HHC v. DC37, 43 OCB 52 (BCB 1989) [Decision No. B-52-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

DECISION NO. B-52-89

Petitioner,

DOCKET NO. BCB-1142-89 (A-2970-88)

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, (Philip D'Elia),

Respondent.

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DECISION AND ORDER

On February 17, 1989, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance submitted by District Council 37, AFSCME, AFL-CIO ("Union") on behalf of Philip D'Elia ("Grievant"). On March 10, 1989, the Union filed its answer to the petition. HHC did not submit a reply.

Background

Grievant is a Motor Vehicle Operator ("MVO") employed by Seaview Hospital and Home ("Seaview"), which is a division of HHC located on Staten Island. For two years preceding the events which gave rise to the instant dispute, Grievant was assigned to the 12:00 AM - 8:00 AM shift (Tour I), for which he was paid a 10% night differential.

On or about January 21, 1988, Grievant was assigned to drive

an Associate Director of the hospital from Seaview to a meeting at Gracie Mansion. It is undisputed that because of traffic delays encountered en route, the Associate Director decided they would not arrive in time for the meeting and, before reaching their destination, ordered the Grievant to return to Seaview.

The Union alleges that the next morning, a Friday, the Grievant was told to report to work the following Monday, January 25, 1988, for the 8:00 AM - 4:00 PM shift (Tour II). On January 26, 1988, HHC issued an Internal Memorandum addressed to all MVOs, which read:

> Mr. Philip D'Elia is being transferred to the 8:00 AM - 4:00 PM tour.
>
> Anyone interested in volunteering for the 12 Midnight tour should contact Mr. Harry Bloch prior to February 3, 1988.[1]

On February 2, 1988, the Union initiated a Step I grievance on behalf of Mr. D'Elia. The nature of his complaint was set forth as follows:

> You are depriving me of my night differential. What happened to my Civil Service seniority? You did not give me written notification of my shift change or why it was changed. You also did not give me a 10 day notice. I feel this is harassment.[2]

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[1] According to the Union, an MVO previously assigned to Tour II, was transferred to Tour I with the employer's assurance that the change in his shift was temporary. The Union adds that the other MVO "is still assigned to the 12AM to 8AM shift and has filed a grievance as a result."

[2] We note that prior to the Step I hearing, preliminary discussions resulted in the mutual agreement to delay imple-

At the Step I hearing held on March 1, 1988, the Union advanced two theories in support of the grievance, to wit: (1) Grievant's transfer was effected without regard to seniority as had been the past practice of the employer, and (2) the transfer constitutes wrongful disciplinary action.

The Step I decision, issued that day, states that inasmuch as the Union failed to identify any "contractual agreement, past practice or arbitral decision" which limits management's right to assign its employees or "any official written statements that would support [its] complaints," the Union did not present "a grievable issue."

On May 31, 1988, HHC's Assistant Director of Labor Relations denied the Union's request for a Step II hearing, concurring with the finding made at Step I after "a thorough review of the arguments presented by the Union and the record."

In response to a request for a Step III hearing, the Chief Review Officer of the Office of Municipal Labor Relations asked the Union for additional information. In a letter dated July 18, 1988, the Union withdrew the assertion of a claimed violation of Grievant's seniority rights based on past practice and restated its position as follows:

> Mr. D'Elia was wrongfully disciplined without the benefit of a hearing when he was reassigned from Tour I to Tour II immediately after a disagreement with the

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mentation of the reassignment at issue until February 22, 1988.

> Associate Director of Seaview Hospital. This resulted in a 10% reduction in salary.

At this point, the Union specifically alleged a violation of Article VII, Section 1(E) of the 1984-87 Collective Bargaining Agreement ("Agreement") between the parties. Article VII, Section 1(E) defines a grievance as:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation 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.

A Step III Conference was held on November 18, 1988. The determination of the Review Officer, dated November 28, 1988, credited the statements of HHC's representative who maintained that the change in Grievant's shift was neither "punitive" nor "vindictive" as the Union contends, but rather "based on the needs of the Hospital." In dismissing the Union's grievance, the Review Officer stated:

> Grievant has failed to cite a contractual provision that addresses the matter of changes in shift applicable to [MVOs]. The claimed violation of Article VII, Section 1(E), is also inapplicable as written charges were not served on grievant and are not involved in the matter of this reassignment of shift.

No satisfactory resolution of the matter having been reached, the Union filed the instant request for arbitration on December 20, 1988. In addition to Article VII, Section 1(E), the

Union cites an alleged violation of Article VII, Section 1(F) of the Agreement, which defines a grievance as:

> Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation upon a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.[3]

As a remedy, the Union seeks:

> Reinstatement to the Midnight to 8:00 AM shift, back pay for lost differential and in all other ways made whole.

