City v. DC37, 45 OCB 33 (BCB 1990) [Decision No. B-33-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-33-90

-and- DOCKET NO. BCB-1206-89
(A-3157-89)

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.
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DECISION AND ORDER

On September 8, 1989, the City of New York ("the City"), appearing by its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance submitted by District Council 37, AFSCME, AFL-CIO ("DC 37" or "the Union"), concerning a claimed wrongful disciplinary transfer of Mary McLaurin ("the Grievant"). After receiving several extensions of time with the consent of the City, DC 37 filed an answer to the petition on November 16, 1989. The City filed a reply on December 8, 1989.

The Nature of the Grievance

From October 1986 until July 17, 1988, the Grievant, serving in the title of Senior Police Administrative Aide, was assigned to and supervised the Roll Call Unit at the 71st Precinct of the New York City Police Department ("Department"). The Union alleges that the 71st Precinct was experiencing problems in the operations of the Roll Call Unit and placed the blame, in part, on the Grievant. In support of its contention, the Union submits that on or about February 8, 1988, the Grievant received a command discipline for

her alleged failure to supervise the roll call "finalizations" between January 1 and February 8, 1988; on or about February 11, 1988, she was issued a second command discipline for allegedly neglecting to provide a manpower availability list to the Brooklyn Borough Commander in a timely manner; and on or about February 11, 1988, the grievant received a third command discipline for allegedly violating an order to sign a particular memorandum and for allegedly failing to have her subordinates sign it.

The Union also submits that it is apparent from an internal Department memorandum from the Commanding Officer of the 71st Precinct to his Borough Commander, dated March 9, 1988 ("the transfer memo"), that the Department took further disciplinary action against the Grievant when it ultimately reassigned her to another precinct on July 17, 1988. In support of its contention, the Union cites the transfer memo, which states in relevant part, as follows:

> The undersigned requests that S.P.A.A. Mary McLaurin be administratively transferred from the 71 Precinct to a less demanding precinct in a position of less responsibility ....
>
> This request stems from recent occurrences involving roll call. S.P.A.A. McLaurin has failed to properly supervise and conduct the roll call function causing extensive problems with the roll call product ....
>
> A police officer experienced in the roll call function ... was reassigned for the purpose of providing assistance. His reassignment was met with unacceptable conduct. This officer was treated without respect or even common human courtesy by S.P.A.A. McLaurin. Her response to this reassignment was an uncooperative attitude which in effect exacerbated this situation and created extensive problems in roll call. It should be noted that S.P.A.A. McLaurin received an above standards evaluation for 1987 indicating an above average ability. The problem here does not involve her ability but rather a deliberate poor attitude affecting the good order of this command.
>
> S.P.A.A. McLaurin failed to fulfill her assigned tasks ... in an apparent effort to further her objection to this needed change. It has since been discovered that a basic part of the problem was S.P.A.A. McLaurin's unwillingness or inability to update the master file ....

It is requested that S.P.A.A. McLaurin be reassigned out of the 71 Precinct due to her unwillingness to perform her assigned task in a professional manner.... [Emphasis supplied by the Respondent.]

There is no dispute that the Grievant was involuntarily transferred to the 83rd Precinct on July 17, 1988, without the service of formal written disciplinary charges.

Background

On or about July 28, 1988, DC 37 filed a Step I grievance alleging a violation of Article VI, Section 1(E)[1] of the 1982-84 Collective Bargaining Agreement ("Agreement") between the parties. Therein, the Union alleged that the Department "capriciously and arbitrarily transferred [the Grievant] administratively to a distant precinct causing her to incur a travel hardship and served her with written charges of incompetence and misconduct which affected her permanent status."[2] The record indicates that the Department did not respond to the Step I grievance.

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[1] Article VI, Section 1 of the Agreement, in pertinent part, provides:

DEFINITION: The term "Grievance" shall mean:

(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.

[2] Apparently, DC 37 admits Grievant was not served with formal written disciplinary charges incident to her transfer but refers to "charges of incompetence and misconduct" written prior to her transfer to support the inference that Grievant's reassignment was disciplinary in nature.

