City v. L.375, DC37, 51 OCB 12 (BCB 1993) [Decision No. B-12-93 (Arb)]

12-93	affirmed	*affd., Matter of NYC Dept. of Sanitation v. MacDonald*, Index No. 402944/93 (Sup. Ct. N. Y. Co. Dec. 20, 1993) (Ciparik, J.), *affd*, 215 A.D.2d 324 (1st Dept. 1995), *affd.*, 87 N.Y.2d 650 (1996).	63

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

-between-

DECISION NO. B-12-93
THE CITY OF NEW YORK, DOCKET NO. BCB-1515-92 (A-4256-92)

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 375,

Respondent.
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DECISION AND ORDER

On July 28, 1992, the City of New York ("the City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance submitted by District Council 37, Local 375 ("the Union") on behalf of Richard Diamond ("the grievant"). On October 30, 1992, the Union submitted an answer and on December 31, 1992, the City filed a reply.

Background

The grievant is employed by the Department of Sanitation ("DOS") as a Civil Engineer, Level II. In June of 1991 he was assigned as a Project Manager to DOS's "District 5/5A" operations in Maspeth, Queens.[1] In this capacity, the grievant "oversaw and coordinated" DOS's construction project at that location. The Union alleges that shortly after taking on this assignment the grievant submitted his recommendations about the number and type of personnel that would be required to complete the project to his immediate supervisor, the Deputy Director of Construction. According to the Union, the grievant received no response to his recommendations.

When staffing levels decreased and other changes were made without the grievant's input, the Union alleges, he sent a memorandum, dated November 8, 1991, to the Director of Construction. In this memorandum the grievant complained that certain actions taken by the Director, such as refusing to provide adequate staffing and hiring private consultants, threatened the timely and safe completion of the project.

About a week later, the Director objected to the fact that the grievant had submitted the memorandum on his own personal stationary rather than on DOS stationary and, according to the Union, on this basis refused to respond to the merits of the

[1] For the three years immediately preceding this assignment, the grievant had been assigned to a location in Douglaston, Queens.

memorandum. The Union alleges, and the City denies, that the Director also stated that the grievant was incompetent and would be transferred to DOS's Fresh Kills operation in Staten Island. On November 19, 1991, the grievant was transferred to Staten Island, a location which the Union alleges is a longer and more expensive commute from the grievant's Queens home. The Union also alleges that prior to the transfer he worked on major "multimillion dollar" projects and that since the transfer he has been involved only in minor projects such as the installation of garage doors. In fact, the Union alleges, no major construction project has been undertaken at the Fresh Kills operation in the year that the grievant has been assigned to that location.[2]

On November 21, 1991, the grievant met with the Director and DOS's Chief Engineer to discuss the transfer. The Union alleges, and the City denies, that during this meeting the Director "emphasized that he transferred [the grievant] because he found [the grievant] to be incompetent." The Union further alleges that "at approximately the same time" the Director gave the grievant a "negative" performance evaluation.[3] Prior to this

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[2] In this connection, the City submitted a document dated December 18, 1992 and entitled "Projects at Fresh Kills" which lists 13 projects ranging in cost from $285,000 to $41,609,000.

[3] The performance evaluation rates the grievant's performance as "satisfactory." The comment section of the evaluation states the following:

"[The grievant] is still of the opinion that he and his
(continued...)

incident, the Union asserts, the grievant received "superior, outstanding or above average evaluations."[4] As further evidence of the grievant's outstanding performance, the Union alleges that he was among 17 City employees selected by the Mayor's Office of Construction to be part of the "Directory of Engineering Discipline Experts." According to the Union, "this highly talented group of technical personnel was created to provide the City with a pool of experts that can be called upon to lend their expertise to any City agency that requested the service of an expert in a particular field."[5]

At the Step III grievance conference held in February of 1992, the Union claimed that the transfer of the grievant from Queens to Staten Island constituted a punitive action which violated Article VI, Section 1(b), (e), and (f) of the parties'

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[3](...continued)
subordinates are to monitor construction. His failure to comprehend that he as the Resident Engineer directs and coordinates the prime contractors dilutes his authority on the job. His mindset fails to exhibit any sense of urgency to complete projects under his supervision within the specified time limits. He accepts bureaucratic delays as 'normal' and fails to expand his envelope of responsibility to its maximum."

