Dep't of Parks & City v. L. 1505, DC 37, 61 OCB 28 (BCB 1998) [Decision No. B-28-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-- between --

The Department of Parks and Recreation and The City of New York,

Petitioners,

DECISION NO. B-28-98

DOCKET NO. BCB-1960-98 (A-7050-97)

-- and --

District Council 37, AFSCME, AFL-CIO, Local 1505 (New York City Attendants, Parks Service Workers & Debris Removers),

Respondent.

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DECISION AND ORDER

On March 2, 1998, the City of New York, appearing by its Office of Labor Relations, ("City" or "Petitioner"), on behalf of the Department of Parks and Recreation ("DPR"), filed a petition challenging the arbitrability of a grievance submitted by District Council 37, AFSCME, AFL-CIO, Local 1505, ("Union" or "Respondent"), on behalf of Nelson Acevedo ("Grievant"). After two requests for extension of time to file, the Union filed an answer on May 1, 1998. Following a request for extension of time to file, the City filed a reply on May 22, 1998.

Background

The City and the Union are parties to a collective bargaining agreement covering employees in the Civil Service title of City Park Worker ("CPW"). The collective bargaining agreement has a term from January 1, 1992, to March 31, 1995, and continues in effect pursuant to the *status quo* provisions of the New York City Collective Bargaining Law ("NYCCBL").

The Grievant has been employed as a permanent, competitive CPW for approximately eleven (11) years.[1] He worked at District No. 11 from the time of his appointment until March, 1997.

Pursuant to a Memorandum of Understanding ("MOU") dated July 21, 1995, between the City and the Union, concerning, *inter alia*, issues related to the Work Experience Program ("WEP"") participants in the Department, the Grievant was given a "step up" to the position of Associate Park Service Worker ("APSW") on or about April 23, 1995.

Section Two of the MOU states:

> DPR agrees that any CPW assigned to supervise WEP participants shall receive a step-up to an APSW position or the APSW minimum salary for such time as they continue to supervise WEP participants....

The Grievant received a salary commensurate with the APSW position. He retained the Civil Service title of CPW. In March, 1997, he was moved from District No. 11 to District No. 12. The Union describes the move as a *transfer* from his APSW duties; the City asserts that it was a *reassignment* to his regular CPW duties. There is no disagreement that the move was because of concerns on the part of management about his performance supervising WEP workers ("WEP crew chief").

Since March, 1997, the Grievant has not supervised WEP workers and no longer receives the salary of an APSW.

Section Five of the MOU states:

> Any dispute, controversy or claim concerning or arising out of the application or interpretation of this agreement shall be subject to grievance procedure set forth in

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[1] The City states that he was appointed to the position in or around May, 1987; the Union states that he was appointed in or around March of that year.

the Blue Collar Unit Agreement.[2]

On or about June 26, 1997, a grievance claiming wrongful disciplinary action was filed at Step I of the procedure provided in Article VI, § 6 (Labor Class Disciplinary Procedure), of the Blue Collar Contract. Under Article VI, § 1(g), a grievance may be defined as:

> A claimed wrongful disciplinary action taken against a labor class employee with one year of service in title, except for employees during the period of a mutually-agreed upon extension of probation.

The procedure to be applied is to take effect "upon service of charges of incompetency or misconduct...." As the remedy sought, the grievance stated, "Restore to title of WEP crew chief and to make member completely whole."

On July 30, 1997, the grievance was denied at Step I on the ground that the Grievant "was stepped down from a seasonal WEP crew chief position based upon performance." His Step II appeal was denied on September 24, 1997, on the ground that, for reasons of job performance, he was no longer supervising WEP participants and, thus, no longer entitled to receive the APSW minimum salary. His request for a Step III hearing was denied on October 10, 1997. Despite the Union and the Grievant's claim that the Grievant was wrongfully disciplined by demotion from the position of WEP crew chief without appropriate due process, the Step III hearing officer determined that the Grievant was not subjected to a demotion and that "no wrongful disciplinary action has been taken by the Department." The hearing officer determined that the Grievant had received the APSW minimum salary for the time he was assigned to supervise WEP participants.