On or about August 16, 1988, the Union requested a Step II hearing. In a decision dated October 27, 1988, the Step II Hearing Officer determined that "[s]ince S.P.A.A. McLaurin has filed an improper practice petition before the Board of Collective Bargaining ("the Board") on these as well as other issues, she is precluded from filing a grievance."[3]

On or about November 10, 1988, the Union filed a Step III grievance with OMLR alleging, in addition, that the Department's actions violate Section 75 (1) of the Civil Service Law.[4] At the Step III Conference, DC 37 maintained that the Grievant's transfer was wrongful in that it was both retaliatory (referring to the improper practice petition earlier filed) and a form of informal discipline. In a decision dated June 15, 1989, the OMLR Review

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[3] In Decision No. B-25-89, the Board dismissed the improper practice petition filed by DC 37 on behalf of the Grievant and another Police Administrative Aide at the 71st Precinct. Relying on the same events which form the basis of the instant matter, that petition alleged that the Department committed an improper practice against the Grievant, inter alia, by improperly transferring her in retaliation for having engaged in union-related activities. Therein, the Board concluded that the Union failed to meet its burden of establishing that the Department harbored anti-union animus or that it discriminated against the Grievant for having engaged in protected activity.

[4] Section 75 (1) of the Civil Service Law, in pertinent part, provides:

> 1. Removal and other disciplinary action. A person described in paragraph (a) ... of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, ...

Officer found that no violation of Article VI, Section 1(E) of the Agreement had been proven. The Review Officer stated that because the Union can point to no contract provision which arguably limits management's right to transfer employees in Grievant's title, the Department has the authority to unilaterally determine whether manning and staffing needs are better met by assigning the Grievant to another precinct.

No satisfactory resolution of the matter having been reached, on July 18, 1989, DC 37 filed the instant request for arbitration citing, in addition to Article VI, Section 1(E) of the Agreement and Section 75 (1) of the Civil Service Law, an alleged violation of Article VI, Section 5 of the Agreement.[5] As a remedy, the Union seeks:

> Reinstatement to 71st Precinct, expungement of personnel record and in all other ways made whole.

Positions of the Parties

City's Position

The City submits that the Department's authority to determine manning and staffing needs, including the right to transfer its employees, is within

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[5] Article VI, Section 5 of the Agreement, in pertinent part, provides:

> In any case involving a grievance under Section 1(E) of this Article, the following procedure shall govern upon service of written charges of incompetency or misconduct:
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> [The procedure provides the employee the option of pursuing the matter in accordance with the Grievance Procedure set forth in the Agreement or, in the alternative, in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law.]

the scope of management rights reserved to the City under Section 12-307b of the NYCCBL. Therefore, the City argues, since DC 37 cannot identify a substantive contract provision, rule or regulation of the Police Department which arguably limits this managerial prerogative, the personnel action complained of is not grievable.

The City denies that Grievant's reassignment was a form of discipline, arguing that the Union "improperly cites this grievance in a disciplinary context" in an attempt to demonstrate a nexus between its complaint and a contract provision which it claims has been violated. Other than this bare allegation, the City asserts, DC 37 has failed to allege facts which, if proven, would fall within the contractual definition of the term "grievance." Furthermore, the City contends, the Union cannot rely solely upon a contract provision which merely defines a grievance (i.e., Article VI, Section 1(E) of the Agreement) to furnish an independent basis for a grievance.[6]

Finally, the City contends that an alleged violation of Section 75 (1) of the Civil Service Law clearly is not among the types of disputes that the parties have previously agreed to submit to arbitration.

Union's Position

DC 37 contends that the undisputed facts raise a substantial issue as to whether the alleged "administrative reassignment" of the Grievant was a pretext for discipline. According to the Union, the employer's own memorandum (the transfer memo) sufficiently supports the inference that disciplinary

[6] The City cites Decision Nos. B-22A-85; B-7-81; B-22-80.

action was contemplated and taken, despite the absence of formal written charges.[7] This conclusion is inescapable from a reading of the transfer memo, which, the Union asserts, "stated quite freely that the commanding officer sought the grievant's transfer because of alleged problems with her work."

While acknowledging the Department's managerial right to assign its employees, DC 37 submits that this right does not preclude review of reassignments made for disciplinary purposes.[8] In this connection, the Union refers to a test recently applied by the Board in determining the arbitrability of alleged disciplinary transfer cases. Citing Decision No. B-52-89, the Union argues that if the facts alleged "establish a sufficient nexus between a transfer and a credible showing that the employer's action had punitive motivation," the Board will find that a prima facie relationship between the act complained of and the source of the alleged right has been demonstrated.

Finally, the Union alleges, it is well settled that in disciplinary matters it is sufficient to cite the pertinent contractual definition of a grievance to satisfy the nexus requirement.[9] The cases cited by the City which hold to the contrary, the Union argues, do not concern disciplinary matters and are therefore inapplicable.

