps contained in Executive Memorandum No. 49-79, and what remedy, if any, should be afforded within the limits of the Memorandum if it is found that there was no such compliance with those steps. We reiterate, however, that the decision over how involuntary transfer decisions are to be made and who is to be transferred lies exclusively with the Department and, by reason of the finality provisions of Executive Memorandum No. 49-79, is not subject to 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 City of New York, and docketed as BCB-992-87, be, and the same hereby is, granted, except to the extent that it is claimed by the Union that the transfers at issue herein were effected in violation of procedural provisions set forth in Executive Memorandum No. 49-79, and as to that extent, it is denied; and it is further

ORDERED, that the request for arbitration filed by the United Probation officers Association in Docket No. BCB-992-87, insofar as it alleges a violation of procedural provisions of Executive Memorandum No. 49-79 be, and the same hereby is, granted, and that in all other respects it is denied.

DATED: New York, N.Y.
September 6, 1988

MALCOLM D. MacDONALD

DANIEL G. COLLINS

GEORGE NICOLAU

CAROLYN GENTILE

JEROME E. JOSEPH

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