NYPD & City v. NYSNA, 57 OCB 44 (BCB 1996) [Decision No. B-44-96 (Arb)]

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

between

The New York City Police Department and New York City,

Petitioners,

Decision No. B-44-96
Docket No. BCB-1849-96
(A-6364-96)

and

New York State Nurses Association,

Respondent.
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DECISION AND ORDER

On August 22, 1996, the New York City Police Department ("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 the New York State Nurses Association ("the Union"). In the Union's request for arbitration, it claimed that the City had violated Article VI, §1(B)[1] of the parties' collective

[1] Article VI, §1(B), states, in pertinent part:
GRIEVANCE PROCEDURE
DEFINITION: The term "Grievance" shall mean:
(B) A claimed violation, misinterpretation or misapplication of the rules and 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 Civil Service Commission 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

(continued...)

bargaining agreement ("CBA"). The Petition states the grievance as follows: "Disparate treatment of Evette Simmons. Frequent transfers to different geographical work locations more than other less senior employees (Case Management Nurses) is discrimination." On September 15, 1996, the Union filed an answer to the City's petition challenging arbitrability. The City filed its Reply on October 7, 1996.

Background

The grievant, Evette Simmons, is a Case Management Nurse, and was working in a clinic in Jamaica, Queens. Upon her reassignment to a clinic in the South Bronx, the Union filed a Step IA grievance on January 11, 1996, claiming discriminatory actions on the part of the Department; this was the eighth time she had been reassigned since the commencement of her employment with the Department in 1988. Receiving no response to the Step IA filing, the Union appealed, filing a Step II grievance on January 31, 1996, followed by a Step III grievance, filed on June 18, 1996, appealing the Step II determination. The Step III grievance was dismissed by the Office of Labor Relations on July 1, 1996. The Union then filed a

[1](...continued)
of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration.

request for arbitration with the Office of Collective Bargaining on July 22, 1996.

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City contends that the Union has failed to allege a nexus between the act complained of and any applicable provision of the parties' CBA. The City states that the provision claimed to have been violated, Article VI, §1(B), has no relevant connection to the fact that the grievant has been frequently transferred, and that the CBA contains no provisions which prohibit the Department from transferring the grievant.

The City also argues that the Union has failed to allege an arbitrable claim. Article VI merely defines what a grievance is; it does not supply any substantive rights nor does it establish an independent basis for a grievance. Moreover, the City maintains that the right to transfer an employee falls under the purview of NYCCBL §12-307(b): managerial prerogative.[2] Hence, the City

[2] NYCCBL §12-307(b) states, in pertinent part:

> 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 os 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

(continued...)

claims that it simply exercised its right to establish the means to effect transfers and decide which personnel would be subject to any transfer.

In its Answer to the Petition Challenging Arbitrability, the Union raised certain specific allegations for the first time in the proceeding: (a) that the transfer of Petitioner violated Procedure No. 303-19 of the Department's Administrative Guide: Evaluation of Members of Service (Procedure No. 303-19); and (b) that Petitioner was transferred because (i) she is the first local representative of the Association since its certification and (ii) she is openly gay.

The City states that, insofar as these newly posited theories of relief amount to a "Last ditch effort[s] to grasp at a contract violation so far along in the process [they] cannot be taken as credible assertions of the Union's belief in a contract violation.... If such claims are arbitrable, they must be resubmitted to the grievance process at the initial stages as contained in the contract."

The City also states that the Union has failed to assert a nexus between the acts complained of, namely, disparate treatment

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[2](...continued)
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.

because Petitioner was the first local representative of the Association and because she is openly gay, and any provision of the applicable CBA. Therefore, the City submits that this action has been brought in the wrong forum. Furthermore, the City maintains that there is no nexus between Procedure No. 303-19 and the fact that Petitioner has been transferred more frequently than other similarly situated employees with less seniority.

Union's Position

In its Answer, the Union states that the grievant's transfer was not an exercise of managerial prerogative, but that it amounted to disparate treatment against the grievant, as this was the eighth transfer since her employment with the Department began in 1988. "This amounts to fifty percent more than any other person in her job classification, despite the fact that she is the most senior employee." In support of this allegation, the Union asserts that every other nurse with less seniority has been transferred less frequently than the grievant.

The Union further contends that the motivating factors behind the disparate treatment of the grievant are that, (a) she is the most senior nurse in her job classification; (b) she is the first representative for the Association in this bargaining unit since its 1993 Certification by the Board; and (c) she is openly gay.

The Union also maintains that there was a violation of Article VI, §1(B) of the parties' CBA, which defines a grievance as "A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer ..." The Union claims that the discriminatory treatment of the grievant violated the "written policy" embodied in Procedure No. 303-19. The Union therefore believes that, as the transfer of the grievant is a violation by the Department of a written policy, it is arbitrable.

Discussion

In determining the question of arbitrability, the Board has a responsibility to ascertain whether a relationship exists between the act complained of and the source of the alleged right.[3] The Union must show that the contract provision invoked is arguably related to the grievance to be arbitrated.[4] Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the transfer of the grievant and Article VI §1(B) of the parties' CBA.

The Union initially complains that the grievant's transfer was a violation of Article VI, §1(B) of the parties' CBA, thereby giving rise to a request for arbitration, seeking the rescission of

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[3] Decision No. B-9-89

[4] Decision Nos. B-9-89; B-4-88; B-35-86

the grievant's transfer and a return to her last work location and assignment. The City challenged the petition for arbitration, stating that the contractual provision cited by the grievant had no nexus to the frequency of transfers of which the grievant complained.

In its Answer to the City's Challenge, the Union claimed for the first time that the grievant's transfer was motivated by anti-Union and anti-gay bias. Even if arbitration were the appropriate forum for resolution of such claims, we would decline to consider these two issues. "The Board has consistently denied the arbitration of claims raised for the first time after the Request for Arbitration has been filed. Permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure."[5] Thus, to permit the Union to raise these issues in its Answer would be antithetical to the collective bargaining process over which we preside, subverting the overall goal of amicable resolution of disputes through dialogue and discussion. However, our rejection of these late-asserted claims is without prejudice to their submission at the appropriate lower step of the parties' grievance procedure, to the extent, if any, that they fall within the scope of the parties' definition of a grievance.

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[5] Decision No. B-2-95. See also, Decision Nos. B-12-94, B-44-91, B-29-91 and B-55-89.

We next deal with the Union's claim that the grievant's transfer was a "Violation, misinterpretation or misapplication ... of the ... written policy ..." : Procedure No. 309-19. This procedure provides guidelines and standards for the evaluation process of members of the Department, to wit, provisions for the smooth transition of the evaluating process upon the retirement/transfer of a "rater" (one who performs the evaluation) vis-a-vis the individual being evaluated; procedural and administrative guidelines for performing evaluations; and practical guides for utilizing data compiled from evaluations in such a way as to coherently and accurately reflect the performance of the individual being rated. The section of this procedure which pertains directly to the grievant, "Sub-Managerial Civilian Personnel," deals specifically with the evaluation process of said sub-management civilian personnel, and procedures to be followed relating thereto. Included as "Additional Data" in this section is a paragraph which deals directly with the issue of transfers:

> When a sub-managerial civilian member is transferred, the commanding officer/supervisory head will ascertain that the "Actual Performance Section" is completed and forwarded to the Commanding Officer, Employee Management Division. The Ratee will be given a copy of the REPORT. The immediate supervisor in the new command will prepare a REPORT listing tasks/standards of the ratee's new assignment. The REPORT will be completed and forwarded to the Commanding Officer, Employee Management Division at the end of the rating period.

There is nothing in the Union's request for arbitration, or in its answer to the City's petition challenging arbitrability, that raises any issue relating to an alleged impropriety or failure by the City to adhere to procedural guidelines promulgated by Procedure No. 303-19. The Union fails to allege any specific facts that would indicate that this personnel action was anything more than the Department's exercise of its managerial right pursuant to NYCCBL §12-307(b).

The evidence presented, on its face, does not establish an arguable link between the transfer of an employee and the provision of the CBA concerning the "Violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer ...", or evaluations of sub-management civilian personnel. The Union has failed to cite any provisions of the CBA which limit or prohibit the Department's right to transfer employees.

For the reasons stated above, we find that the Union has failed to establish a nexus between the grievant's transfer and Article VI, §1(B) of the CBA. Accordingly, the petition challenging arbitrability is granted.

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 challenge to arbitrability raised herein by The City be, and the same is hereby, granted in all respects, and it is further

ORDERED, that the Request for Arbitration filed herein by the New York State Nurses Association in all respects be, and same is hereby, denied.

Dated: November 26, 1996
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Thomas J. Giblin
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER

MEMBER