DC 37, L. 1505, 7 OCB2d 7 (BCB 2014)

(Arb.) (Docket No. BCB-4010-13) (A-14504-13)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the DOT wrongfully disciplined the Grievant when it terminated him during a medical leave of absence. The City argued that the Union failed to establish the requisite nexus between the termination and the cited provision of the parties' collective bargaining agreement because the termination did not involve discipline and was a proper exercise of DOT's statutory management rights. The Union argued that DOT's rigid adherence to a unilaterally imposed deadline for a doctor's note stating that the Grievant could return to work demonstrates that the termination was disciplinary. The Board found that the requisite nexus was not established. Accordingly, the City's petition challenging arbitrability was granted, and the Union's request for arbitration was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1505, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On October 4, 2013, District Council 37, Local 1505, AFSCME, AFL-CIO ("Union") filed a request for arbitration on behalf of Michael Durante ("Grievant"), alleging that the City of New York ("City") violated Article VI, § 1(g), of the Blue Collar Agreement ("Agreement") when it wrongfully disciplined the Grievant by terminating him during a medical leave of absence. On November 1, 2013, the City and its Department of Transportation ("DOT") filed a

petition challenging the arbitrability of the grievance. The City asserts that the Union failed to establish the requisite nexus between the termination and the cited provision of the Agreement, because the termination did not involve discipline and was a proper exercise of DOT's statutory management rights. The Union argues that DOT's rigid adherence to a unilaterally imposed deadline for a doctor's note stating that the Grievant could return to work demonstrates that the termination was disciplinary. This Board finds that the requisite nexus has not been established. Accordingly, the City's petition challenging arbitrability is granted, and the Union's request for arbitration is denied.

BACKGROUND

The Grievant was employed by the DOT as a City Debris Remover ("CDR"). The Union represents employees in the CDR title. The Union and DOT are parties to the Agreement, which expired on March 2, 2010, and currently remains in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

On March 17, 2012, the Grievant commenced an approved medical leave of absence. On April 1, 2013, DOT sent the Grievant a Notice of Intended Action ("Notice") requesting that he resolve his employment status no later than April 15, 2013. The Notice stated that DOT records indicated that the Grievant had been on medical leave for a period of one year or more and was unable to perform the duties of his position due to a non-work related disability. The Notice then specified that if the Grievant was physically and mentally fit to return to work, he must submit medical documentation stating so by April 15, 2013. Further, the Notice stated:

> Please note that the medical documentation must make clear that you are physically and mentally competent to return to duty as a [CDR]. Ambiguous or vague documentation is unacceptable.

> Once this documentation is received, the agency will determine whether or not you should undergo an examination by a City designated physician.
>
> If you are not physically and mentally fit to resume your position as a [CDR], or if you fail to submit medical documentation by April 15, 2013, or if the medical documentation you submit does not clearly state that you are now fit to return to duty as a [CDR], you shall be terminated.
>
> If you wish to resolve your employment status by resignation or retirement, if you are eligible for retirement, you may do so.
>
> Please resolve your employment with the Department no later than April 15, 2013. Failure to respond to this notice of Intended Action will result in your immediate termination.

(Pet., Ex. 4). The Notice was signed by Erica Carraway, DOT disciplinary counsel.

On April 12, 2013, the Grievant's treating physician sent DOT a fax which stated:

> [The Grievant] is under long term inpatient care . . . . He is doing well attending all necessary programs. He has come a long way in his recovery but as per our assessment, i.e. physical and psychological, he may need an additional six months of intensive inpatient treatment. In my opinion, he will benefit in long term if he puts some more time into the program. At that time, he will be able to resume his daily responsibilities related to life and work as needed.

(Pet., Ex. 5)

Thereafter, on April 15, 2013, DOT sent the Grievant a Notice of Termination. It stated:

> In March 2012, you were placed on a leave of absence due to your medical unfitness to perform the duties of your position. On April 1, 2013, a Notice of Intended Action was sent to your attention requesting that you resolve your employment status with the Department no later than April 15, 2013 (see attached). Your employment is terminated effective April 15, 2013.

(Pet., Ex. 6)

On April 22, 2013, the Union faxed a second physician's note to DOT, dated April 19. This note stated that the Grievant was "physically fit to resume his employment responsibilities."

(Pet., Ex. 7) It further stated that the physician strongly recommended that the Grievant attend outpatient therapy on a regular basis. Thereafter, a Union representative contacted DOT in an effort to have the Grievant reinstated or examined by a DOT designated physician. However, the Union contends that DOT "refused to acknowledge the April 19, 2013 note." (Ans. ¶ 22)

On October 4, 2013, the Union filed a request for arbitration, alleging that DOT violated Article VI, § 1(g) of the Agreement.[1] The request for arbitration stated the issue to be arbitrated as "[w]hether the employer, the [DOT], violated the [Agreement] by wrongfully disciplining the grievant, and if so, what shall be the remedy?"[2] (Pet., Ex. 2) As a remedy, the Union seeks "[r]einstatement, expungement of all disciplinary records, back pay with interest and any other remedy necessary to make the grievant whole." (*Id*.)

POSITIONS OF THE PARTIES

City=s Position

The City argues that no nexus exists between the Grievant's termination and Article VI, § 1(g) of the Agreement because the termination was not disciplinary in nature. Rather, the City asserts that the termination was a proper exercise of DOT's managerial right under NYCCBL ' 12-307(b) to "relieve its employees from duty because of lack of work or for other legitimate reasons . . . ."

The City argues that the Grievant was terminated because his physician submitted documentation which clearly stated that he was not mentally or physically able to perform his

[1] Article VI, § 1(g) of the Agreement defines a grievance 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."

[2] In its request for arbitration the Union mistakenly listed the Department of Parks & Recreation as the employer at issue.

duties. The note cannot be considered vague or ambiguous, and even if it could be, DOT made it clear in its April 1, 2013 Notice that vague or ambiguous documentation was unacceptable. Further, the Grievant was not served with written charges of incompetency or misconduct, and the Union has not alleged any statements or allegations that would indicate that DOT had a punitive motivation for the termination. Citing to *CEU, L. 237*, 61 OCB 44 (BCB 1998), and *NYSNA*, 55 OCB 2 (BCB 1995), the City asserts that, in the absence of evidence supporting the Union's conclusory assertion of disciplinary motive, Board precedent demonstrates that the request for arbitration must be dismissed and the City's request for arbitration granted.

Union's Position

The Union argues that it has established the requisite nexus between the Agreement and the Grievant's termination. It asserts that the facts and circumstances indicate that DOT was eager to terminate an employee on prolonged medical leave and acted harshly and in a punitive manner in doing so.

The Union argues that the cases cited by the City are distinguishable from the situation at hand. In both of those cases, the grievants were employed in permanent competitive titles and their requests for reinstatement were processed in accordance with New York Civil Service Law. Here, the Grievant was employed in a labor class title and the Union alleges that his termination was not carried out pursuant to a statute. Further, in both cases the Board found that there was no evidence to indicate a punitive motivation behind the employers' actions. However, the Union argues that the circumstances present here demonstrate such a motive.

In particular, the Union argues that although the Grievant was on an approved medical leave, he was ordered to immediately submit sufficient medical documentation. The Grievant did not ignore this directive, but sent the documentation on April 12, 2013, prior to DOT's unilaterally-imposed deadline. While this documentation did not specifically state that the

Grievant was fit to immediately return to work, it did indicate that he was progressing in his treatment. The Union argues that DOT unilaterally deemed this insufficient and summarily terminated the Grievant's employment. Further, DOT ignored subsequent documentation which unequivocally stated that the Grievant was fit to resume duty and refused the Union's repeated requests to have the Grievant assessed by a City-designated physician. According to the Union, these circumstances indicate that DOT had a disciplinary motivation for the termination. Consequently, the petition challenging arbitrability should be denied.

DISCUSSION

The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

DC 37, L. 420, 5 OCB2d 4, at 12 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). The Board lacks jurisdiction to enforce contractual rights, and therefore it will generally not inquire into the merits of the parties' dispute. *See id.* (citing *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010); *NYSNA*, 69 OCB 21, at 7-9 (BCB 2002); *DC 37*, 27 OCB 9, at 5 (BCB 1981)); *see also* N.Y. Civ. Serv. Law § 205(5)(d).