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[2] The MOU also provides that it "shall be deemed an appendix to the 1992-95 Blue Collar Unit Agreement pursuant to the terms set forth in Article XIII thereof and shall be coterminous with said 1992-95 Blue Collar Agreement."

He also determined that, because the Grievant was no longer assigned to supervisory duties, he no longer was entitled to receive the APSW minimum salary.

On December 4, 1997, the Union filed a Request for Arbitration in the matter, citing Article VI, § 1(g), as the contract provision claimed to have been violated. It cites ArticleVI, § 6, as the section of the agreement under which the demand for arbitration is made. As relief, the request specifies "restoration to former title, back pay and otherwise made whole."

Positions of the Parties

City's Position

First, the City argues that the instant grievance must be dismissed for want of a nexus between the act complained of, *i.e.*, a managerial decision no longer to have the Grievant supervise WEP participants, and the provisions of the collective bargaining agreement cited by the Union in its request for arbitration. Those provisions are Article VI, §§ 1(g) and 6. The City also argues that the MOU contains no language regarding promotions or demotions. The City further maintains that the Grievant's reassignment from WEP crew chief to regular CPW duties did not constitute a demotion, as it contends the Union asserts, and that no wrongful disciplinary action under Article VI, § 1(g), was taken. It points out that the Grievant retained his Civil Service title of CPW both during and subsequent to his "step up" to APSW. Because no demotion has taken place, the City asserts, no nexus has been stated which would bring the instant claim under within the purview of the parties' agreement to arbitrate.

Secondly, the City maintains that the decision to return the Grievant to regular CPW duties was proper under § 12-307(a) of the NYCCBL. That section of our law provides, in

pertinent part, that management has the right to direct its employees, maintain efficiency of government operations, and to determine the methods, means and personnel by which government operations are to be conducted. The City states there are no contractual limitations on management's right to reassign the Grievant or any CPW from supervising WEP participants back to regular CPW duties.

Union's Position

The Union observes that, when the Grievant's supervisory duties were revoked, he was given "lesser" duties resulting in lower pay. In the Union's view, this demotion, as the Union characterizes it, constituted wrongful discipline. In its answer for the first time, the Union also argues that the Grievant's transfer in March, 1997, to a different District constituted wrongful discipline, grievable under the collective bargaining agreement. The Union reasons that management's actions were disciplinary in nature, because (1) the actions were taken admittedly "as a result of concerns with Grievant's work performance," rather than for reasons of economic necessity, (2) the Grievant received a lower salary and was stripped of his supervisory duties, and (3) the transfer increased the Grievant's commuting time.

Also for the first time in its answer, the Union asserts that the City denied the Grievant due process under § 1(g) of the collective bargaining agreement and under New York State Civil Service Law § 75(3). In sum, it maintains that it has stated an arguable nexus between the management action which is the subject of the complaint and the asserted source of the right to arbitrate.

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.[3] 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.[4] 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.[5] However, where it is alleged that the disputed action is within the scope of the employer's statutory management rights,[6] 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 a union.[7] Under this test, a grievant must first allege sufficient

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[3] Decision Nos. B-18-94, B-12-93, B-33-90, and B-52-89.

[4] Article VI, § 1(g), *supra*, at 3.

[5] Decision Nos. B-18-94, B-12-93, B-52-89, and B-40-86.

[6] It is well settled that the right to assign, reassign, and transfer employees falls within the scope of management rights defined in NYCCBL § 12-307(b). *See, e.g.,* Decision Nos. B-18-94, B-12-93, B-52-89, and B-47-88.

[7] Decision Nos. B-18-94, B-12-93, B-52-89, B-33-88, B-5-87, and B-4-87.

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.[8] The burden will not only be on a 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.[9] Such a showing requires close scrutiny by this Board on a case-by-case basis.