Positions of the Parties

HHC's Position

At the outset, HHC notes that the Union's position "has varied during the course of the grievance procedure." In any event, HHC maintains that the dispute is not subject to

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[3] Section 75(3) of the Civil Service Law provides:

> Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service;....

arbitration under the Agreement for three reasons:

First, HHC submits that the Union has failed to identify any provision of the Agreement which provides an MVO with a right, by reason of seniority or otherwise, to be maintained on a certain tour of duty.

HHC next asserts that the Union's characterization of the Grievant's change of tour as "wrongful discipline" is conclusory and, thus, without merit. HHC states that at no time did it claim that there was any misconduct on the part of the Grievant which warranted the service of written charges. Accordingly, it argues, because neither written charges were served nor any disciplinary penalty imposed, the Union fails to demonstrate an arguable violation of Article VII, Section 1(E) or 1(F) of the Agreement.

Finally, HHC submits that in the absence of any contractual provisions which arguably apply to this dispute, its decision to reassign or to change the tour of an employee is within statutory management prerogative and not subject to arbitral review.

Union's Position

While acknowledging HHC's statutory right to assign its employees, the Union contends that an exercise of managerial prerogative which conflicts with rights granted an employee under a collective bargaining agreement states an arbitrable claim.

According to the Union, HHC violated Article VII, Section 1(E) of the Agreement by depriving the Grievant of his contractual right to written notice and a hearing of the charges prior to having been transferred as a disciplinary measure. The Union contends that the transfer at issue must be deemed a disciplinary penalty since it involves a reduction in salary (loss of night differential).[4]

The Union alleges that the circumstances surrounding Grievant's transfer raises a substantial issue as to whether it was "related to misconduct and was for a disciplinary purpose." As evidence to support this argument, the Union points out that HHC's sudden decision to change the Grievant's tour was "initially instituted no less than one day following the incident" on January 21, 1988, was implemented without regard to "a past practice and pattern of granting preference in tour assignments on the basis of seniority," and that HHC has not articulated a business necessity for the transfer. Thus, the Union claims it has demonstrated a sufficient relationship between management's act and the allegation of wrongful discipline to permit arbitral resolution of this dispute.

In response to HHC's challenge to arbitrability based on the absence of written charges, the Union argues that Seaview's

[4] The Union also complains that the transfer created an additional hardship because the Grievant was forced to resign from a second position he held during the daytime hours.

failure to bring charges amounts to a violation of Article VII, Section 1(F) of the Agreement. The Union further asserts that because HHC does not "deny that grievant engaged in any misconduct, preferring instead to remain silent on the issue," the service of written charges should not be a condition precedent to the arbitration of a disciplinary grievance. The Union argues that to so find would give license to the taking of disciplinary action in a manner that would deprive employees of their contractual remedy.[5]

Discussion

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before the Board of Collective Bargaining ("Board") on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate.[6] In the instant matter, the Union claims that HHC's action constitutes wrongful disciplinary action which, on its face, falls within the definition of an arbitrable grievance.[7] HHC denies the

[5] The Union cites City of New York v. District Council 37, AFSCME, AFL-CIO, Decision No. B-9-81, rev'd sub nom. Matter of 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).

[6] E.g., Decision Nos. B-33-88; B-28-87; B-5-84.

[7] Article VII, Section 1(E), supra, at 4.

assertion, contending that the mere allegation that a transfer was made for a disciplinary purpose does not transform an act of management discretion into a wrongful disciplinary action. Moreover, HHC argues, because no written charges were filed or any disciplinary penalty imposed, there is no action by HHC which the Union may argue is disciplinary in nature so as to constitute a grievance under Article VII, Sections 1(E) or 1(F) of the Agreement, respectively.

Ordinarily, the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator.[8] However, where it is alleged that the disputed action is within the scope of statutory management rights,[9] we have been careful to fashion a test of arbitrability which strikes a balance between often conflicting considerations and which accommodates both the employer's management prerogatives and the contractual rights asserted by the Union.[10] In an analogous case, we applied the following test:

> The Union is first required to allege sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged right. A

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[8] Decision No. B-40-86; B-5-84; B-8-74; B-25-72.

[9] It is well-settled that the right to assign, reassign and transfer employees falls within the scope of management rights defined in Section 12-307b of the NYCCBL. See e.g., Decision Nos. B-47-88; B-5-87; B-4-87; B-10-85; B-5-84; B-8-81.

[10] Decision Nos. B-33-88; B-5-87; B-4-87; B-40-86; B-5-84; B-9-81; B-8-81.

> bare allegation that a transfer or an assignment was for a disciplinary purpose will not suffice; rather the Union must establish to the satisfaction of the Board that the case involves a substantial issue concerning the disciplinary nature of an assignment or transfer.[11]

Further, where we have found that the facts alleged establish a sufficient nexus between a transfer and a credible showing that the employer's action had punitive motivation, the fact that no written charges of incompetency or misconduct were served on a grievant will not invariably bar the arbitrability of a claim of wrongful disciplinary action.[12]

In the instant matter, we find that the Union has not met its threshold burden of showing that Grievant's transfer raises a substantial question as to whether the action taken was disciplinary in nature. In contrast to the facts alleged in other cases in which we found that the union had made a prima facie showing of disciplinary action,[13] here we find that the Union not only has failed to allege any facts or circumstances traditionally characteristic of wrongful disciplinary action (i.e., the service of written charges or the imposition of a disciplinary penalty within the meaning of Article VII, Section 1(F) of the Agreement), but it also has failed to demonstrate

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[11] Decision No. B-4-87. See also, Decision Nos. B-81-88; B-33-88.

[12] Decision Nos. B-33-88; B-5-84; B-9-81.

[13] Decision Nos. B-61-88; B-33-88; B-9-81.

sufficiently that disciplinary action arguably was intended by HHC.[14]

In the instant matter, the Union argues that the allegation that HHC deviated from its past practice of assigning tours based on seniority, coupled with the allegation that the shift reassignment was initially implemented one day after the "incident" between Grievant and his superior, is sufficient to meet the threshold burden of establishing the requisite nexus to disciplinary action. However, a review of the record reveals no evidence which can be construed as circumscribing HHC's managerial prerogative to assign, reassign or transfer its employees without regard to seniority. Moreover, we reject the Union's contention that the proximity in time of the two events, without more, establishes a causal connection sufficient to make a prima facie showing that the change in Grievant's tour was for a disciplinary purpose. In the absence of any other persuasive

[14] For example, in Decision No. B-61-88, we found that actions taken by the employer were arguably disciplinary in nature based on the documentation proffered by the union, which included HHC's own documentation and representations the employer made to a third party (the New York State Education Department of Professional Discipline) in characterizing its own actions as "internal department discipline."

In Decision No. B-33-88, the union demonstrated, through the Department's own memoranda, that the transfers were arguably related to management's publicly expressed dissatisfaction with the grievants' performance.

In Decision No. B-9-81, the union alleged that the grievant, a foreman, was told by management that he was "incompetent," disciplinary charges were brought against nine of his subordinate employees, and the grievant was transferred to a different work location, as was one subordinate who was found guilty of misconduct.

evidence, such a finding would be purely speculative.

On the other hand, the employer has alleged business necessity as the underlying reason for its actions. Contrary to the Union's assertion, we do not agree that HHC's failure to articulate its reason implies a disciplinary motive. In cases such as this, the burden is on the Union to demonstrate, by probative facts, that there is a substantial question that the disputed action was taken for a disciplinary purpose. There is no corresponding burden on the employer to demonstrate a non-disciplinary purpose underlying the disputed action since the action, the transfer of an employee, is within the scope of the employer's management prerogative. Accordingly, HHC's failure to articulate the reason for its action cannot serve to satisfy the Union's burden.

Finally, and for the same reasons, we conclude that the Union has also failed to allege sufficient facts to state an arguable violation of Article VII, Section 1(F) of the Agreement. Article VII, Section 1(F) defines a grievance as the alleged "[f]ailure to serve written charges ... where any [disciplinary] penalties ... set forth in Section 75(3) of the Civil Service Law have been imposed."[15] The bare allegations concerning the circumstances surrounding the Grievant's transfer, which do not raise a substantial issue concerning whether the transfer was

[15] Supra, note 3, at 5.

punitive in nature, equally fail to support any contention that written charges should have been served and were withheld for the purpose of depriving Grievant of his contractual due process rights. Furthermore, the fact that Grievant was transferred and, as a result, will no longer receive a 10% shift differential does not, under these circumstances, constitute a disciplinary penalty as enumerated in Section 75(3) of the Civil Service Law, which is incorporated by reference in the Agreement.

Accordingly, we will grant HHC's petition challenging arbitrability and deny the Union's request for arbitration in all respects.

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 of the New York City Health and Hospitals Corporation be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration of District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied.

DATED: September 13, 1989
New York, New York

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
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