City v. UFA, 45 OCB 57 (BCB 1990) [Decision No. B-57-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Respondent.

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DECISION NO. B-57-90

DOCKET NO. BCB-1276-90
(A-3396-89)

DECISION AND ORDER

The City of New York ("the City"), by its Office of Municipal Labor Relations, filed a petition on April 26, 1990, challenging the arbitrability of a grievance submitted by the Uniformed Firefighters Association of Greater New York ("the Union"). The grievance contests the involuntary transfer of a firefighter by the New York City Fire Department ("the Department") on the grounds that the transfer was a disciplinary action taken without due process. In response, the Union filed an answer, memorandum and affidavit on May 18, 1990. The City filed its reply on June 1, 1990.

Background

The grievant, Robert Cicero, has been employed by the Department as a firefighter for over twelve years. From March, 1982, until January, 1990, he was assigned to Rescue Company No.

2 in Brooklyn. In July, 1988, grievant was charged under § 25.1.1 of the Rules of the Fire Department with failure to obey the direct order of Lt. Luis Calleja while at the scene of a fire. In April, 1989, after a hearing held by an administrative law judge, grievant was acquitted of the charge.

According to the City, Fire Department policy requires that "handie-talkie" devices be used with discretion at the scene of a fire, so that emergency messages may be transmitted without delay.[1] The parties agree that sometime in the first two weeks of November, 1989, grievant had a second confrontation with Lt. Calleja while at the scene of a fire. During this confrontation, grievant used the handie-talkie to ask Lt. Calleja whether the lieutenant had started the fire. It is not known from the pleadings whether grievant's superiors discussed the incident with him. No charges were filed, nor was a disciplinary hearing held.

On January 16, 1990, grievant was involuntarily transferred to Engine Company 162 in Staten Island. The Union filed a grievance at Step III on January 29, 1990. It alleged that the transfer was a disciplinary action taken in response to the incident of November, 1989, and was effected without due process and in violation of Article XIX of the Collective Bargaining

[1] No authority for the source of this policy was cited in the City's petition.

Agreement ("CBA"),[2] Personal Administrative Informational Directive 3-75 ('IPA/ID 3-7511)[3] and Chapter 26 of Department Regulations ("Chapter 26"), "Discipline - Charges."

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[2] Article XIX of the Collective Bargaining Agreement, "Individual Rights", sets forth procedures for formal disciplinary action, and employees' rights under such procedures.

[3] § 2.3.2 of PA/ID 3-75, "Command Discipline Policy and Procedures", cited by the Union both in its grievance and Answer to the Petition, states:

Loss of Vacation Leave: one (1) day for each point; maximum of seven (7) days, to be deducted from the current year's leave balance...

We note that PA/ID 3-75 provides, in relevant part:

> 2.2 Appropriate Instances for Command Discipline
> Commanding officers may elect to dispose of a violation of regulation, order, command or instruction... The following infractions are among those generally appropriate for non-judicial proceedings... (The numbers in parentheses indicate the approximate penalty point range...).
>
> 2.2.15 Disrespect to an officer or superior. (1-7)
>
> 2.2.17 Failure to comply with Department regulations, directives, bulletins, or procedures. (1-7)
>
> 2.3 Penalty and Point Assessment
>
> Penalties that may be imposed by commanding officers in non-judicial proceedings are limited to the type and extent shown below... [a] commanding officer reviewing a complaint report which has been referred for non-judicial proceedings shall, after investigation and interview with the accused, and after evaluation of the violation and its circumstances, determine the appropriate number of penalty points and the type or combination or penalties that he thinks most appropriate.
> 2.3.3 Detail: one (1) month for each (2) points; maximum of three (3) months...

A Step III decision was issued on April 5, 1990, denying the grievance. The hearing officer noted:

> "...Ff. Cicero sent a message on his handie-talkie asking whether the officer had started the fire. Department policy requires that discretion be used when utilizing a handie-talkie... The Department states that disciplinary charges were not warranted for this incident, but that Ff. Cicero's behavior justified his transfer pursuant to A.U.C. 263 (R) Section 1.1. That section allows reassignments based upon a member's attitude, behavior or lack of commitment... I find that the Department's reassignment of Ff. Cicero complied with A.U.C. 263. Since no disciplinary charges were filed, the grievant has not demonstrated a violation of the CBA or Department regulations."[4]

No satisfactory resolution of the dispute having been reached, the Union filed a Request for Arbitration on April 16, 1990. It seeks, as a remedy, the "return of Firefighter Robert Cicero to Rescue Company No. 2."

