Dep’t of Sanitation & City v. L.444,SEIU, 55 OCB 4 (BCB 1995)
[Decision No. B-4-95 (Arb)]

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

DEPARTMENT OF SANITATION and
THE CITY OF NEW YORK

Petitioner,

-and-

SANITATION OFFICERS ASSOCIATION
LOCAL 444, S.E.I.U.

Respondent.
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Decision No. B-4-95

Docket No. BCB-1666-94
(A-5394-94)

DECISION AND ORDER

On July 22, 1994, the Department of Sanitation ("DOS" or "Department") and the City of New York ("City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance submitted by the Sanitation Officers Association ("Union") on behalf of Blas Oliveras ("grievant"). On August 12, 1994, the Union filed an "answer and cross motion for dismissal of the petition challenging arbitrability." The City filed a reply on September 15, 1994.

Background

The grievant is employed by DOS as a Supervisor. In early March of 1993 the grievant was hospitalized after his doctor determined that his blood pressure was unacceptably high; he remained in the hospital for two and a half days. Shortly after he

was released, he was examined by a DOS physician. The DOS physician found the grievant's EKG to be abnormal and his blood pressure to be too high. Based the physician's findings, the Department placed the grievant on a temporary paid sick leave. Later, the Department placed the grievant on a "no driving" or "light duty" assignment. Sometime after May 21, 1993, the grievant was reinstated to his normal full duty assignment.

By letter dated May 11, 1993, the grievant initiated a grievance at Step I of the contractual grievance procedure. In this letter the grievant claimed, essentially, that he should not have been placed on sick leave or "light duty" assignment. According to the grievant, when his private physician examined him only days prior to the DOS examination, his heart rate and blood pressure were normal. The grievant alleges that as a result of having been taken off his regular assignment, he lost $5,500 in "overtime and other entitlements." There is no evidence of any response to this letter in the record.

By letter dated June 18, 1993, the Union filed a grievance on behalf of the grievant at Step II of the grievance procedure. The letter states that the grievance "relates to harassment of the grievant by [the DOS physician]...as specified in the [grievant's May 11, 1993 letter]." As relief the letter requests that the Department "cease and desist from such harassment" and pay "monies and overtime lost by the grievant as a result of [the DOS physician] improperly forcing the grievant to remain home." The

Department denied this grievance on the ground that, considering the grievant's recent hospitalization and the DOS physician's finding as to his physical condition, there appeared to be "a substantial medical basis for his remaining on paid sick leave and the subsequent 'no driving' assignment." Apparently addressing the alleged "harassment" by the DOS physician, the Department further stated that "with respect to the allegation of unprofessional conduct, [the DOS physician] denied all such allegations."

By letter dated September 21, 1993, the Union appealed the grievance to Step IV of the grievance procedure.[1] The Union characterized the grievance as follows:

> The issue involves the harassment of the grievant by [the DOS physician] at the DOS clinic. [The DOS physician] improperly sent the grievant home sick and forced him to remain home for an extended period while grievant was fit to perform work. As a result the grievant lost monies and overtime.

OLR found that the Department's action was warranted based upon the DOS physical and denied the grievance.

No satisfactory resolution of the dispute having been reached, on March 11, 1994, the Union filed a request for arbitration pursuant to Article X, Section 2 of the parties' collective bargaining agreement ("the agreement" or "the contract")[2].

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[1] There is no evidence in the record of a grievance having been filed at Step III of the grievance procedure.

[2] Article X, Section 2 of the parties' collective bargaining agreement defines the term "grievance" as follows:

(continued...)

Therein, the Union set forth the grievance to be arbitrated as "harassment of [the grievant] by the DOS clinic resulting in improper denial of overtime and other entitlements." The Union cited Article IV, Section 4 and Article VII, Sections 1, 2, 4, and 7 as the contract provisions which had been violated.[3]

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[2](...continued)
(A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;

(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 the terms and conditions of employment; provided, disputes involving the Rules and Regulations of the City Personnel Director 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 specification; and

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

[3] Article IV, Section 4 of the agreement provides:

> (a) Paid Holidays - Each employee shall receive eleven (11) paid holidays annually, payment for which shall be made in accordance with existing procedures.
>
> (b) Sunday Work - An employee who works on a Sunday will receive two times his respective pro-rated hourly rate of pay for the hours actually worked.
>
> (c) Night Shift Differential - Employees shall receive a differential of ten percent of their daily rate of pay for work performed on a night shift....

Article VII, Sections 1, 2, 4 and 7 provide, in relevant part:

Section 1. Hours
(a) Effective July 1, 1989 every employee shall be (continued...)

[3](...continued)
scheduled to work 8 hour and 15 minutes shifts for a total of 41 hours and 15 minutes per week. The additional 15 minutes shall be exclusive of Sundays and shall be scheduled for the beginning of the tour.

(b) The following shall be the normal shifts for all employees covered by this Agreement.

Garage Shifts - 8 to 4, 4 to 12, 12 to 8
Waste Disposal - 8 to 4, 4 to 12, 12 to 8
Normal Field Operations - 7 to 3, 4 to 12 shift
Night Plow Operations - 12 Midnight to 8 A.M.

* * *

(e) The work week shall consist of 40 hours, consisting of five (5) eight (8) hour days, exclusive of Sundays.

Section 2. Sunday Work
(a) Assignment of Shifts
(i) All regularly assigned night officers will retain their shift, except by mutual agreement.

(ii) The highest ranking officer assigned to work on a Sunday shall work the day shift. If there is more than one officer in the highest ranking title so assigned, then, the most senior officer in that title shall work the day shift. This provision shall not apply if it requires an officer to work a double shift.

(b) Supervisor and General Superintendent (Level I) Roster - Sunday work shall be offered to every Supervisor and General Superintendent (Level I), on a rotation basis, according to previous Sundays worked, on a standardized Sunday Borough Roster. The Department shall have the right to select from District rosters in the order of standing thereon in making assignment on Sundays after holidays. In making such assignments, the Department shall rotate among districts within a zone.

* * *

(e) Declination
(i) With the exception of those officers on sick leave, military duty, LODI, or excused because of a death in the family, any officer requesting not to work on an assigned
(continued...)

[3](...continued)
Sunday shall be charged with said Sunday and not be reassigned to work again until his name is reached in orderly sequence. Officers on vacation, long weekend or jury duty shall have the option to work or refuse to work on Sundays. If they work, they will be charged for said Sunday; if they refuse, they will not be charged with a refusal but will work when they return to duty. Officers on vacation, long weekend or jury duty shall not have the option to work on Sundays if such assignment is related to a special event.

(ii) Officers on sick leave, military duty or LODI, or excused because of a death in the family, do not have the option to work on said Sunday.

* * *

Section 4. Holiday Work
(a) Assignments of Shifts
(i) All regularly assigned night officers will retain their shift, except by mutual agreement.

(ii) The highest ranking officer assigned to work a holiday shall work the day shift. If there is more than one officer in the highest ranking title so assigned, then, the most senior officer in that title shall work the day shift. This provision shall not apply if it requires an officer to work a double shift.

(b) Supervisor and General Superintendent (Level I) Roster - Holiday work shall be offered to every Supervisor and General Superintendent (Level I), on rotation basis, according to previous holiday worked on a rotating basis on a Standard Borough Roster.

* * *

Section 7. Job Assignment

(a)(i) In those districts that have a 12 midnight to 8:00 AM yearly operation, the Department will offer these positions to employees for voluntary transfers. Seniority will prevail on all such transfers. The Department will assign the current 12-8 field officer to this position should an officer (supervisor) be presently assigned. All further
(continued...)

Positions of the Parties

City's Position

The City claims that "the gravamen of the grievance is that the grievant disagrees with a DOS doctor's medical determination concerning his fitness for duty and claims that this constitutes harassment." The City contends that the Union has failed to establish a nexus between this grievance and any of the provisions cited in the request for arbitration. According to the City, none of the cited provisions address "harassment", "a right to contest the medical determination of a DOS doctor," or "a right to perform the customary duties of a supervisor while medically unfit".

The City further argues that, pursuant to §12-307b of the NYCCBL, the City has the right to "relieve employees from duty because of lack of work or for other legitimate reasons" absent a

[3](...continued)
assignments will be made by voluntary transfer. However, should the Department discontinue staffing the 12:00 midnight to 8:00 AM shift, the officer will be reassigned as rotating officer in assigned district. Nothing in this subsection will impair the Department's right to create, maintain, or abolish shifts as it, in its sole discretion, may determine to be necessary.

(ii) Shifts - Normally the following assignments will be in effect:

4 to 12 ANDS - Supervisor
4 to 12 Garage - Supervisor
12 to 8 Garage - Supervisor
8 to 4 Garage - Supervisor
Day Section - Supervisor

* * *

limitation on this right in the parties' collective bargaining agreement. The City contends that the provisions cited by the Union in the request for arbitration do not limit the City's right to place an employee on sick leave or on a limited duty assignment for legitimate reasons. In this case, the City argues, the grievant was removed from his normal assignment for a legitimate reason; a medical judgment was made regarding his fitness for full duty.

Also pursuant to §12-307b of the NYCCBL, the City argues, the assignment of overtime is within its statutory management rights. The City maintains that the parties' collective bargaining agreement does not limit this right. The City argues that even where a contract provides for compensation for overtime worked, such a provision in no way establishes that an employee is granted the right to perform overtime work in any particular circumstances.

Union's Position

According to the Union, there was no medical reason to place the grievant on sick leave or on a limited duty assignment[4]; the grievant's high blood pressure, a condition he had for years, was

[4] In its answer to the petition challenging arbitrability the Union alleges, for the first time, that the grievant's duties did not change in any way when he was placed on light duty. In fact, the grievant was even required to drive. The Union argues that by giving the grievant an assignment that was the same as his full duty assignment, the Department recognized that "nothing was [medically] wrong with him."

being monitored and treated. The Union contends that the real reason that the Department removed the grievant from his normal assignment was to punish him for having had an argument with the DOS physician.[5] The effect of this action, the Union asserts, was to deny the grievant "overtime, shift differential, Sunday pay and Holiday work which standardly came with his assignment and seniority."

The Union argues that it has established the requisite nexus between the cited provisions and the complained of act. The Union maintains there is a nexus between the grievance and Article VII, Section 7, and Article IV, Section 4 of the contract in that the grievant bid for and received his normal shift based on his level of seniority and is entitled to the paid holidays, Sunday work and night shift differentials associated with that shift. As for Article VII, Sections 2 and 4, the Union argues that "there were lists for Sunday work, holiday work, and chart day work, again usually rotating by seniority." The Union contends that under the contract, none of these "entitlements" may be denied in retaliation "for what appears to be an argument with a departmental doctor."

Discussion

[5] In his June 18, 1993 letter, the grievant states that the DOS physician "poked" his chest and accused him of using cocaine. He also states that the physician threatened "to put [the grievant] in for ordinary disability" on more than one occasion. Finally, the grievant characterized the physician's behavior as "disrespectful" and "prejudice."

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.[6] 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.[7] Further, where the public employer asserts that the action in question is a right accorded to management by statute, the Union must show that a substantial issue under the collective bargaining agreement has been presented.[8] This requires close scrutiny by the Board.[9]

In the instant case the Union argues that, pursuant to Article VII, Section 7 of the agreement, the grievant bid for and received his usual shift assignment. Having received this shift, the Union argues, he is entitled to the paid holidays, Sunday work and night shift differentials associated with it. The Union contends that there was no medical justification for the Department's action and the Department does not have the contractual right to deny these "entitlements" in order to punish an employee. The City contends

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[6] See, e.g., Decision Nos. B-29-92; B-19-89; B-65-88.

[7] See, e.g., Decision Nos. B-1-89; B-7-81.

[8] See, e.g., Decision Nos. B-29-92; B-74-89; B-46-86.

[9] See, e.g., Decision Nos. B-59-90; B-74-89; B-35-88; B-16-87.

that it acted within its statutory management rights when it temporarily removed the grievant from his normal assignment based upon a medical determination regarding his fitness. Moreover, the City argues, the Union has failed to demonstrate the requisite nexus between its action and the cited contractual provisions.

As the City correctly points out, in the absence of any contractual or other limitation, the City retains the statutory right to relieve its employees from duty for legitimate reasons. In the instant case, the City asserts that it exercised this right when it placed the grievant on sick leave and on light duty assignment based upon a medical determination. Under these circumstances, the burden is on the Union to demonstrate a limit, derived from the collective bargaining agreement, on this management right. We find that the Union has not met this burden.

Based upon the Steps I, II and IV grievances and the request for arbitration, it is clear that the gravamen of the grievance is that the Department lacked a "legitimate reason" to relieve the grievant from duty because the physician's medical determination was improper and unfair. However, the Union has cited no provision which arguably gives it the right to arbitral review of a medical determination. The provisions cited by the Union address job assignments, Sunday work, a night shift differential, holiday work, and hours. As for the Union's argument that the act was punitive, retaliatory, or disciplinary in nature, we note that the contractual definition of the term "grievance" does not include a

claimed wrongful disciplinary action taken against an employee.

We reject the Union's argument that the grievant bid for and received his normal shift based on his level of seniority and is therefore "entitled" to the overtime, holiday work, Sunday work, and night differential associated with that shift. In the absence of an express limitation set forth in the collective bargaining agreement or in a rule or regulation or written policy of the employer, the broad managerial authority to direct employees provided in Section 12-307(b) of the NYCCBL permits the employer unilaterally to implement adjusted work assignments as it deems necessary.[10] When the Department placed the grievant on sick leave and on "light duty" assignment, it exercised its right to adjust work assignments. The provisions relied upon by the Union do not limit this right; they set forth the length of the workweek, the length of a shift, possible "normal" shifts for covered employees, the number of paid holidays, the method by which holiday work will be assigned, the rate of pay for Sunday work, the method by which Sunday work will be assigned, the rate of pay for night work, and the method by which the midnight to 8:00 AM shift will be assigned.

This Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[11] In the instant case, the Union has

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[10] Decision Nos. B-27-93; B-46-92.

[11] Decision Nos. B-29-92; B-35-89; B-41-82; B-15-82.

not demonstrated a nexus between the complained of act and the provisions of the contract that it claims have been violated. Accordingly, the petition challenging arbitrability is granted.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining it is hereby,

ORDERED, that the petition challenging arbitrability filed by the Department of Sanitation and 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 Sanitation Officers Association Local 444, S.E.I.U. be, and the same hereby is, denied.

Dated: New York, New York
March 30, 1995

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Richard A. Wilsker
MEMBER

Jerome E. Joseph
MEMBER

Thomas J. Giblin
MEMBER