Where, as here, it is undisputed that the parties have agreed to arbitrate certain disputes, the Board's inquiry focuses on whether the Union has established the required nexus between the controversy at issue and the Agreement. "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." *CEU, L. 237*, 61 OCB 44, at 6 (citations omitted).

In its petition, the City argues that there is no nexus between the Grievant's termination and Article VI, § 1(g) of the Agreement, because there is no evidence that the termination was disciplinary in nature. Rather, it argues that under NYCCBL § 12-307(b), the City has the management right to terminate an employee for lack of work or other legitimate reasons. Where, as here, the City's management right is challenged as being disciplinary in nature, "the burden will not only be on the 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." *DC 37, L. 768*, 4 OCB2d 41, at 13 (BCB 2011) (quoting *Local 375, DC 37*, 51 OCB 12, at 12 (BCB 1993)) (quotation marks omitted). We have previously stated that "'[w]hether an act constitutes discipline depends on the circumstances surrounding the act' and, therefore, the Board examines whether specific facts have been alleged that show that the employer's motive was punitive." *DC 37, L. 768*, 4 OCB2d 45, at 13 (quoting *Local 375, DC 37*, 51 OCB 12, at 13).

In support of its argument that the termination was of a disciplinary nature, the Union asserts that DOT unilaterally deemed the Grievant's April 12, 2013 medical documentation insufficient and summarily terminated him. Further, it claims that DOT ignored subsequent medical documentation that stated that the Grievant was fit to resume his duties and refused the Union's requests to have him examined by a City-appointed physician. The Union argues that these circumstances evince the disciplinary nature of the termination. For the reasons set forth below, we find that these allegations do not raise a substantial question as to whether the Grievant's termination was disciplinary.

Here, as in prior cases cited by the City, the Union has not alleged any facts or

circumstances which are traditionally characteristic of disciplinary action.[3] The facts of *CEU, L. 237*, 61 OCB 44, are particularly on point with the instant matter. There, the Board noted that the Union did not assert any facts that may have precipitated any kind of disciplinary action. The grievant had been placed on a medical leave of absence and later presented a doctor's note stating that he was fit to return to his duties. However, the employer required the grievant to be examined and obtain medical clearance by its own health services office, which determined that he was unfit to return to duty on that date. Approximately one month later the parties agreed that the grievant could return to work, and he subsequently filed a grievance alleging that this one month period constituted a disciplinary suspension. In granting the City's petition challenging arbitrability, the Board noted that there were no allegations that the grievant was served with charges of incompetence, insubordination, or misconduct. *See CEU, L. 237*, 61 OCB 44, at 8; *see also NYSNA*, 55 OCB 2, at 13. Similarly, there are no such allegations here.

The Union also argues that DOT's refusal to reconsider its decision indicates that it had a disciplinary motive. However, DOT's actions in this regard occurred subsequent to the Grievant's termination. Consequently, we do not find this to be an indication of DOT's motivation for making its decision to terminate the Grievant in the first instance. Further, the burden is on the Union to demonstrate a limit, derived from the Agreement, on DOT's management right to terminate an employee for legitimate reasons. *See Local 444, SEIU*, 55 OCB 4, at 11 (BCB 1995) (Union failed to demonstrate that collective bargaining agreement placed a limit on management's right to place grievant on sick leave and light duty assignment based upon a medical determination). Here, the Union has not pointed to any provision of the Agreement that would require DOT to consider medical documentation submitted subsequent to

[3] Contrary to the Union's arguments, no part of the decisions in *CEU, L. 237*, 61 OCB 44, or *NYSNA*, 55 OCB 2, rested upon the fact that the employees at issue were employed in permanent competitive Civil Service titles.

the Grievant's termination. Consequently, in the absence of evidence supporting the Union's conclusory allegation that DOT had a disciplinary motive for terminating the Grievant, we find that it has not presented a substantial issue in this regard. We therefore find that it has not established a nexus between the Grievant's termination and Article VI, § 1(g) of the Agreement.

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 and the New York City Department of Transportation, docketed as BCB-4010-13, be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 1505, AFSCME, AFL-CIO, docketed as A-14504-13, be and the same hereby is, denied.

Dated: February 24, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER