City & DOT v. L.141, IUOE, 49 OCB 30 (BCB 1992) [Decision No. B-30-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

New York City Department of Transportation and the City of New York,

Petitioners,

-and-

International Union of Operating Engineers, Local 14-14B,

Respondent.
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Decision No. B-30-92

Docket No. BCB-1461-92
(A-4045-91)

DECISION AND ORDER

On February 6, 1992, the New York City Department of Transportation ("the Department") and the City of New York ("the City"), by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by Local 14-14B of the International Union of Operating Engineers ("the Union"). The grievance alleged that the Department violated certain rules and regulations when it transferred Samuel Serio ("grievant"), a Gas Roller Engineer, from Queens to Brooklyn. The Union filed an answer on March 3, 1992. The City filed a reply on March 30, 1992.

Background

Grievant is an employee in the Bureau of Highways whose wages and supplemental benefits are determined pursuant to a Comptroller's Consent Determination. The collectively bargained agreement between the parties contains provisions concerning rates of pay and other terms and conditions of employment, but not a grievance and arbitration procedure. Grievant was assigned to the Queens Arterial Highway Division in 1971. In October, 1990, he was transferred to Brooklyn.

On November 10, 1990, grievant filed a grievance alleging that he was involuntarily transferred to Brooklyn and that "[his] seniority was denied to

[him] on the basis that family members cannot work in [the] same boro." The grievance was moved to Step III on September 10, 1991 and was denied.

No satisfactory resolution of the dispute having been achieved, the Union filed a Request for Arbitration on January 6, 1992. It alleges violations of Rule 6.1.3 of the Rules and Regulations of the City Personnel Director;[1] Rule 5.1 of the New York State Civil Service Department;[2] and

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[1] Section I, "Transfers", of the Rules and Regulations of the City of New York Personnel Director provides:

> 6.1.3 General Requirements
> Every transfer, other than a functional transfer, shall require the consent, in writing, of the proposed transferee and of the respective heads of the agencies concerned therewith and the approval of the city personnel director.

[2] Section 5.1 ("Transfers") of the New York State Civil Service Rules and Regulations provides:

(a) General conditions and limitations.

In addition to the conditions and limitations prescribed by statute or in other provisions of these rules, transfers shall be subject to the following requirements:

> (1) A transfer may not be made to a position for which a preferred list exists containing the name of an eligible willing to accept reinstatement to such position, unless the vacancy created by such transfer is in the same geographical area as the position to which transfer is made and such eligible is simultaneously offered reinstatement to such vacancy.
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> (2) A transfer may be made only if the position to which transfer is sought is at the same or substantially the same or a lower salary level than the position from which transfer is sought.
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> (3) Every transfer shall require the consent, in writing, of the transferee and of the appointing authority having jurisdiction over the position to which transfer is sought, and the approval of the Civil Service Department.

(b) Transfers between geographical areas.

(continued...)

unspecified rules and regulations regarding notification for voluntary transfers and appointment of volunteers, transfers in reverse seniority order, and families working in the same borough. The provisions under which the demand for arbitration is made are § 12-312 of the New York City Administrative Code;[3] and Title 61, § 1-06 of the Rules of the City of New York.[4]

In its grievance, the Union claims that grievant had been improperly transferred; that he was not properly notified of the posting for voluntary transfers; that there was an improper appointment of volunteers for transfer; that transfers were not made in reverse seniority order; and that there is no rule against family members working in the same borough. As a remedy, it seeks that grievant be returned to the Queens Arterial Highway Division.

Positions of the Parties

City's Position

The City states that neither the Rules of the Office of Collective Bargaining ("OCB Rules") nor § 12-312 of the New York City Collective

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[2](...continued)
Except for reassignment under a reassignment list program approved by the Department of Civil Service, and except for a transfer or reassignment pursuant to section 5.8 of this Part, a person appointed to a position in the State service in any particular geographical area may not, for at least one year, be transferred or reassigned to a similar position in another geographical area unless he is reachable for appointment to such other position from the eligible list from which appointed.

[3] Section 12-312 of the New York City Administrative Code is the section of the New York City Collective Bargaining Law entitled "Grievance procedure and impartial arbitration."

[4] Title 61, § 1-06 of the Rules of the City of New York [formerly Part 6 of the Revised Consolidated Rules of the Office of Collective Bargaining] is entitled "Arbitration," and sets forth the procedures to be followed when requesting arbitration through the Board of Collective Bargaining.

Bargaining Law ("NYCCBL") can serve independently as the basis of a demand for arbitration absent an agreement between the parties to submit their disputes to arbitration. It argues that the Union has failed to establish that the parties have agreed to resolve their disputes through arbitration. The City contends that although the only basis for arbitration in this case is Mayoral Executive Order No. 83 ("E.O. 83"),[5] the Union has not asserted a claim that any written rule of the Department has been violated and, therefore, a claim may not be brought pursuant to E.O. 83. For this reason, the City argues, the Union has failed to demonstrate the requisite nexus between the acts alleged and its claimed right to arbitration.

The City claims that although the Union asserts that Rule 6.1.3 provides such a nexus, the rule only governs transfers from one agency to another. It argues that even if the Union could satisfactorily apply that rule to the

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[5] Section 5 of E.O. 83 provides, in relevant part:

(1) a. (1) The following grievance procedure shall be applicable to all mayoral agency employees who are eligible for collective bargaining under the New York City Collective Bargaining Law except:

(A) Members of the police force of the Police Department and

(B) All other employees in a bargaining unit for which the collective bargaining representative recognized or certified to bargain on wages, hours and working conditions has executed a written collective bargaining agreement containing a grievance procedure....

(2) b. For purposes of subdivision a of this section, the term "grievance" shall mean (A) a dispute concerning the application or 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 the 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....

instant dispute, the Rules and Regulations of the City Personnel Director may not form the basis of a grievance under E.O. 83 because they are not written rules or regulations of the mayoral agency by which the grievant is employed. The City sets forth the same argument with regard to Rule 5.1 of the State Civil Service Department and asserts that neither the Union nor the grievant has identified any other applicable rule or regulation of the Department.

The City maintains that the Union's attempt to amend its request for arbitration to rely on E.O. 83 should not be tolerated by the Board. In the instant case, the City claims, the defect was not merely technical, but substantive. Further, the City asserts, the rules alleged to have been violated may not be grieved pursuant to E.O. 83 because the Rules and Regulations of the City Personnel Director are not "written rules or regulations of the mayoral agency by whom the grievant is employed."

Furthermore, the City states, § 1.2 of the Rules and Regulations of the Civil Service Department[6] defines "transfer" as the change of a permanent employee from the jurisdiction of one appointing authority to a position under the jurisdiction of another appointing authority. The City maintains that

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[6] Section 1.2 of the Civil Service Rules provides, in relevant part:

(b) Unless otherwise expressly stated or unless the context or subject matter requires a different meaning, the several terms hereinafter mentioned, whenever used in these rules, shall be construed as follows:

> (1) The term "transfer" means the change, without further examination, of a permanent employee from a position under the jurisdiction of one appointing authority to a position under the jurisdiction of another appointing party or to a position in a different title in the same or a higher salary grade under the jurisdiction of the same appointing authority.
>
> (2) The term "reassignment" means the change, without further examination, of a permanent employee from one position to a position in the same title under the jurisdiction of the same appointing authority.

there is no allegation that the grievant's transfer was to a position outside the Department, and therefore both Rule 6.1.3 and Rule 5.1 are inapplicable.

The City cites Decision No. B-15-79 for the proposition that a verbal assurance is not tantamount to a rule, regulation or procedure. According to the City, even if the grievant was told by Department personnel that certain rules exist, such statements may not form the basis of a grievance.

The City argues that although the Union belatedly attempts to base the grievance on Department rules and procedures referring generally to § 75 on disciplinary matters, neither these rules nor § 75 apply to grievant because he is neither a competitive nor a non-competitive employee. The City maintains that wrongful disciplinary action is not within the definition of arbitrable grievances in E.O. 83. Furthermore, it contends, the Board held in Decision No. B-15-82 that E.O. 83 does not provide for arbitration of disputes concerning wrongful discipline.

Union's Position

The Union argues that E.O. 83 is incorporated by reference into § 12-312(g)[7] of the NYCCBL because that section refers to an arbitration procedure

[7] Section 12-312(g) of the NYCCBL provides:

An employee may present his own grievance either personally or through an appropriate representative, provided that:

(1) a grievance relating to a matter referred to in section 12-307 of this chapter may be presented and processed only by the employee or by the appropriate designated representative or its designee, but only the appropriate designated representative or its designee shall have the right to invoke and utilize the arbitration procedure provided by executive order or in the collective agreement to which the designated representative is a party; and provided further that:

(2) any other grievance of an employee in a unit for which an employee organization is the certified collective bargaining representative may be presented and processed only by the employee or by the certified employee organization, but only the certified employee organization shall have the right to invoke and utilize the arbitration procedure provided by executive order

(continued...)

provided by executive order. The Union cites Decision No. B-59-90 for the proposition that the Board may find a basis for arbitration in E.O. 83 even where it was not cited in the Union's demand for arbitration. The Union petitions the Board to ignore the technical defect in its request for arbitration, and to amend the request for arbitration to include E.O. 83 as a basis for its claim.

The Union claims that, pursuant to Chapter 35 of the New York City Charter,[8] the Rules and Regulations of the City Personnel Director are written rules and regulations of the mayoral agency employing grievant. For this reason, the Union argues, the Department is obligated to incorporate and follow these rules. The Union asserts that DOP Rule 6.1.3 is applicable to the instant dispute because grievant was transferred from the Arterial Highways Division to the Highway Operations and Maintenance Division without his approval. Citing state law and Chapter 35 of the New York City Charter, it makes a similar claim regarding an alleged violation of Rule 5.1 of the State Civil Service Department.

The Union contends that grievant was lead to believe that rules and regulations exist concerning notification for voluntary transfers, appointment of volunteers, transfers in reverse seniority, and families working in the same borough. According to the Union, although it appears that such rules and regulations do not exist, grievant was deliberately misinformed by Department management of the alleged rules so that it could transfer him punitively without preferring charges. The Union claims that if such written rules and regulations do not exist, grievant has been disciplined in violation of § 75[9]

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[7](...continued)
or in the collective agreement to which the certified representative is a party.

[8] The Union does not cite what it deems to be the relevant section of Chapter 35 of the New York City Charter.

[9] Section 75 of the Civil Service Law is entitled "Removal (continued...)

of the Civil Service Law and Rule 6.4.2[10] of the Rules and Regulations of the City Personnel Director.

The Union maintains that throughout the grievance proceedings, grievant consistently claimed that his reassignment and transfer were punitive. The Union alleges that grievant was told by Assistant Commissioner Burton Most at the Step I proceeding that his transfer was the result of incompetence and lack of productivity. It claims that grievant, who was the shop steward for the Arterial Highways Division at the time of his transfer, had previously been accused by Chief of Operations Michael Pergola of deliberately slowing down a job. The Union also alleges that Commissioner Most stated, "I don't like unions. I work around them." The Union contends that at a meeting in July, 1990, it proved to Department management that grievant had not deliberately slowed down a job. The Union claims that Mr. Pergola later made

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[9](...continued)
and Other Disciplinary Proceedings." The Union has not cited to a specific provision in this section.

[10] Rule 6.4.2 of the Rules and Regulations of the City Personnel Director provides:

Service of Charges and Determination

(a) Where the employee is a resident of the city, a copy of charges preferred in a disciplinary action pursuant to sections seventy-five and seventy-six of the civil service law shall be served in person upon the employee thus charged.

(b) Where personal service cannot be made or where the employee is not a resident of the city, it shall be sufficient for the agency head to serve such charges by registered mail to the last known address of such person. Where service is made by registered mail such person shall be allowed an additional three days in which to answer or otherwise appear.

(c) Service by the agency head of written notice of determination to be reviewed pursuant to sections seventy-five and seventy-six of the civil service law shall be sufficient if such written notice is delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail such person shall be allowed an additional three days in which to file such appeal.

new accusations against grievant and that grievant was subsequently transferred, allegedly because of a rule prohibiting family members from working in the same borough. The Union maintains that the reassignment is punitive because grievant earns less money from night work in his new assignment, and notes that grievant now works with his brother in Queens.

The Union cites Decision Nos. B-57-90 and B-5-87 for the proposition that the Board has found punitive transfers without filing of formal charges to be arbitrable. It argues that the Department should not be allowed to discipline employees in violation of Department rules, and asserts that such alleged violations have previously been found arbitrable by the Board in Decision Nos. B-2-91 and B-31-90.

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.[11] 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 applicable agreement. The Board will consider each such case individually.[12]

The City argues that the Union has failed to demonstrate a nexus between the acts alleged and its claimed right to arbitration. It maintains that the rules cited by the Union do not apply to transfers from one agency to another, and in any case, are not included within the definition of arbitrable

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

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

grievances under E.O. 83. In addition, the City asserts, neither the Union nor the grievant has identified a written rule or regulation of the Department regarding notification for voluntary transfers, appointment of volunteers, transfers in reverse seniority or families working in the same borough.

In its Request for Arbitration, the Union did not cite any provision which would uphold a claim to arbitration. Failure to state a basis for arbitration ordinarily would compel us to find the grievance not arbitrable, since the Board cannot create a duty to arbitrate where none exists.[13] In its answer, however, the Union claimed that this dispute can proceed to arbitration pursuant to E.O. 83.

E.O. 83 provides a grievance and arbitration procedure which may be used when such a procedure has not been incorporated into a written collective bargaining agreement.[14] The City and the Union are parties to a Comptroller's Consent Determination under § 220 of the Labor Law. The Determination does not contain a grievance and arbitration clause. The parties, therefore, are governed by the grievance and arbitration procedure set forth in E.O. 83.
[15]

The grievance in the present case presents a dispute concerning a claimed violation of a written rule or regulation of the Department. Such a dispute is clearly within the scope of the grievance and arbitration provision of E.O. 83. While we do not condone the Union's failure to cite E.O. 83 in its Request for Arbitration, it is apparent from the City's petition that it considered E.O. 83 to be a possible basis for arbitration and argued accordingly.

The City asserts that, even if the Union had submitted its petition pursuant to E.O. 83, the grievance cannot be maintained. It argues that alleged violations of the Rules and Regulations of the City Personnel Director

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[13] Decision Nos. B-17-84; B-36-80; B-12-77.

[14] Decision Nos. B-59-90; B-17-84.

[15] Decision Nos. B-18-83; B-9-83; B-13-77.

may not be arbitrated under E.O. 83 because they are not written rules or regulations of the mayoral agency by which the grievant is employed. DOP Rule II,

§ V, 2.5., states, "[t]hese rules shall apply to all offices and positions in the classified service of the City." Moreover, we have held that rules which are applicable to the agency employing the grievant, although not promulgated by that agency, are nonetheless rules or regulations of the agency by which the grievant is employed, within the meaning of E.O. 83.[16] We conclude, therefore, that DOP Rule 6.1.3 is a rule of the Department within the meaning of E.O. 83.

The Union's reliance on Rule 6.1.3 to provide a nexus in this case, however, is misplaced. It is apparent that the rule contemplates only transfers from one agency to another, because it provides, "[e]very transfer...shall require the consent, in writing, of the proposed transferee and of the respective **heads of the agencies** concerned therewith.... [emphasis added]. Similarly, we find no nexus between the City's alleged acts and the claimed violation of Rule 5.1 of the State Civil Service Department.

The City contends that wrongful disciplinary action is excluded from the definition of arbitrable grievances in E.O. 83. We have previously held, however, that such a claim may proceed to arbitration if the Union demonstrates that the Department's alleged action arguably constitutes "a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment."[17]

Moreover, the City is incorrect in asserting that we have previously held that E.O. 83 does not provide for arbitration of disputes concerning wrongful discipline. In Decision No.