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[7] The Union cites Decision No. B-61-88.

[8] The Union cites Decision Nos. B-33-88; B-5-87; B-9-81.

[9] The Union cites Decision Nos. B-5-84; B-9-81.

Discussion

We have long held that in determining the arbitrability of disputes, we must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue.[10] In the instant matter, it is clear that the parties have agreed to arbitrate their grievances as they are defined in Article VI of the Agreement. In particular, we note that a claim of wrongful disciplinary action, on its face, is expressly within the contractual definition of an arbitrable grievance as it is defined under Article VI, Section 1(E). We have consistently found that there is a sufficient nexus between an act which is arguably disciplinary in nature and the right to grieve such an act when the contract defines the term "grievance" to include "a claimed wrongful disciplinary action."[11] Therefore, we reject the City's argument that an alleged violation of this provision of the Agreement does not, in and of itself, furnish an independent basis for a grievance.

However, the City also argues that the personnel action complained of constitutes a legitimate exercise of a statutory management right under Section 12-307b of the NYCCBL.[12] Because the Department's authority in this

[10] See e.g., Decision Nos. B-33-88; B-5-87; B-5-84; B-6-81; B-15-79.

[11] See Decision Nos. B-52-89; B-61-88; B-33-88; B-5-87; B-40-86; B-21-84; B-5-84; B-9-81; B-8-81; B-6-77; B-6-76.

[12] Section 12-307b of the NYCCBL, in pertinent part, provides:

(continued...)

area is not circumscribed by the contract or otherwise, the City asserts, the Union disingenuously attempts to challenge management's decision by couching its complaint as an alleged disciplinary action.

DC 37 maintains that it has clearly demonstrated a prima facie showing of disciplinary action. The Union asserts that the facts alleged, including the Department's transfer memo, sufficiently support the inference that the "administrative reassignment" was disciplinary in nature. In advancing its claim, the Union points out not only that the Commanding Officer expressly sought the Grievant's transfer, but that the allegations he made concerning her work performance rose to the level of charges of incompetency and misconduct. Thus, by the Department's actions and words, DC 37 claims to have established the requisite nexus between its complaint and Article VI, Section 1(E) of the Agreement.

As we have held in the past, management's right to manage is neither unlimited nor does it insulate the City from an examination of actions claimed to have been taken within its limits. Rather, we have recognized that an action which on its face falls within an area of management prerogative (e.g., transfers and reassignments), also may conflict with the rights granted to an employee in the collective bargaining agreement (e.g., the right to grieve an alleged wrongful disciplinary action). It is well-settled that if the facts

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[12](...continued)
It is the right of the City,... acting through its agencies, to ... direct its employees;... determine the methods, means and personnel by which government operations are to be conducted;... and exercise complete control and discretion over its organization and the technology of performing its work.

alleged establish a substantial issue concerning the disciplinary nature of a management act, such act may be subject to arbitral review.[13]

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.[14] However, where, as here, it is alleged that the disputed action is within the scope of an express management right, our response has been to fashion a test of arbitrability which endeavors to balance these competing interests. This test may be stated 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. The bare allegation that a transfer was for a disciplinary purpose will not suffice.[15] Thus, in any case in which the City's management right to assign its employees is challenged on the ground that the assignment (or reassignment) is of a disciplinary nature, the burden will not only be on the union ultimately to prove that allegation, but the union will be required initially to establish to the satisfaction of the Board that it has raised a substantial question that the disputed action

[13] Decision Nos. B-61-88; B-33-88; B-4-87; B-40-86; B-27-84; B-9-81; B-8-81; B-36-80.

[14] Decision Nos. B-5-84; B-8-81; B-8-74; B-25-72.

[15] Decision Nos. B-33-88; B-4-87; B-40-86; B-8-81.

was taken for a disciplinary purpose.[16] This showing requires close scrutiny by the Board on a case by case basis.

In the instant matter, we note the Union's uncontroverted allegations that in February 1988, the Department issued three instances of command discipline against Grievant concerning her work performance. We also note that Grievant's Commanding Officer, in the transfer memo dated March 9, 1988, alleged that several "recent occurrences" involving the Grievant's work performance justified his request that she be transferred. Moreover, the Commanding Officer requested not only that Grievant be "reassigned out of the 71st Precinct" but further recommended that she be "reassigned to a position of lesser responsibility."

