City v. L.1795, DC37, 43 OCB 19 (BCB 1989) [Decision No. B-19-89 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

Decision No. B-19-89
Docket No. BCB-1121-88
(A-2951-88)
(A-2985-89)

-and-

DISTRICT COUNCIL 37, LOCAL 1795,

Respondent.
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DETERMINATION AND ORDER

The City of New York ("the City") initially filed a petition challenging the arbitrability of a grievance commenced on behalf of Miguel Coulotte (A-2951-88) by Local 1795 of District Council 37 of the American Federation of State, County and Municipal Employees ("the Union") on December 12, 1988 challenging the City's transfer of Mr. Coulotte.

Before filing its answer to the City's petition, the Union requested, with the City's consent, that the request for arbitration it had filed on behalf of Mr. Coulotte be consolidated with its request for arbitration of a grievance commenced on behalf of Francisco Colmenares (A-2985-89) solely to determine the arbitrability of employee transfers under Department of Correction rules. This Board agreed to consider the City's challenges to the two requests for arbitration together.

Accordingly, the City filed an amended petition challenging arbitrability of the Union's two requests for arbitration on

February 14, 1989. The Union filed its answer to the amended petition on February 21, 1989. The City filed its reply on April 3, 1989.

Background

The Union is the certified bargaining representative of employees in the title "High Pressure Plant Tender." The parties are privy to a consent determination issued by the Comptroller under Labor Law, §220. They are also subject to Executive Order No. 83 and the grievance procedures provided thereunder.[1]

Miguel Coulotte

Miguel Coulotte ("Coulotte") was employed by the New York City Department of Correction as a High Pressure Plant Tender at the Bronx House of Detention. On or about April 7, 1988, he was

[1] Section 5 of Executive Order No. 83 defines an arbitrable grievance as:

> (A) a dispute concerning the application of [sic] interpretation of the terms of (i) a written, executed collective bargaining agreement: or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment; (B) a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting terms and conditions of his or her employment; and (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification.

ordered transferred to the Rikers Island Power House.

On or about April 11, 1988, Coulotte filed a Step I grievance alleging that he was transferred to a different work location "without any reason." The parties did not satisfactorily resolve the matter.

By letter dated April 18, 1988, the Union requested a hearing. A hearing was subsequently held on May 17, 1988. On or about May 20, 1988, a Step II decision was issued which denied the grievance noting, in part, that "neither the matter of [Coulotte's] transfer nor the attending matter of 'travel hardship' is grievable." The decision also found that the City had not violated any provision, rule or regulation related to seniority as alleged by the Union.

By letter dated June 6, 1988, the Union requested a Step III hearing. On or about September 13, 1988, a Step III decision was issued which found that the grievance failed to cite a specific written rule, regulation, policy or procedure which the City had allegedly violated.

On November 23, 1988, the Union filed the instant request for arbitration in which it alleges that Coulotte was wrongfully transferred in violation of Department of Correction Rule 3.15.180.[2] As a remedy, it seeks the reassignment of Coulotte to

[2]Rule 3.15.180 provides the following:

> A member of the Department [of Corrections] shall not directly or indirectly cause or
>
> (continued...)

the Bronx House of Detention.

Francesco Colmenares

Francesco Colmenares ("Colmenares") was also employed as a High Pressure Plant Tender. However, in April, 1988, he was reassigned from the Rikers Island Power Plant to the Bronx House of Detention.

On or about April 15, 1988, he filed a Step I grievance alleging, among other things, that he should not have been transferred because of the "extreme hardship" such a move would have on him. The grievance also alleged other wrongful acts by the City that were not the subject of the instant petition challenging arbitrability. The parties did not resolve the grievance at Step I.

The Union, therefore, requested a Step II hearing. On or about May 16, 1988, a Step II decision was issued denying the

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> permit any person to make a request or recommendation for him on his behalf, pertaining to promotion, transfer, designation, detail, assignment, leave of absence, sick leave, disciplinary trial, determination of pension rights, proposed present or future change of status or any matter in any way affecting his duties within the department. This rule shall not include requests or recommendations made by employees in the discharge of their official duties or applications made on behalf of members of the Department by their duly designated attorneys in connection with legal proceedings, department trials or hearings.

grievance. In pertinent part, it found that Rule 3.15.180 was "not relevant since it generally proscribes members of the Department from soliciting another's influence in matters relating to one's employment within the Department."

The Union requested a Step III hearing. On November 21, 1988, a Step III decision was issued which upheld the Step II determination. Consequently, the Union filed the instant request for arbitration. In relevant part, the request alleges a violation of Rule 3.15.180 and seeks, as a remedy, the reassignment of Colmenares to the Rikers Island Power Plant.

Positions of the Parties

The City's Position

The City relies upon New York City Collective Bargaining Law ("NYCCBL) §12-307b.[3] It argues that absent any limitation or

[3]NYCCBL §12-307b states that:

> 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 for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental 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

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waiver of its statutory right to transfer City employees, which it claims is embodied in NYCCBL §12-307b, the City's exercise of its managerial prerogative is not arbitrable. According to the City, the Union has failed to demonstrate any limitation on that right.

The City also claims that the Union has failed to establish any nexus between its claim and Rule 3.15.180 as it must under this Board's precedent.[4] It argues that the intent of Rule 3.15.180 is to prevent any undue influence upon promotions, transfers and other similar personnel decisions. The Rule clearly is not, according to the City, a general transfer policy or procedure.

Finally, the City notes that paragraph 13 of the Union's answer alleges that the transfers were the product of "bad faith, arbitrary and discriminatory decisions." In contrast, the City points to the allegation in the same paragraph that the grievants were transferred without explanation. Therefore, so the City argues, the Union does not know why the grievants were transferred and cannot allege that the transfer was in bad faith or for invidious reasons.

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technology of performing its work. [emphasis in City's pleading.]

[4]The City cites Decision Nos. B-16-87, B-35-86, B-4-86, B-9-83, B-7-79 and B-1-76.

The Union's Position

The Union argues that Rule 3.15.180 broadly proscribes a "member" of the Department of Corrections from making requests or recommendations with respect to the transfer of Department of Correction employees. According to the union, this includes supervisory and managerial personnel. The Union construes the language of Rule 3.15.180 to proscribe bad faith, arbitrary and discriminatory transfers.

As evidence that the grievants were transferred in bad faith and for arbitrary and discriminatory reasons, the Union alleges that there were other less senior High Pressure Plant Tenders at their former work locations. Noting the hardship that would befall the grievants upon a transfer, i.e., the disruption of their private lives and increased travel time, the Union argues that a good faith transfer decision should have involved consultation with the tranferees as well as an explanation for the transfers, none of which the City offered.

In rejecting the City's argument with respect to Rule 3.15.180, the Union argues that it raises an issue of interpretation of the Rule. Citing Decision No. B-3-79, it contends that what Rule 3.15.180 means and how it should be applied goes to the merits of the grievance and should be left for an arbitrator.

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate their controversies and, if they are, whether that contractual obligation is broad enough to include the acts complained of by the Union.[5] Furthermore, when challenged, as it is in this case, the Union must establish a nexus between the City's acts and the contract provisions it claims have been breached.[6] We resolve doubtful issues of arbitrability in favor of arbitration.[7]

In the instant matter, the parties do not dispute that an alleged misapplication or misinterpretation of a rule of the Department of Corrections gives rise to an arbitrable grievance. Rather, the City challenges the existence of a nexus between the Union's grievances and Rule 3.15.180.

The Union contends that Rule 3.15.180 vests employees with a substantive right to be free from transfers which are promulgated arbitrarily, discriminatory and in bad faith. The City argues that Rule 3.15.180 is not the source of any such broad right but merely limits employees from requesting on their own behalf,

[5]Decision Nos. B-65-88; B-28-82; B-15-79.

[6]Decision Nos. B-7-81; B-6-81.

[7]Decision Nos. B-65-88; B-15-80.

among other things, transfers. Moreover, the City argues that it has a managerial right to transfer employees which is unimpeded by Rule 3.15.180.

We have never held that management has an unlimited right to transfer or assign employees as it sees fit.[8] We have recognized that there may be rights which an employee has which limit the exercise of management's prerogative.[9] Thus, the issue presented for us is whether the Union has adequately proved the existence of such a limitation to entitle it to proceed to arbitration.

In resolving this issue, we do not adjudicate the merits of the Union's claim. Rather, where the Union must establish an arguable relationship between its grievance and the source of an alleged right, as it must here, we must scrutinize the source of the right more closely than we might otherwise. We cannot interpret the text of the rule in question but must ascertain whether the provision relied upon by the Union provides a colorable basis for the Union's claim.[10] For the reasons set forth infra, upon undertaking that analysis, we find that the Union has failed to establish a colorable basis for its claim.

Unquestionably, Rule 3.15.180 addresses an aspect of management's right to transfer employees. Moreover as the Union

[8]Decision Nos. B-47-88; B-4-87.

[9]Decision Nos. B-47-88; B-4-87; B-5-84.

[10]Decision Nos. B-24-88; B-9-83; B-21-80.

argues, by its use of the term "member's it may include managerial and supervisory employees. However, by its plain terms it prohibits only a request made by an employee "on his behalf pertaining to . . . transfer." The rule does not on its face, nor even colorably, address the issue of good faith or lack thereof. The Rule does not generally or specifically limit management's right to transfer an employee on its own initiative; rather, it is specific limitation on an employee's right to seek, among other things, a transfer on that employee's behalf.

The Union has failed to cite any other provisions which could be construed to circumscribe the City's managerial prerogative to transfer employees. Therefore, the Union has failed to establish an arguable relationship between its grievance and Rule 3.15.180, and we find that the Union's grievance is not arbitrable.

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 granted, and

ORDERED, that the request for arbitration submitted by Local 1795, District 37, American Federation of State, County and Municipal Employees be, and the same hereby is denied.

Dated: New York, New York
April 27, 1989

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
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FREDERICK P. SCHAFFER
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