City v. Doctors Council, 53 OCB 18 (BCB 1994) [Decision No. B-18-94 (Arb)]

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

-between-

DECISION NO. B-18-94

CITY OF NEW YORK,
Petitioner

DOCKET NO. BCB-1503-92 (A-4248-92)

-and-

DOCTORS COUNCIL,
Respondent.
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DECISION AND ORDER

On June 29, 1992, the City of New York, through its representative, the Office of Labor Relations ("the City" or "petitioner"), filed a petition challenging the arbitrability of a grievance submitted by the Doctors Council ("the Union" or "the respondent") on behalf of Anne Brouard, M.D. ("grievant"). The Union filed an answer to the petition on August 31, 1992. The City filed a reply on September 10, 1992.

After having had preliminary deliberations on this matter, the Board heard oral argument, at the request of the attorney for the Union, on June 28, 1994. Following oral argument, the Board, by letter dated July 5, 1994, requested that the Union submit a copy of any written evidence that it believed would support its contentions. In response, the Union's attorney submitted a letter, dated July 12, 1994, together with copies of a performance evaluation and a memorandum addressed to the

grievant. The City filed a letter in response, dated July 29, 1994.

Background

Grievant, a Senior Medical Specialist, was employed by the Department of Health ("Department") for more than seven years in the in-house title "Clinic Director". The Union alleges that in June and November 1991, grievant received a negative performance evaluation from the City. Thereafter, she was relieved of her supervisory duties, and her salary was reduced by an amount commensurate with the change in her assignment.

On November 21, 1991, the Union filed a grievance at Step I of the grievance procedure alleging that the Department improperly took disciplinary action against grievant by demoting her and reducing her salary in violation of Article VIII of the parties' collective bargaining agreement. As a remedy, the Union requested immediate reinstatement of grievant to her position as Clinic Director, and to be made whole for her losses.

The Step I grievance was denied on December 5, 1991. In denying the grievance Ilene Klein, Deputy Director of Operations, Bureau of Child Health, noted that grievant was not demoted from her civil service title. Rather, Ms. Klein stated that:

> Effective December 2, 1991 Dr. Brouard will assume a fully clinical assignment in keeping with her professional strengths and tasks and standards, while retaining her present title. As such, Dr. Brouard will maintain her current hourly rate. However, since she will no longer be acting in a supervisory capacity, effective December 2, 1991 she will not be entitled to the supervisory differential.

Thereafter, on May 13, 1992, the grievance was denied at Step III of the grievance procedure. In reaching her decision, the Step III Review Officer stated that "[t]he record in this matter reflects that grievant's assignment was changed from one which required supervisory responsibilities and, in the absence of supervisory responsibilities, grievant is not entitled to earn a differential payment." The Step III Review Officer further stated that "the change in grievant's assignment does not represent a demotion as grievant's title remains that of Senior Medical Specialist and grievant continues to be paid the correct hourly rate for said title."

No satisfactory resolution of the matter having been reached, the Union filed a request for arbitration, on June 3, 1992, alleging improper demotion, discipline and/or reduction in salary of grievant by the New York City Department of Health in violation of Article VIII, Section 1 of the parties' collective bargaining agreement.[1] As a remedy, the Union requested

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[1] Article VIII, Section I of the parties' collective bargaining agreement defines the term "grievance" as follows:

> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
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> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders 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

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rescission of the demotion and/or other discipline imposed; reinstatement of grievant to her former position with full back pay and benefits, plus interest; removal of all documents

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[1](...continued)
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;

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

(D) A claimed improper holding of an open-competitive rather than a promotional examination;

(E) A claimed wrongful disciplinary action taken against (i) a permanent employee covered by Section 75(1) of the Civil Service Law; (ii) a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation; (iii) a non-competitive per annum employee appointed in a title in Section 2(a) of Article III hereof who was employed prior to September 1, 1983 or who has completed one year of service; and (iv) a per diem or per session employee of a Mayoral Agency who is regularly employed 17-1/2 or more hours per week and has completed one year of such employment; upon whom the agency head shall have served written charges of incompetency or misconduct while the employee is serving in his or her permanent title or which affects his or her permanent or continued status of employment.