Based on these undisputed facts, we find that the Union has raised a substantial question concerning whether the "administrative reassignment" that followed her Commanding Officer's recommendation, was arguably related to his dissatisfaction with her work performance. Because the evidence supports the inference that the personnel action taken by the Department was an attempt to correct a perceived problem, and that this action was arguably disciplinary in nature, we conclude that the dispute herein falls within the parties' definition of an arbitrable grievance under Article VI, Section 1(E) of the Agreement.

We do not suggest that every involuntary transfer is tantamount to discipline; nor do we suggest that it is inappropriate for the City to exercise its prerogative to reassign or transfer its employees in some cases

[16] Decision Nos. B-52-89; B-61-88; B-4-87; B-40-86; B-9-81.

for disciplinary reasons.[17] These issues are not before us. Rather, the issue here is whether the parties have agreed to place limitations on the exercise of managerial prerogative when circumstances permit the inference that management's actions were punitive in nature. Because we find that DC 37 has alleged facts concerning the Grievant's reassignment to the 83rd Precinct which establish a causal connection sufficient to make a prima facie case of discipline, and that Article VI, Section 1(E) of the Agreement defines a grievance as, inter alia, "a claimed wrongful disciplinary action," the Grievant is entitled to proceed to arbitration.

We emphasize that this finding is in no way a determination of the merits of the underlying dispute. We merely conclude that DC 37 has met its threshold burden to allege facts sufficient to raise a substantial issue that the action taken was for a disciplinary purpose.[18] The burden, however, remains on the Grievant in the arbitral forum to substantiate her claim that the transfer was related to allegations of misconduct or incompetency and was for a disciplinary purpose.[19]

With respect to the alleged violation of Article VI, Section 5 of the Agreement, we note that this section provides an employee with certain procedural due process rights in cases involving a grievance defined by Article VI, Section 1(E) of the Agreement.[20] Ordinarily, these rights are

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[17] Decision No. B-5-87.

[18] See e.g., Decision Nos. B-61-88; B-33-88.

[19] See Decision No. B-8-81.

[20] Supra, note 5, at 6.

triggered by the "service of written charges of incompetency or misconduct." Because the Union, as a threshold matter, has alleged facts sufficient to demonstrate that Grievant's transfer was arguably based on allegations of incompetency or misconduct, we need only comment that in appropriate circumstances, the absence of formal written charges will not bar arbitrability of a claimed wrongful disciplinary action.[21] If the arbitrator finds that the City has violated Article VI, Section 1(E) of the Agreement, a violation of Article VI, Section 5 will be implicit therein. If, on the other hand, the arbitrator finds that the act complained of was not disciplinary in nature, undoubtedly the facts alleged equally fail to support the contention that written charges should have been served.[22]

Finally, we agree with the City that an alleged violation of Section 75 (1) of the Civil Service Law, does not state a grievance as defined by Section 12-303(o) of the NYCCBL;[23] nor has it been defined as such by the Agreement.

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[21] See e.g., Decision Nos. B-52-89; B-33-88; B-5-84; B-9-81.

[22] See Decision B-52-89.

[23] Section 12-303(o) of the NYCCBL provides:

> The term "grievance" shall mean: (1) a dispute concerning the application or interpretation of the terms of a written collective bargaining agreement or a personnel order of the mayor, or a determination under section two hundred twenty of the labor law affecting terms and conditions of employment; (2) a claimed violation, misinterpretation, or misapplication of the rules or regulations of a municipal agency or other public employer affecting terms and conditions of employment; (3) a claimed assignment of employees to duties substantially different from those stated in their job classifications; or (4) a claimed improper

(continued...)

Therefore, we shall not permit the Union to advance this claim in the arbitral forum.

Accordingly, we shall grant the Union's request for arbitration insofar as it has alleged, prima facie, a violation of Article VI, Section 1(E) of the Agreement.

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 Union's request for arbitration be, and the same hereby is, granted insofar as the request seeks arbitration of an alleged violation of Article VI of the Agreement, as set forth herein, and is denied insofar as the request seeks arbitration of a claimed violation of Section 75 (1) of the Civil Service Law.

DATED: New York, New York
June 27, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE

[23](...continued)
holding of an open-competitive rather than a promotional examination. Notwithstanding the provisions of this subsection, the term grievance shall include a dispute defined as a grievance by executive order of the mayor, by a collective bargaining agreement, or as may be otherwise expressly agreed to in writing by a public employee organization and the applicable public employer.

MEMBER

THOMAS J. GIBLIN
MEMBER

SUSAN R. ROSENBERG
MEMBER