In the case at bar, we find that the Union has not met its threshold burden of showing that the 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 a sufficient showing of disciplinary action,[10] here we find that the Union has failed to allege

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[8] Decision No. B-18-94. In this regard, we emphasize that this arbitrability test is the exception rather than the rule. It is not applied in every case in which the City merely asserts that its action falls within the purview of the statutory management rights provision. Rather, the Board has reserved this test for cases where the contract provision invoked by the union, on its face, does not appear to relate to the subject matter of the management right asserted. The Board has applied this test most often in cases where an employee was transferred and the union claimed that the transfer was disciplinary and therefore arbitrable pursuant to a contractual provision that defines a grievance as a claimed wrongful disciplinary action. In those cases, the contract provision granting the right to grieve wrongful discipline, on its face, did not appear to be related to management's right to transfer employees. Accordingly, in those cases, the union had the burden of showing, by factual allegations, that the transfer in question was intended as a disciplinary action. *See* Decision Nos. B-18-94, B-12-93, B-52-89, B-33-88, B-5-87. In the instant matter, this test is being applied because the contract provision granting the right to grieve wrongful discipline, on its face, does not appear to be related to management's right to revoke a "step up" authorized under the MOU regarding the supervision by unit members of WEP workers.

[9] Decision Nos. B-18-94, B-12-93, B-52-89, and B-40-86.

[10] *See, e.g.,* Decision Nos. B-12-93, B-33-90, B-33-88, and B-4-87.

sufficient facts to demonstrate that disciplinary action arguably was intended by the City.

As the sole evidence of disciplinary action in violation of the applicable collective bargaining agreement, the Union states that the Department admits that it took away the Grievant's supervisory duties and concomitant pay differential because of his performance record in that work. There is no dispute that the move was because of concerns on the part of management about the Grievant's supervision of WEP workers. There is no evidence, however, that the assessment of his performance in supervising WEP participants encompassed the performance of his Civil Service job title duties. In fact, he retained his permanent Civil Service job title throughout the relevant time period. Furthermore, there is no claim that the Grievant was not paid the salary commensurate with his Civil Service title. The loss of pay differential associated with the APSW work was simply a function of the managerial decision to revoke an in-house assignment to supervisory duties.

Moreover, the Union has not pointed to any language in the MOU which would serve as a basis for a claim that a CPW was *entitled* to serve as an APSW. Nor has it pointed to any restrictions on management's prerogative whether or not to assign the Grievant to APSW work. The MOU merely guarantees payment of the APSW minimum salary "for such time as they continue to supervise WEP participants. . . ."

Finally, we have consistently denied claims first alleged after the Request for Arbitration is filed, reasoning that to permit arbitration of such a claim would frustrate the purpose of a multi-level grievance procedure, *i.e.*, to encourage discussion of the dispute at each step of the

procedure.[11] In the instant matter, the record of the lower steps of the grievance procedure is devoid of references to the claim, raised for the first time in the Union's answer, that the Grievant's transfer to another District, as distinguished from the removal of his supervisory duties and pay differential, was wrongful discipline. The record reveals only references to assertions that the managerial decision to revoke the "step up" to WEP crew chief and the pay differential that went along with it were tantamount to demotion. Therefore, the claim that the Grievant was wrongfully disciplined by transfer from one district to another is dismissed as untimely asserted.

The Union also asserts, for the first time in the answer, a claim that the Grievant was denied due process under the New York State Civil Service Law, § 75(3). However, it has not been alleged that the parties' collective bargaining agreement authorizes the arbitration of claimed violations of statutes. To the extent that the Union also raises, for the first time in its answer, a claimed denial of due process under Article VI, § 1(g), of the contract, we find that claim was not timely asserted at the lower steps of the grievance procedure; so, it cannot be permitted to serve now as a basis for arbitration.

In short, we find that the Union has failed to allege any direct or circumstantial evidence supporting the claim of wrongful disciplinary action. Accordingly, for all the reasons stated above, we shall grant the City's petition challenging arbitrability and deny the Union's request for arbitration in all respects.

ORDER

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[11] Decision Nos. B-30-94, B-12-94, B-20-90, and B-44-88.

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 District Council 37, AFSCME, AFL-CIO, Local 1505, be, and the same hereby is, denied.

DATED: New York, N.Y.
July 30, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER