

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	:
DEPARTMENT OF CORRECTION,	:
	:
Petitioners,	:
	:
-and-	:
	:
CORRECTION OFFICERS' BENEVOLENT	:
ASSOCIATION,	:
	:
Respondent.	:
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Decision No. B-13-1999  
Docket No. BCB-2026-98  
(A-7497-98)

**DECISION AND ORDER**

On November 18, 1998, the City of New York (“City”) and the Department of Correction (“Department”), appearing by the Office of Labor Relations (“OLR”), filed a petition challenging the arbitrability of a grievance and a request for arbitration filed by the Correction Officers’ Benevolent Association (“Union” or “COBA”). The grievance concerned the transfer of Officer James Bynes (“Bynes”) from his post. The Union filed an answer on November 30, 1998, to which the City filed a reply on December 18, 1998. On January 6, 1999, the Trial Examiner requested additional information from the parties. The Union responded on January 11, 1999; the City did not submit a written response.<sup>1</sup> On February 24, 1999, the City requested additional time to compile the information that the Trial Examiner requested. In a letter dated February 26,

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<sup>1</sup> The attorney for the City responded by telephone that he had no information to add beyond what he set forth in the City’s pleadings.

1999, COBA urged the Trial Examiner to reject the City's request for additional time. The Board, however, granted the City an extension to submit the documentation. On March 9, 1999, the City submitted documents containing AMKC logs and schedules from December 21, 1997 through January 8, 1998. On March 18, 1999, the City submitted AMKC logs for the week following January 8, 1998.

### BACKGROUND

On January 26, 1998, the Union filed a grievance on behalf of Officer James Bynes alleging that on January 8, 1998, the administration of the Anna M. Kross Center ("AMKC") relieved Bynes of his awarded post in violation of Directive 2258R.<sup>2</sup> The warden responded that

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<sup>2</sup> Directive 2258R, effective on April 12, 1993 pertains to the Department's sick leave program and provides in relevant part:  
Subject: Absence Control/Uniformed Sick Leave Program  
Purpose: To establish an Absence Control Program to reduce chronic absenteeism among members of the uniformed force.

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#### III.

##### C. Discretionary Benefits and Privileges

Discretionary Benefits and Privileges include:

1. Assignment to a steady tour;
2. Assignment to a specified post or duties;

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##### F. Mitigation

Before a disciplinary or termination action is commenced, the following mitigating factors shall be considered:

1. The member's use of sick leave since joining the department.
2. Whether the sick leave is the result of a verified line-of-duty injury.
3. Whether the use of sick leave precedes or follows pass days and holidays

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##### G. Administrative Procedures

1. It is the responsibility of each Commanding Officer or designee to monitor the attendance records of the members assigned to that Command and to counsel any member whose record is developing a pattern that will result in a Category A or Category B classification.

Bynes was “administratively removed from [the] position.”

On April 3, 1998, the Union submitted a Step II grievance to the Department, which also sought time cards for the years 1996 and 1997 “to help substantiate allegations set forth in the grievance.” The Department denied the Step II grievance on April 22, 1998, stating that the grievant was “never awarded said post and that said post does not exist as named (School Escort). The Program Escort Post is the correct title.” The Department determined that, “In light of the foregoing, the grievance is hereby denied as no violation, misinterpretation or misapplication of the collective bargaining agreement or departmental rules or procedures affecting terms and condition of employment has been established.”

On July 24, 1998, the Union submitted a Step III grievance to the Department indicating that the Union is proceeding to the next level as a result of an “unsatisfactory response from Steps I and II.” OLR next scheduled a Step III conference for September 4, 1998. On August 17, 1998, the Union wrote to OLR indicating that since OLR did not review the appeal from the Step II decision within fifteen working days, the Union was canceling the September 4, 1998 hearing and requested a decision without a hearing. OLR denied the Step III grievance on October 5, 1998.

The Union then filed a request for arbitration on October 23, 1998, alleging a violation of Directive 2258R, §§ F and G. As a remedy, the Union seeks “that Officer Bynes be restored to

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2. The Commanding Officer may deny or revoke one (1) or more discretionary benefits and privileges of any member who is developing a pattern of chronic absence and has not responded to counseling.

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the School Escort Post which he has occupied for nine years.”<sup>3</sup>

### **POSITIONS OF THE PARTIES**

#### **City’s Position**

The City contends that Bynes is a Correction Officer at the AMKC assigned to work the 7:00 A.M. to 3:31 P.M. tour and that from December 24 through December 27, 1997, Bynes “was assigned to the mail room and was not in the position of Program Escort.” The City contends that “[d]uring the month January 1998, the grievant was assigned to the position of Program Escort Post,” which entailed escorting construction crews performing work at AMKC. According to the City, this post was not a steady one, rather, it was merely a temporary position lasting only until construction work was completed. The City argues that on January 8, 1998, Bynes was assigned to escort a construction crew during his 7:00 A.M. to 3:31 P.M. tour and that at 4:00 P.M., after the crew and Bynes had left the work area, a hacksaw belonging to the

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<sup>3</sup> The Trial Examiner requested that the parties provide documentary evidence as to the grievant’s actual position/post during the period in question.

- “a) prior to December 25, 1997,
- b) between December 27, 1997 and January 8, 1998, and
- c) after January 8, 1998.”

The Union responded that it was “not in possession of this documentation and, by copy of this letter to the Office of Labor Relations, the Union is hereby requesting that the weekly schedule and control room logbook be provided...”

The City supplied documents indicating that on December 21, 1997, Bynes worked as a “Learning Center Chap[eron].” He did not work from December 22 - 26, and returned to the learning center post on December 27, 1997. Bynes did not work on December 28 and 29 and according to the logs, he returned to work on December 30 to a position in the “Mailroom.” He worked in the mail room from December 30 - January 2; he did not work January 3 and 4 and returned to the mail room on January 5-8. Bynes did not work on January 9-10 and was assigned on January 11 to the “Visit Patrol” post. Although he was scheduled to work on January 12, his name does not appear on the log for that day. On January 13, Bynes worked in “Radiology” and on January 14 he worked in “Corr[ection] Control.”

contractor was discovered in the vicinity. The City explains that on January 9, 1998, Bynes was removed from his position pending disciplinary charges related to the incident of the prior day and that on January 22, 1998, Bynes was informed of the charges against him as part of the Department's Command Discipline procedure.

According to the City, after the Union filed a Step I grievance on Bynes' behalf, Bynes met with his supervisor on January 30, 1998 to discuss the charges stemming from the January 8, 1998 incident and Bynes agreed to forfeit five (5) vacation days as a penalty for his misconduct. Bynes also acknowledged that any decision in the case against him was "apart from and [did] not preclude the exercise of management prerogatives such as transfer, reassignment, etc."

The City argues that the Union's grievance should be denied because it falls within the scope of management's statutory rights pursuant to § 12-307 (b) of the New York City Collective Bargaining Law, which provides:

It is the right of the city... to 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 reasons; maintain the efficiency of governmental operation; determine the methods, means, and personnel by which government operations are to be conducted...

The City claims that the Department has the right to transfer and reassign employees when necessary to manage an efficient and effective operation. It contends that Bynes failed to properly perform his duties when, under his supervision, a hacksaw remained in the vicinity of the construction site. The City argues that when the Department removed Bynes from the program escort post, it was merely exercising its management prerogative. In addition, as part of the disciplinary process, the City argues that Bynes signed a form acknowledging that

management retains the right to transfer and reassign personnel.

The City further contends that the Union's grievance on behalf of Bynes is simply not arbitrable because it is not considered a grievance under the collective bargaining agreement.

Article XXI, § 1(b) of the agreement defines "grievance" as:

[A] claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters.

The City argues that Bynes' reassignment from his post was a punishment for his failure to properly carry out his duties as a program escort and that under the agreement, correction officers do not have the right to grieve disciplinary matters nor bring them to arbitration.

Furthermore, the City argues that the grievance must be dismissed because it fails to demonstrate a nexus between the act complained of and Directive 2258R. The City contends that in order for the grievance to go to arbitration, the Union must establish that the contract provision cited is arguably related to the grievance. The City alleges that the managerial decision to reassign Bynes on January 9, 1999, was a disciplinary measure for his failure to appropriately perform his duties the prior day even though the Union prefers to attribute Bynes' reassignment to his use of a sick leave day on December 25, 1997. The City maintains that sick leave was not an issue in the decision to reassign Bynes and consequently no nexus can be established between his reassignment and Directive 2258R. The City further argues that Directive 2258R does not preclude the Department from exercising its managerial prerogative where the employees' sick leave is not an issue in the decision to transfer the employee. The City concludes that since the Union does not establish a relationship between Bynes' post reassignment and his use of a sick

day, the Union has failed to demonstrate the required nexus between the act complained of and Directive 2258R. Thus, the City argues that the request for arbitration must be dismissed.

### **Union's Position**

The Union argues that Bynes was not assigned to work in the mail room, rather, his regular post for the last nine (9) years was that of school escort, which entailed escorting the inmates to and from school. In addition, COBA argues that after Bynes reported sick on December 25 and 26, 1997, his regular duty of school escort was changed to working in the housing areas and escorting construction crews.<sup>4</sup> Furthermore, the Union denies that disciplinary charges were pending when Bynes was removed from his school escort post. The Union argues that Bynes was removed from the school escort post prior to the filing of disciplinary charges under the Command Discipline procedure.

The Union alleges that in order for a grievance to be submitted to arbitration, the Board “will inquire as to the *prima facie* relationship between the act complained of and the source of the alleged right.” The union need only show that the contract provision invoked “arguably deals” with the subject matter at issue. Once the Board finds that an arguable nexus exists, its inquiry comes to an end and the grievance must be referred to arbitration.

The Union argues that Directive 2258R is grievable under the contract because it falls under the Article XXI category of “rules, regulations, or procedures of the agency affecting terms and conditions of employment.” Directive 2258R addresses the rules of sick leave and the

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<sup>4</sup> The documents provided by the City support the Union's assertion that Bynes was assigned to the “Learning Center” the week of December 21, 1997. Although the logs do not indicate that he was transferred to the housing area/construction crews, they indicate that he was transferred on December 30, 1997 to the mail room.

Union alleges that Bynes was removed from the school escort post as a result of his calling in sick on December 25 and 26, 1997. The Union alleges that the Department's removal of Bynes from his regular duty of escorting inmates to and from school is related to a sick day taken on December 25, 1997. The Union insists that removing Bynes from his post because of a sick day violates the Directive which requires that the Department monitor the sick leave of employees by placing them into certain categories. The designation into Category A or B is appealable by the employee and only if the appeal is denied, may the Department revoke a discretionary benefit such as "assignment to a specified post of duty." COBA argues that there is clearly a nexus between Directive 2258R and the Department's revocation of Bynes' post and the grievance must, therefore, go to arbitration.

The Union further contends that Directive 2258R is a limitation on the City's management right to assign personnel. COBA also disputes the City's allegation that Bynes was removed from the school escort post as a disciplinary measure resulting from the hacksaw incident on January 8, 1998. The Union maintains that it will demonstrate at arbitration that the City's argument is merely pretextual and that the true reason for Bynes' reassignment was because of his sick day on Christmas.

The Union concludes that factual disputes as well as the merits of the case must be decided by an arbitrator. COBA claims that once a union cites a written policy that has been violated, and demonstrates a colorable basis for its claim, it thereby satisfies the elements of arbitrability to the extent they are considered by the Board.

## **DISCUSSION**



In considering challenges to arbitrability, this Board has a responsibility to ascertain whether the parties are in any way obligated to arbitrate their dispute and, if so, whether a *prima facie* relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.<sup>5</sup>

In the present case, it is clear that the parties have agreed to arbitrate their disputes as defined in Article XXI of the collective bargaining agreement.<sup>6</sup> The City maintains that Bynes' reassignment was a disciplinary measure not subject to arbitration. It asserts that the Union has "completely failed to demonstrate how Directive 2258R, a directive which creates a program for limiting the use of sick leave through the placement of chronically sick employees into categories for monitoring, applies to the situation at bar." The Union, on the other hand, maintains that the Department improperly revoked a discretionary benefit in violation of Directive 2258R.

We find that the Union has demonstrated the required nexus between the instant grievance and Article XXI, § 1(b) of the collective bargaining agreement. The parties do not dispute that Directive 2258R, which creates a program to monitor sick leave, falls under the

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<sup>5</sup> *The City of New York v. District Council 37 et al.*, Decision No. B-2-98 at 11; *The City of New York v. District Council 37 et al.*, Decision No. B-19-90 at 5.

<sup>6</sup> Article XXI, § 1(b) of the agreement defines "grievance" as: a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters.

category of “rules, regulations or procedures” as described in the agreement. The Union claims that the removal of Bynes from his nine-year post of escorting inmates to and from school to a post escorting a construction crew was directly related to his having called in sick on Christmas Day. The City denies that Bynes ever held the post of school escort and alleges that he worked in the mail room until he was assigned to escort a construction crew in January 1998. While the AMKC logs do not resolve the dispute regarding what Bynes’ actual assignments were, they do support the Union’s contention that Bynes was transferred after he took the sick day on December 25, 1997 and prior to the hacksaw incident on January 8, 1998.<sup>7</sup> The Union has, therefore, established an arguable basis for its claim that Bynes’ reassignment was in violation of Directive 2258R. Once an arguable relationship is shown, the Board will not consider the merits of the grievance;<sup>8</sup> rather, it is for an arbitrator to decide whether the reassignment was a removal of a discretionary benefit, in violation of the Directive, as a consequence of the grievant’s use of sick leave, or, rather, a disciplinary measure in response to the hacksaw incident. If the arbitrator finds that the reassignment was a disciplinary measure, then his or her inquiry will be at an end, since such matters are outside the scope of the parties’ grievance and arbitration agreement.

## ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York

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<sup>7</sup> The logs indicate that Bynes was transferred from the learning center to the mail room on December 30, 1997. *See* note 3, *supra*.

<sup>8</sup> *New York City Health and Hospitals Corp. v. Local 30 et al.*, Decision No. B-16-98 at 6; *City of New York v. Local 300 et al.*, Decision No. B-6-95 at 9; and *City of New York v. Social Service Employees Union Local 371*, Decision No. B-46-91 at 8.

City Collective Bargaining Law, it is hereby,

ORDERED, that the petition of the City of New York be, and the same hereby is, denied;  
and it is further

ORDERED, that the request for arbitration filed by the Correction Officers' Benevolent  
Association be, and the same hereby is granted.

Dated: April 5, 1999  
New York, New York

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