[4] The Union has submitted no evidence of this allegation. In fact, the performance evaluation that was submitted by the Union covers an earlier evaluation period and rates the grievant's performance as satisfactory for that period.

[5] According to the City the "Directory of Engineering Discipline Experts" is a program that relies on the "voluntary participation of City employees on a limited basis."

collective bargaining agreement.[6] The grievance was denied by OLR on the ground that the transfer was a business necessity. No satisfactory resolution of the dispute having been reached, on June 11, 1992, the Union filed a Request for Arbitration in which it stated the grievance as follows:

> Whether the employer, the New York City Department of Sanitation, violated the collective bargaining agreement by wrongfully transferring [grievant]? If so, what shall the remedy be? Whether the employer

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[6] Article VI, Sections 1(b), (e), and (f) define a "grievance" as follows:

> (b) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration;
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> (e) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent 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.
>
> (f) 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 employee covered by the Rules and Regulations of the Health and Hospitals Corporation where any of the penalties (including a fine) set for in Section 75(3) of the Civil Service Law have been imposed.

> failed to serve the grievant with written charges in violation of the collective bargaining agreement? If so, what shall the remedy be?

As a remedy, the Union requested reassignment of the grievant to his former work location or to another one in Queens.

Positions of the Parties

City's Position

Citing Section 12-306b of the NYCCBL,[7] the City argues that the transfer of an employee is within the City's managerial rights. According to the City, DOS was merely exercising its right to determine the means and personnel by which its operations are to be conducted when it transferred the grievant. The City alleges that the grievant was transferred along with many other employees because, as a result of a Consent Order, the

[7] Section 12-307b of the NYCCBL provides, in relevant part, as follows:

> b. 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 and personnel by which government 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 technology of performing its work.

Fresh Kills operations is "the subject of judicial scrutiny" and requires several construction projects.

The City contends that in cases, such as the instant one, where the disputed action of management falls within the scope of an express management right, the union is first required to establish an arguable relationship between the act complained of and the source of the alleged right. According to the City, the Union has failed to allege any facts to establish an arguable relationship between the transfer and Article VI, Section 1(e) of the agreement, i.e., the Union has failed to make a showing that disciplinary action was taken. The City contends that an allegation that a transfer was disciplinary in nature, without supporting facts, does not satisfy the requirement of the test. The City argues that the difficulty of the grievant's commute is irrelevant, denies the Union's claim that the grievant is only working on minor projects, and denies the allegation that the grievant was told that he was incompetent.

In any event, the City contends, Article VI, Section 1(e) clearly states that an employee may grieve a claimed wrongful disciplinary action where written charges of incompetency or misconduct have been served. The City argues that since written charges were never served in the instant case, the grievant may not grieve the transfer. Addressing the Union's argument that the performance evaluation constituted written charges, the City argues first that, contrary to the Union's assertion, the

grievant was not evaluated on the date of his transfer. Rather, the City maintains, the grievant's supervisor completed the evaluation on September 2, 1991, more than 2 1/2 months prior to the transfer.[8] Furthermore, the City argues, a satisfactory performance evaluation cannot be construed as being charges of incompetence. The City argues that the comment included on the evaluation is simply an assessment by a supervisor of what he perceives to be an employee's strengths and weaknesses.

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[8] The performance evaluation form submitted by the City covers three distinct periods of time. For each period there are corresponding boxes which indicate when the supervisor signed the form and when the grievant signed the form (or refused to do so). In summary, the form includes the following information:

	Date of Supervisor's Signature	Date of Grievant's refusal to sign
Period 1 1/1/91- 4/30/91	5/15/91	1/14/92
Period 2 5/1/91- 8/31/91	9/2/91	1/14/92
Period 3 9/1/91- 12/31/92	5/29/92	6/18/92

Based on this form it is impossible to determine with certainty when the grievant was actually evaluated. The grievant could have been evaluated on the date that the supervisor signed the form, on the date that the grievant signed the form, or on some other date.

As to the alleged violation of Article VI, Section 1(f) of the collective bargaining agreement, the City argues that there is no nexus between the complained of act and this provision. The City argues that pursuant to Section 1(f), the failure to serve written charges may only be grieved where one of the penalties set forth in Section 75(3) of the Civil Service Law[9] has been imposed. Since a transfer is not one of the penalties listed in Section 75(3), the City argues, Article VI, Section 1(f) of the contract cannot serve as the basis for arbitration.

In summary, the City argues, according to the terms of the contractual grievance procedure there are only two instances in which an employee may grieve a disciplinary action; either when written charges have been served or when a Section 75(3) penalty is imposed on a grievant without the service of written charges. The City argues that this case does not fall within either of these circumstances.

Finally, the City argues that as to Article VI, Section 1(b) of the collective bargaining agreement, the Union has failed to

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[9] Section 75(3) of the Civil Service Law provides, relevant part, as follows:

> 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 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; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty.

alleged a violation of any rule, regulation, policy or order of the employer.

The Union's Position

The Union argues that the circumstances surrounding the grievant's transfer raises a substantial issue as to whether it was disciplinary in nature. As evidence to support this argument, the Union alleges that the transfer followed immediately after the grievant was declared "incompetent" by the Director and given a "highly critical" performance evaluation. This declaration of incompetence, the Union argues, followed a complaint letter sent by the grievant to the Director. Further, the Union maintains, the transfer has greatly increased the grievant's commuting time and travel expenses. Finally, the Union contends, despite his record as an above average employee, the grievant was reassigned to oversee only minor construction projects; unlike his previous assignment, the new assignment does not employ his skill, experience and expertise. 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.

Addressing the City's claim that the lack of written disciplinary charges prevents the Union from arbitrating this

claim, the Union argues that the performance evaluation given to the grievant constituted written charges of incompetence since its purpose was to justify the transfer.

DISCUSSION

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate.[10] In the instant matter, the Union claims that the City's action constitutes a wrongful disciplinary action which, on its face, falls within the definition of an arbitrable grievance. The City denies this assertion, contending that transfers are within the City's managerial rights. Moreover, the City argues, because no written charges were filed or any Section 75(3) disciplinary penalty imposed, there is no action by the City which the Union may argue is disciplinary in nature so as to constitute a grievance under Article VI, 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

[10] E.g., Decision Nos. B-52-89; B-33-88; B-28-87.

determined by an arbitrator.[11] However, where it is alleged that the disputed action is within the scope of statutory management rights,[12] 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.[13] This test may be stated as follows: The grievant is required to allege sufficient facts to establish an arguable 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. Thus, in any case in which the City's management right to assign its employees is challenged on the ground that the transfer 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 a substantial issue is presented in this regard.[14] This showing requires close scrutiny by this Board on a case by case basis.

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[11] Decision Nos. B-52-89; B-40-86; B-5-84.

[12] 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-52-98; B-47-88; B-5-87.

[13] Decision Nos. B-52-89; B-33-88; B-5-87; B-4-87; B-40-86; B-5-84.

[14] Decision No. B-40-86.

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 claimed wrongful disciplinary action.[15]

Whether an act constitutes discipline depends on the circumstances surrounding the act.[16] We find that the Union's factual allegations concerning the circumstances surrounding the grievant's transfer raise a substantial question as to whether the actions were disciplinary in nature. First, it is undisputed that the grievant sent a critical memo to the Director of Construction approximately one week prior to the transfer and that the Director refused to respond to this memo. According to the Union, the Director stated that the grievant was incompetent and would be transferred on two occasions; once when he refused to respond to the grievant's memo and once during the meeting in

[15] Decision Nos. B-57-90; B-52-89; B-61-88; B-5-84. With respect to this issue the City cites Decision No. B-9-81, a case in which the Board was presented with a contract provision identical to the one found in the instant case and held that the service of written charges of misconduct or incompetency is not a condition precedent to establish a sufficient nexus between the transfer of the grievant and the contractual right to grieve a claimed wrongful disciplinary action. The City points out that this decision was reversed on appeal in the Matter of City of New York and District Council 37, N.Y.L.J., October 23, 1981, at 6, Col. 5 (Sup. Ct. N.Y. Co. 1981). However, since judgment was never entered in that case, it cannot be considered binding precedent.

[16] Decision Nos. B-57-90; B-5-84.

which the grievant's transfer was discussed. Moreover, the Union alleges that the grievant was given a critical performance evaluation at the time that he was transferred.[17] Finally, the grievant was transferred to a distant and inconvenient location. The City's denial of the allegations of incompetency serves only to raise an issue of credibility which must be determined by an arbitrator. Likewise, the City's arguments concerning the meaning of the evaluation and the timing of its issuance also involve issues of credibility.

The Union, having met its threshold burden, is entitled to proceed to arbitration. In the arbitral forum, however, the burden will be upon the grievant to substantiate his claim that his supervisor made statements regarding his competency, that the transfer was related to allegations of incompetency and that it was implemented for a disciplinary purpose. The City may, of course, refute any evidence offered by the grievant on this question. But if the arbitrator determines that the transfer was disciplinary within the meaning of the contract between the

[17] In Decision No. B-40-86, this Board held that, in the absence of any other evidence of disciplinary action, it would not accept the grievant's contention that an unsatisfactory rating on an annual performance evaluation was the equivalent of the service of written charges of incompetence. The Board further stated that the function of a performance evaluation is not to serve as written charges, but to put an employee on notice of management's assessment of his or her strengths and weaknesses. Our holding in B-40-86, however, does not prevent the arbitrator from considering the performance evaluation in the instant case since the Union has offered other evidence of disciplinary action.

parties, the burden shall be upon the City to establish that the discipline was justified. We note that the grievant has not alleged the right to arbitrate the City's failure to follow disciplinary procedures in instituting the transfer. At the arbitration, therefore, the grievant shall be precluded from alleging that the City failed to follow the proper procedures.

Article VI, Section 1(f) of the contract is clear on its face. This provision defines a grievance as an alleged failure to serve written charges where any of the disciplinary penalties enumerated in Section 75(3) of the Civil Service Law have been imposed. Since a transfer is not one of the enumerated penalties, there is no apparent relationship between Article VI, Section 1(f) and the complained of act. Therefore, this provision cannot serve as a basis for arbitration.

Finally, with respect to the alleged violation of Article VI, Section 1(b) of the contract, we find that the Union has failed to establish a nexus between the transfer and this provision. As the City correctly contends, the Union has not alleged a violation of any rule, regulation, policy or order of the employer.[18]

[18] We note that the Union alleged that the City violated "departmental and City rules regarding procedures for executing performance evaluations for sub-managerial employees" by having the Director of Construction evaluate the grievant despite the fact that this individual did not supervise the grievant. However, the Union has not cited any specific departmental or City rule.

For the reasons stated above, we grant the City's challenge to arbitrability to the extent that it challenges the alleged violation of Article VI, Sections 1(b) and 1(f) of the collective bargaining agreement. In all other respects, we deny the City's challenge to arbitrability and grant the Union's request for arbitration.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York Collective Bargaining Law, it is hereby

ORDERED that the request for arbitration filed by District Council 37, Local 375 be, and the same hereby is, granted to the extent set forth above; and it is further

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

DATED: New York, New York
March 24, 1993

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

I dissent, George B. Daniels
MEMBER

I dissent, Steven H. Wright
MEMBER