(F) (i) Per session employees in Mayoral Agencies who have been employed fewer than 17-1/2 hours but at least 5 years on a regular basis of at least 10 hours per week, will not be subject to termination of employment for arbitrary or capricious reasons; and any issues hereunder shall be subject or the contractual grievance procedure up to and including Step III (OMLR) only.

(ii) Effective January 1, 1984, the provisions of Section 1(F)(i) shall apply to employees who have completed at least 4 years of service.

relating to the demotion and/or disciplinary action from grievant's personnel file and all other files maintained by the employer; and such other relief as may be appropriate.

Positions of the Parties

City's Position

The City challenges arbitrability of the stated grievance on two grounds. First, it contends that the reassignment of grievant's duties from supervisory to clinical was a proper exercise of its management right under § 12-307 of the New York City Collective Bargaining Law ("NYCCBL").[2] Second, it argues that the Union has failed to cite a grievable contract provision as the basis for its claim.

In support of its first argument, the City cites several prior decisions of this Board dismissing grievances as non-

[2] Section 12-307b of the Administrative Code states:

> It is the right of the City, or any other public employer, acting through its agencies, to determine the standard of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action, relieve its employees 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. . . and exercise complete control and discretion over its organization and the technology of performing its work.

arbitrable where a change in assignment of duties had occurred.[3] The City asserts that since the grievant's reassignment carried with it no change in job title or salary level, the decision to alter her duties within the parameters of that job title fell "within management's prerogative." Subsequently, having been properly reassigned from supervisory to clinical duties, the City maintains, the grievant was no longer eligible for the supervisory assignment differential she had been receiving in her former capacity.

The City also argues that the Union has failed to demonstrate a nexus between the personnel action referred to and the contractual provision cited as the basis for its claim. In support of its position, the City submits that the Union has failed to establish how "management has bargained away the right to make decisions on assignment of duties." The City argues that the Union may not infringe on this managerial right absent an evidentiary showing of intent or motive on the part of the employer to take punitive action. In the instant case, the City contends, the Union has made no such showing and has provided no circumstances establishing a cause for discipline. Consequently, the City asserts, the Union's bare allegation or

[3] Decision Nos. B-68-90; B-23-87; B-40-86.

"mischaracterization" that the grievant was "demoted" is insufficient to support its request for arbitration.[4]

The City rejects the Union's argument that the "demotion" issue is a matter of fact for the arbitrator to decide. While the City does not dispute that in prior decisions this Board has permitted arbitration of disciplinary grievances, it submits that those cases are distinguishable from the instant one.[5] According to the City, the facts alleged in those cases raised the grievance above the level of a bare allegation and, therefore, justified sending the grievance to arbitration. In the instant case, the City claims, the Union's request for arbitration falls short of this threshold.

The City argues further that the performance evaluation relied upon by the Union does not constitute a charge or finding of incompetence. While the grievant's ability to supervise was questioned, there was no allegation that she was unable to perform the job duties associated with her job title. In fact, it was stated the grievant's strength was in direct patient contact, and she was reassigned to duties within her job specification which were in the area of her greatest ability. The City further notes that discipline implies a penalty, while here, the grievant merely ceased to perform an additional job

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[4] Decision No. B-52-89.

[5] Decision Nos. B-57-90; B-4-87.

duty and therefore no longer was entitled to extra hourly pay under the contract. The loss of the differential was not imposed as a penalty to punish the grievant; rather, it resulted from a change in her job duty.

Finally, the City argues that to allow arbitration of a grievance involving the clear managerial right to reassign employees to duties within their job specifications would render meaningless the management rights clause set forth in the NYCCBL.

Union's Position

The Union submits that the City's right to reassign its employees does not insulate from review the reassignment of an employee when the reassignment constitutes punitive action taken by the employer against the employee. Accordingly, the Union argues that the reassignment of grievant's duties and corresponding reduction in pay (loss of assignment differential) constituted wrongful discipline in violation of the collective bargaining agreement. Citing Article VIII, Section 1 of the agreement, the Union notes that a grievance is defined as "wrongful disciplinary action" and, therefore, the instant grievance is arbitrable.[6]

The Union rejects the City's assertion that "no demotion ... took place." In support of its position, the Union notes that in

[6] See Article VII, Section 1(e).

June and October of 1991, the City conducted reviews of grievant's job performance which resulted in negative evaluations. Thereafter, and in response to these evaluations,[7] the Union claims, the City "stripped the grievant of supervisory duties which she had consistently performed for over seven years, and reduced her salary by the amount of the assignment differential she had consistently received over that same period of time." This summary revocation of duties, salary differential (approximately $6,000 per annum) and in-house title (Clinic Director), the Union argues, amounted to improper disciplinary action. In this regard, the Union notes that a recent arbitration award rendered under the unit contract held that a reduction in pay predicated on an allegation of "incompetency" presents a grievable issue of "claimed wrongful disciplinary action" under the collective bargaining agreement. The Union argues that the unfavorable performance evaluations given the grievant are the equivalent of allegations of incompetence. In any event, the Union asserts that the factual question of whether the City's actions did or did not constitute discipline is one for an arbitrator to decide.[8]

[7] The Union notes that the October 1991 performance evaluation contains the statement "reassignment recommended".

[8] Decision Nos. B-40-86; B-5-84; B-8-74; and B-25-72.

Finally, the Union submits that the decisions cited by the City for the proposition that management's reassignment of duties is not arbitrable are distinguishable from the instant case. According to the Union, the cases relied upon by the City did not involve a reduction in salary, whereas in the case at bar, the grievant's salary was indeed reduced as a result of the loss in assignment differential.

DISCUSSION

It is well-established that where, as in the instant case, the parties do not dispute that they have agreed to arbitrate their controversies, the question presented to this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[9] In the instant matter, the Union claims that the City's action constitutes wrongful disciplinary action which falls within the definition of an arbitrable grievance.[10] The City denies this assertion, arguing that the mere allegation that a reassignment of duties was made for a disciplinary purpose does not transform an act undertaken pursuant to the employer's management right into a wrongful disciplinary action.

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.[11] However, where it is alleged that the disputed action is within the scope of the employer's statutory management rights,[12] we have been careful to fashion a

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[9] See, e.g., Decision Nos. B-12-93; B-33-90; B-52-89.

[10] Article VIII, Section 1(e), supra at 3-4.

[11] Decision Nos. B-12-93; B-52-89; B-40-86.

[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-12-93; B-52-89; B-47-88.

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] Under this test, the grievant must first 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, assignment or reassignment was for a disciplinary purpose will not suffice. 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] Such a showing requires close scrutiny by this Board on a case by case basis.

Moreover, where we have found that the facts alleged establish a sufficient nexus between a reassignment and a credible showing that the employer's action had punitive motivation, the fact that no written charges of misconduct or incompetency were served on a grievant will not in and of itself bar the arbitrability of a claim of wrongful disciplinary action.[15]

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[13] Decision Nos. B-12-93; B-52-89; B-33-88; B-5-87; B-4-87; B-40-86.

[14] Decision Nos. B-12-93; B-52-89; B-40-86.

[15] Decision Nos. B-12-93; B-57-90; N-52-89.

In the case at bar, we find that the Union has not met its threshold burden of showing that grievant's reassignment raises a substantial question as to whether the action taken was disciplinary in nature. In contrast to the facts alleged in other cases in which we found that the Union had made a sufficient showing of disciplinary action,[16] here we find that the Union has failed to allege sufficient facts to demonstrate that disciplinary action arguably was intended by the City.[17]

In the instant matter, the Union presents a "negative performance evaluation" as the sole evidence that the grievant's reassignment was intended as a disciplinary measure. As we have

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[16] E.g., Decision Nos. B-12-93; B-33-90; B-33-88; B-4-87.