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[4] Fire Department Bureau of Operations All Units Circular No. 263 (R) (:AUC 263") states in relevant part:

> "Teamwork, order and uniformity are essential to the work of firefighting and rescue. Officers are required to develop these disciplines to a high degree in order to insure the highest level of performance in fulfilling the responsibilities of the Department for the life and safety of the citizens. In an instance where any member of the Department fails to contribute to the development of the level of excellence required in these areas, i.e., through attitude, behavior, or lack of commitment, the member may, as one alternative, be reassigned upon the recommendation of supervisors. Unacceptable behavior and performance in violation of the Regulations of the Department are occasionally of such a serious nature that, in the judgment of the superior officers in command of the unit, it is necessary to effect temporary reassignment pending the outcome of formal disciplinary procedures..."

Positions of the Parties

City's Position

The City argues that the Union has failed to establish a nexus between the instant grievance and provisions of the CBA, Department regulations and policy directives cited by the Union which set forth disciplinary procedures and penalties. The City submits that grievant was not subject to a fine, demotion or dismissal under Chapter 26 or PA/ID 3-75, and that because the Department did not prefer formal disciplinary charges against grievant, or take formal punitive action, those provisions cannot form the basis of an arbitrable grievance. The City states that there is no nexus with Article XIX of the CBA because that section of the contract sets forth employee rights under formal disciplinary procedures, and no formal procedures were instituted against grievant.

The City further argues that the transfer was an exercise of its managerial powers under § 12-307 of the New York City Collective Bargaining Law ("NYCCBL")[5] and that, by transferring

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[5] Section 12-307b of the New York City Collective Bargaining Law provides 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 or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means

(continued...)

grievant, the Department was merely exercising its right to direct its employees and determine the means by which it conducts its operation. The City asserts that it is the Department's policy, elucidated in § 1.1 of AUC 263, to maintain a high level of service by transferring personnel who, by their behavior, attitude or weakness of commitment, fail to contribute to the requisite level of excellence; therefore, grievant's transfer complied with Department policy and was justified by his behavior, i.e., his indiscreet use of a handie-talkie.

The City states that in order to arbitrate personnel transfers, the Union must demonstrate a substantial issue as to whether the action in question was taken by the Department intentionally to discipline grievant. It contrasts past Board decisions with the present Request for Arbitration and concludes that, in this case, the Union has not made a prima facie showing that grievant's transfer was of a disciplinary nature. Because no formal disciplinary action was taken against grievant, the City argues, the transfer was not disciplinary, and was within the scope of the Department's management prerogatives.

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5 (...continued)
and personnel by which governmental operations are to be conducted; determine the content of the 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."

Union's Position

The Union maintains that grievant's burden is to allege facts sufficient to demonstrate a nexus between the act and the source of the claimed right, and a substantial issue as to whether grievant's transfer was punitive. The Union submits that the City's assertion that grievant's transfer was not a disciplinary penalty is contradicted by the Union's allegations, supported by grievant's affidavit and Department regulations. The Union argues that neither the merits nor the truth of the allegations need be considered here, since the only issue to be decided is whether the grievance is arbitrable.

The Union maintains that it has met the requirements of the arbitrability test. The Union submits that it has demonstrated a prima facie relationship between grievant's transfer and the provisions cited, because both the Department hearing officer and the City's petition clearly state that grievant violated a Department policy, and that this behavior was the cause of the transfer.

The Union cites Board Decision B-36-80, in which we held that a Department employee's summary transfer, shortly after being cleared in a disciplinary hearing, was arbitrable as a possible violation of Chapter 26. It contends that the facts in this case are similar, and that the Department transferred grievant as a means to discipline him without bringing formal charges because he had prevailed in a previous disciplinary

hearing involving the same officer. Referring to grievant's transfer as a "detail", the Union alleges that a detail is a penalty imposed by commanding officers in non-judicial disciplinary proceedings as set forth in PA/ID 3-75 and that, therefore, the Department had taken punitive action against grievant.

The Union also cites Board Decision No. B-5-87, in which we held that AUC 263 permits only a temporary reassignment pending the outcome of formal disciplinary procedures, as evidence of a nexus between the instant grievance and a Department policy.

Discussion

In considering challenges to arbitrability, the Board 'must first ascertain whether there is a demonstrable relationship between the act complained of and the source of the right alleged to have been violated. When challenged, the party requesting arbitration must show that the contract provision invoked is arguably related to the grievance to be arbitrated, and that the parties have agreed to arbitrate the type of dispute set forth in the Request for Arbitration.[6] In addition, when the City's management right to transfer personnel is challenged as a disciplinary measure effected without due process, the burden is on the Union to present a substantial issue under the collective bargaining agreement. The Board will consider each such case

[6] Decision Nos. B-74-89; B-52-88; B-35-88.

individually.[7]

The parties have included a grievance procedure in their collective bargaining agreement culminating in binding arbitration, and have agreed that a claimed violation of existing policy or regulations of the Department affecting terms and conditions of employment is subject to such arbitration.[8] Chapter 26 and PA/ID 3-75, cited by the Union in its Request for Arbitration, set forth the policy and regulations of the Department regarding disciplinary measures to be taken against employees.