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[16] Decision Nos. B-41-90; B-13-77.

[17] Decision No. B-59-90.

B-15-82, the case cited by the City for this proposition, we held that the Board could not order arbitration pursuant to E.O. 83 because the Union did not show a claimed violation of the written rules or regulations of the agency. The instant case is distinguishable because the Union has submitted into the record a copy of § VIII of the Department of Transportation Rules and Regulations Manual, entitled "Guidelines for Disciplinary Proceedings." The Manual provides a lengthy and detailed procedure for instituting and implementing disciplinary action, which the Union alleges that the Department has violated.

The City claims that although the Union attempts to base the grievance on Department rules and procedures regulating discipline, neither these rules nor § 75 apply to grievant because he is neither a competitive nor a non-competitive employee. This argument is irrelevant in the present case. The Manual does not, on its face, distinguish among classes of employees nor does it expressly reserve disciplinary procedures contained therein for a certain class of employees. By arguing that the Manual implicitly limits its provisions to certain classes of employees, the City asks us to accept its interpretation of that document. We have long held, however, that questions of interpretation of written provisions alleged to have been violated are matters to be determined by an arbitrator.[18] Where, as here, the express language of the document does not preclude its applicability to the grievant, the question of its applicability may be resolved by the arbitrator.[19]

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[18] See, e.g., Decision Nos. B-55-91; B-2-89; B-65-88; B-4-85.

[19] We note, however, that the title Gas Roller Engineer is classified by DOP as "C-X", a competitive, Rule X title in the Skilled Craftsman and Operative Service. Grievant is listed in the City of New York Payroll Management System as a competitive employee. If the City is arguing that competitive class employees are covered by the Department's disciplinary procedures, it would appear that grievant falls within the category that the City claims is covered.

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 raised here, however, is whether the Department itself has limited its managerial right to discipline grievant through its own written regulations. Since the Department chose to adopt such regulations, whether they are applicable to grievant and, if they are, whether they have been violated, are matters for an arbitrator to decide.

Failure to serve charges 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.[20] Whether an act constitutes discipline depends on the circumstances surrounding the act.[21] The circumstances alleged by the Union, not rebutted by the City, raise a substantial question as to whether grievant's transfer was punitive. The Union claims that grievant was told by Department management that his transfer was the result of incompetence and lack of productivity. It alleges that, after the satisfactory conclusion of a meeting with management concerning these charges, grievant was again accused by the Chief of Operations and was subsequently transferred without a hearing. Such an action, if it occurred, arguably would be a violation of § VIII of the Department's Rules and Regulations Manual, and would be subject to the grievance and arbitration procedure under E.O. 83.

The question of whether the disciplinary procedures set forth in the Department's Manual are applicable to grievant is one of interpretation, which is for an arbitrator to decide. We have found that substantial issues are presented here as to whether the Department intended to punish 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 rules and regulations of the Department which were submitted into the record by the Union. If the

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[20] Decision Nos. B-59-90; B-52-89; B-61-88; B-5-87; B-5-84.

[21] Decision Nos. B-59-90; B-4-85.

arbitrator concludes that the procedures set forth in the Department's manual are applicable to grievant, it will remain for the arbitrator to determine the merits of the Union's allegations. Accordingly, we find the grievance presented to be 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 request for arbitration filed by Local 14-14B of the International Union of Operating Engineers be, and the same hereby is, granted; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, denied.

Dated: New York, New York MALCOLM D. MACDONALD

June 24, 1992

CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

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DISSENT OF MEMBERS SILVERBERG AND WRIGHT

We hereby dissent. In this opinion, the majority has unreasonably extended the reach of Executive Order 83 to include the right to grieve disciplinary matters.

Dated: New York, New York
July 14, 1992

MEMBER

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OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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Dated: New York, New York
July 14, 1992

DEAN L. SILVERBERG
MEMBER

STEVEN H. WRIGHT
MEMBER