[17] For example, in Decision No. B-12-93, we found that actions taken by the City were arguably disciplinary in nature based on documentation and other factual allegations proffered by the Union. Specifically, the grievant in that case had sent a critical memo to the Director of Construction approximately one week prior to the transfer that went unanswered, and had alleged that the Director stated on two occasions that grievant was "incompetent" and would be transferred. These circumstances were in addition to the critical performance evaluation alleged to have been given at the time of the transfer.

In Decision No. B-33-90, the Union revealed three separate instances of command discipline against grievant concerning her work performance. Additionally, the Commanding Officer's own transfer memorandum included allegations of several "recent occurrences" involving poor work performance that justified grievant's transfer and reassignment to a position of "lesser responsibility."

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

already held in Decision No. B-40-86, in the absence of any other evidence of disciplinary action, we will not accept a grievant's contention that an unsatisfactory rating on an annual performance evaluation is the equivalent of the service of written charges of incompetency.[18] Rather, the Board has held that the function of a performance evaluation is to put the employee on notice of management's assessment of her strengths and weaknesses, and to provide feedback to the employee so that discipline will not have to be taken.[19] In the present case, the performance evaluation was critical of the grievant's supervisory abilities, but it also stated that she:

> . . . is well versed in current medical practices and I feel that her expertise lies in the area of providing direct patient services in a clinical setting.

We believe that this evaluation is, overall, consistent with the function described above. We do not find that it is tantamount to a charge of incompetence. In this regard, we observe that on the grievant's evaluation form, in the section labeled "Recommendations", the box for "reassignment recommended" was checked off, while the box for "disciplinary action recommended" was not.

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[18] See Decision No. B-40-86; for further elaboration, see also Decision No. B-12-93, footnote 17.

[19] Id.

Moreover, even if performance evaluations, on their own, could be considered evidence of disciplinary action, the Union asks us to do something in the instant case that we have refused to do in prior decisions involving similar facts -- that is, to draw an inference of disciplinary intent based on a temporal connection between the evaluation and the reassignment. In Decision No. B-52-89, the Union alleged that a shift reassignment implemented one day after an "incident" between grievant and his superior was sufficient to meet the threshold burden of establishing the requisite nexus to disciplinary action. The Union buttressed this allegation with a further contention that the City had deviated from its past practice of assigning tours based on seniority. With these facts as the sole evidence of wrongful discipline, we rejected the Union's contention that the proximity in time of the two events, without more, establishes a causal connection sufficient to make an arguable showing that the change in grievant's tour was for a disciplinary purpose. As we noted in that decision, in the absence of any other persuasive evidence, such a finding would be purely speculative.[20]

In arguing that the grievant was disciplined by the City, the Union also points to the "harm" resulting from grievant's reassignment to clinical duties. While we recognize that the loss of her supervisory assignment differential and in-house

[20] Id.

title of Clinical Director constituted more harm than that found in some prior cases wherein this Board held similar grievances non-arbitrable,[21] we note that the grievant in the instant matter has not suffered a change in her permanent job title (Senior Medical Specialist) or a change in the salary paid to that title.

Finally, we find the Union's reliance on an arbitration award rendered under the unit contract to be unpersuasive. The Union contends that the arbitrator held that any reduction in pay predicated on an allegation of "incompetency" presents a grievable issue of "claimed wrongful disciplinary action" under the collective bargaining agreement. Assuming that this is a correct statement of the holding, it is significant that in that case the employer admitted that it reduced the grievant's hours because he was unable to do his job and it wanted to give him a "hint" that he should resign. It was in the context of these facts that the arbitrator found the basis for a claim of wrongful discipline. As stated above, we do not find that the instant case presents facts that demonstrate any comparable allegation of "incompetence". In any event, the ruling of a contract arbitrator in another, earlier, case is not controlling on the determination by this Board of a question of arbitrability.

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[21] See, e.g., Decision No. B-40-86.

Accordingly, for all of the reasons stated above, we will grant the City's petition challenging arbitrability and deny the Union's request for arbitration.

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 be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Doctors Council be, and the same hereby is, denied.

DATED: New York, New York
September 27, 1994

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Dennison Young, Jr.
MEMBER

Anthony P. Coles
MEMBER