The City maintains that its right to transfer is a managerial prerogative granted by § 12-307 of the NYCCBL, and thus the Department's transfer of grievant according to its policy directive cannot be challenged. It is not, however, the right to transfer itself that is protected by the NYCCBL, but the right to take appropriate and necessary action in order to manage effectively. Reserving an area in which management is free to act unilaterally does not bestow unlimited power. The protected area is not shielded beyond all review.[9]

An action which appears to fall within an area of management

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[7] Decision Nos. B-16-86; B-8-81.

[8] Article XX of the CBA sets forth a grievance procedure to be followed for "a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment."

[9] Decision Nos. B-4-87; B-27-84; B-8-81.

prerogative may actually conflict with a right won by employees through collective bargaining. If we accepted the City's argument that a transfer is not a disciplinary action simply because no formal proceedings were instituted, the Department could discipline at will merely by choosing not to prefer formal charges. Failure to serve charges, however, does not bar arbitration of a claim of wrongful discipline when the facts alleged raise a substantial question as to whether the act was intended to be punitive.[10] Whether an act constitutes discipline depends on the circumstances surrounding the act.[11]

A substantial issue is presented here as to whether the Department intended to punish the grievant by means of a permanent transfer and, if so, whether the summary imposition of such a transfer without a hearing is violative of the regulations and policies of the Department which are cited by the Union in its request for arbitration. The Department's own policy directives and regulations appear to conflict.
PA/ID 3-75 states, "[w]hile discipline does not necessarily imply punishment, punitive action must be applied in appropriate instances when Department policy, rules or regulations are violated." Section 5 suggests:

> [f]ormal judicial proceedings, rather than command discipline, are appropriate, and the charges, specifications, and other procedures required by Chapter 26 of the Regulations may culminate in a

[10] Decision Nos. B-52-89; B-61-88; B-5-84.

[11] Decision No. B-5-84.

trial ...

5.1.9 When the accused member has been the subject of previous discipline and the member's attitude or behavior indicate little or no inclination to change...

Chapter 26, § 26.8.1 provides, "[w]hen members below the rank of lieutenant commit minor infractions of the Regulations, company commanders may, in lieu of charges, assign such members extra tours of housewatch duty..." AUC 263, upon which the City relies, provides that while behavior that fails to contribute ta the required level of excellence merits permanent reassignment, "unacceptable behavior and performance in violation of the Regulations of the Department" calls for temporary reassignment pending the outcome of formal disciplinary proceedings. Because the cited provisions arguably conflict, they raise a question as to whether the Department's action addresses a violation of its policy and, further, whether punitive action is recommended or permitted by its regulations. When a Department policy is violated, one looks to PA/ID 3-75 to determine the appropriate punitive action. If the infraction is minor, it is punishable by a point and penalty system clearly set forth in the regulations.[12] If the infraction is one that requires judicial proceedings, such discipline is governed by Chapter 26 and Article XIX of the CBA. The City alleges that grievant's behavior violated Department policy,

[12] Supra, note 3, at 2.

justifying his permanent transfer, but it does not cite an applicable Department policy directive; the indiscreet use of a handie-talkie is not mentioned in PA/ID 3-75 as an infraction punishable either by judicial or non-judicial methods.

It is not necessary to reach the Union's contention that grievant's transfer was a "detail", and thus a penalty under PA/ID 3-75, although we note that the term "detail" connotes a temporary and limited reassignment rather than a permanent transfer.

The Union has stated a proper grievance under Article XX of the CBA. The apparent conflict in Department policy and regulations; the question of whether grievant was punished for a violation of regulations, or, indeed, whether grievant was punished at all; the substantial prior history of disciplinary action taken against grievant; and the Union's allegation of a nexus between that prior disciplinary proceeding and the transfer, considered together, suffice to raise an arbitrable issue as to a possible violation of Chapter 26 and PA/ID 3-75.

The City's argument that Article XIX, Chapter 26 and AUC 263 do not support the Union's claim goes to the merits of the dispute rather than to the issue of arbitrability. It is well-settled that in deciding questions of arbitrability, this Board will not inquire into the merits of the dispute.[13] Our holding that this matter is arbitrable does not reflect the Board's view

[13] See, e.g., Decision Nos. B-73-89; B-5-87; B-10-77.

of the merits of the claim. We do not suggest that it is improper for the Department to transfer employees for disciplinary reasons, nor can there be any question of the Department's right to take appropriate disciplinary action. The issue here, however, is whether the City itself has limited its managerial right through collective bargaining or its own policies. Since the Department chose to adopt such regulations, whether or not they have been violated is a matter for an arbitrator to decide.

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

ORDERED, that the request for arbitration by the Uniformed Firefighters Association be, and the same hereby is, granted.

Dated: New York, New York
September 17, 1990

MALCOLM D. MacDONALD
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MEMBER

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MEMBER

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