City & HHC v. L. 237, CEU, 61 OCB 44 (BCB 1998) [Decision No. B-44-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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| In the Matter of the Arbitration | : | |
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| -between- | : | |
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| THE CITY OF NEW YORK and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, | : | |
| | : | Decision No. B-44-98 |
| Petitioners, | : | Docket No. BCB-1950-98 |
| | : | (A-6855-97) |
| -and- | : | |
| | : | |
| THE CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, | : | |
| | : | |
| Respondents. | : | |

## DECISION AND ORDER

On January 22, 1998, the City of New York and the New York City Health and Hospitals Corporation (hereinafter referred to as "City" or "HHC"), appearing by the Mayor's Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the City Employees Union, Local 237, International Brotherhood of Teamsters ("Local 237" or "Union"). The Union filed its answer on March 31, 1998. The City filed its reply on July 24, 1998.

## BACKGROUND

The grievant is employed as a Maintenance Worker by HHC at Morrisania Diagnostic and Treatment Center ("MD&TC"). Grievant last reported to work on April 14, 1995 as he had a medical condition which resulted in the amputation of his toe. On October 7, 1995, the grievant was

placed on a Medical Leave of Absence without pay by HHC, with a tentative return to duty date of February 12, 1996. In a letter dated November 13, 1995, the grievant was informed by the Associate Director of Human Resources at MD&TC that grievant needed to obtain medical clearance from the Employee's Health Service ("EHS") so that he may return to work. In order to obtain the necessary clearance from EHS, the grievant was required to bring a note from his physician stating that he may return to full active duty on the February 12, 1996, and include the diagnosis, prognosis and dates of treatment.

On December 7, 1995, grievant obtained a letter from his physician stating that in the physician's opinion, grievant may be expected to resume full work activities on December 18, 1995. On December 18, 1995, the grievant was examined at EHS. The Union claims that grievant did, in fact, submit the December 7, 1995 letter to EHS. The City alleges that they did not receive any documentation. The City asserts EHS found that grievant was unfit to return to work because he allegedly had an unsteady gait upon examination. On January 29, 1996, it was decided by all parties that the grievant was able to return to full duty.

On February 6, 1996, the grievant submitted a Step I grievance, requesting thirty days pay for not being permitted to return to work on December 18, 1995. On February 6, 1996, the grievant's Step I grievance was denied because HHC determined that the grievant was medically unfit to return to full duty as a Maintenance Worker on December 18, 1995. On April 18, 1996, the Union requested a Step II hearing in which they requested a remedy of twenty-nine working days pay for the grievant. On December 12, 1996, a Step II hearing was held. On January 14, 1997, the Hearing Officer denied the grievance, finding that HHC's previous decision was justified. On

January 27, 1997, the Union requested a Step III hearing. On February 3, 1997, OLR requested documentation from the Union pertaining to the grievance record. On March 31, 1997, OLR dismissed the complaint because the Union had not submitted the requested documentation. On July 21, 1997, the Union filed a request for arbitration, alleging that the City violated Article VI, § 1(e) of the Special Officers agreement.[1] The statement of the grievance to be arbitrated is "wrongful suspension." The remedy sought is full back pay and benefits for the period from December 18, 1995 through January 29, 1996.

## POSITIONS OF THE PARTIES

### *City's Position*

The City contends that the Union has failed to establish a nexus between the relevant section of the contract and the right alleged to have been violated. It notes that the Union makes its request for arbitration under Article VI, § 1(e) of the Special Officers agreement, and it argues that, as Article VI, § 1(e) pertains to disciplinary actions, and there is no evidence presented that HHC has disciplined the grievant in any way or attempted to in regard to this matter, the Union has failed to establish the requisite nexus. In fact, they argue, there is no such provision in the entire agreement which refers to any alleged right that the grievant claims have been violated.

The City also argues that the Union is attempting to arbitrate the outcome of a decision that was made within management's prerogative. It cites the portion of the New York City

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[1] Article VI, § 1(e) reads:

A claimed wrongful disciplinary action taken against a permanent employee covered by § 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.

Administrative Code, § 12-307(b), which states that "[i]t is the right of the City to . . . relieve its employees from duty because of lack of work or other legitimate reasons." The City argues that grievant was still suffering from the effects of his amputation on December 18, 1995, and therefore he was unfit to return to duty as a Maintenance Worker on that date. Accordingly, the employer relieved grievant from duty because he was medically unfit, and therefore it legitimately exercised its management right. It argues that the parties' collective bargaining agreement does not limit the City's statutory rights.

Finally, the City draws the Board's attention to a prior decision, Decision No. B-4-95, where a Supervisor employed by the New York City Department of Sanitation ("DOS") had sought to return to full duty after being hospitalized with high blood pressure. After his release from the hospital in March, 1993, a DOS physician examined the grievant and found that his EKG was abnormal and his blood pressure was too high. Based upon the physician's findings, the grievant was not returned to full duty until May, 1993. The DOS Supervisor filed a grievance seeking money for lost overtime and other entitlements. The City filed a petition challenging arbitrability. The Board granted the City's petition, stating that ". . . 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 matter, the City alleges that the grievant's job required him to, among other things, climb ladders and carry heavy objects and when EHS conducted a fitness for duty evaluation on December 18, 1995, it found that grievant was walking unsteadily following a major surgical procedure. Accordingly, the City argues that EHS properly exercised its statutory right in

determining that grievant was medically unfit for duty on that date.

***Union's Position***

In response to the City's contentions that the Union has failed to establish the requisite nexus, the Union argues that previous Board decisions have determined that the question of whether an employee has been disciplined within the meaning of a contractual term is ordinarily one to be determined by an arbitrator.[2] The Union argues that the fact that no written charges of incompetency or misconduct have been served on a grievant will not invariably bar the arbitrability of a claimed wrongful disciplinary action.[3] It also argues that the issue of whether an act constitutes discipline may depend on circumstances surrounding the act.[4] Applying the facts of the instant matter to the previous Board decisions, the Union asserts that it is clear that the grievant has been wrongfully disciplined because he had been cleared by his personal physician to work on December 18, 1995, found unfit by the EHS around that date, then a mere month later, he was found fit by EHS. As such, they have met the required nexus and the issue of whether the grievant had been wrongfully disciplined is a question for an arbitrator.

In response to the City's management rights claim, the Union states that they have demonstrated a substantial issue under the collective bargaining agreement, as required by the Board when the City asserts its management's rights. It argues that the actions of the City raise an issue of whether its actions constitute wrongful discipline. As such, it argues that the Union has met its

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[2] The Union cites Decision Nos. B-54-91; B-52-89; B-40-86 and B-5-84.

[3] The Union cites Decision Nos. B-2-95; B-12-93; B-57-90 and B-76-90.

[4] The Union cites Decision Nos. B-2-95; B-12-93; B-57-90 and B-5-84.

burden.

## DISCUSSION

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[5] When challenged to do so, a union requesting arbitration has the burden of showing that the contractual provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[6]

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.[7] However, when management's statutory right is implicated,[8] not only is the burden on the union, ultimately, to prove that allegation but also,

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[5] Decision Nos. B-47-92 and B-15-90.

[6] Decision Nos. B-50-92; B-47-92; B-29-91 and B-9-89.

[7] Decision Nos. B-12-93; B-52-89; B-40-86 and B-5-84.

[8] Section 12-307(b) of the NYCCBL, titled “management rights" provides, 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 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; . . . and exercise complete control and discretion over its organization and the technology of performing its work....

initially, to establish to the satisfaction of the Board that a substantial issue is presented.[9] This showing requires close scrutiny by the Board on a case-by-case basis.[10]

The fact that no written charges of incompetency or misconduct have been served on a grievant will not invariably bar the arbitrability of a claimed wrongful disciplinary action.[11] Whether an act constitutes discipline depends on circumstances surrounding the act.[12]

Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the contractual provisions cited as the basis for its claim. Our reasoning is as follows:

Concerning the charge that the medical determination of the EHS constituted a wrongful disciplinary action in violation of Article VI, § 1(e), of the parties' agreement, we find that the Union

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[9] 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 the 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 relieve its employees from duty because of lack of work or other legitimate reasons.

[10] Decision Nos. B-12-93 and B-40-86.

[11] Decision Nos. B-12-93; B-54-91; B-76-90; B-57-90; B-52-89 and B-61-88.

[12] Decision Nos. B-12-93; B-57-90 and B-5-84.

has not alleged any facts or circumstances which are traditionally characteristic of disciplinary action. In fact, the record is devoid of facts alleging that charges of incompetence or misconduct were made or served or that accusations of any sort of culpability were made. As to circumstances surrounding the alleged wrongful discipline, the Union has failed to assert any facts which may have precipitated any kind of disciplinary action on behalf of the HHC. There is no supporting documentation or any statement or allegation of fact other than the Union's conclusory allegation of disciplinary action which would indicate a punitive motivation by the employer for denying the grievant's request to return to full duty. In the absence of evidence supporting the Union's conclusory assertion of disciplinary motive, we find that the Union has not met its burden of presenting a substantial issue under the parties' agreement on the claim that Article VI, § 1(e), of the Agreement was violated.

**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 challenging arbitrability filed by the City of New York, be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Local 237, International Brotherhood of Teamsters, and the same hereby is denied.

Dated: New York, New York
September 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

ROBERT H. BOGUCKI
MEMBER

THOMAS J. GIBLIN
MEMBER