

***Uniformed Firefighters Ass'n, 75 OCB 27 (BCB 2005)***

[Decision No. B-27-2005] (Docket No. BCB-2398-04 (A-10475-04)).

***Summary of Decision:*** The City and FDNY filed a petition challenging the arbitrability of a grievance, which asserts that the reassignment of all of the firefighters in Engine 151 and Ladder 76 to other companies was a form of discipline without charges, and thus violated their rights as protected by FDNY's regulations and the parties' collective bargaining agreement. The City argues that this grievance is not arbitrable because the Union failed to establish a reasonable relationship between the subject of the grievance and the source of the alleged right. The Board finds that the Union failed to establish that a reasonable relationship exists between the transfer of these firefighters and the discipline provisions invoked in the grievance because the Union did not allege a sufficient factual basis to demonstrate that these transfers were intended to be disciplinary. (*Official decision follows.*)

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**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 FIRE DEPARTMENT,**

***Petitioners,***

***- and -***

**UNIFORMED FIREFIGHTERS ASSOCIATION,**

***Respondent.***

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**DECISION AND ORDER**

On April 29, 2004, the City of New York and the New York City Fire Department ("City" or "FDNY") filed a petition challenging the arbitrability of a grievance filed by the Uniformed Firefighters Association ("Union" or "UFA"). The grievance asserts that the

reassignment of all of the firefighters in Engine 151 and Ladder 76 to other companies was a form of discipline without charges and thus violated their rights as protected by the parties' collective bargaining agreement ("Agreement"), FDNY's Command Discipline Policy ("PA/ID 3/75"), and Chapter 26 of FDNY's Regulations ("Chapter 26"). The City argues that this grievance is not arbitrable because the Union has failed to establish a nexus between the subject of the grievance and the source of the alleged right. Alternatively, if a reasonable relationship exists, the City contends that it may exercise its managerial right to transfer employees. We find that the Union has failed to establish that a reasonable relationship exists between the transfer of these firefighters and the discipline provisions invoked in the grievance because the Union did not allege a sufficient factual basis to demonstrate that these transfers were intended to be disciplinary. Accordingly, the petition is granted.

### **BACKGROUND**

On December 31, 2003, two on-duty firefighters were involved in an altercation in the firehouse shared by Engine 151 and Ladder 76. One of the firefighters was struck in the face with a metal chair, causing severe bodily injuries that required immediate hospitalization and placement on medical leave. In an apparent attempt to cover up the altercation, the injured firefighter initially claimed that he suffered his injuries as a result of falling down the stairs of the firehouse. After the cause of the injury was uncovered, the firefighter who inflicted the injury was arrested and charged with felony assault and misdemeanor weapons-possession. At the time of the altercation, ten members of Engine 151 and Ladder 76 were at the firehouse. All of the other firefighters from these two units were either off-duty, on sick leave, or on vacation.

In early February 2004, FDNY announced that the Fire Commissioner had determined that every firefighter in these two units would be reassigned to different firehouses. Shortly thereafter, on February 7, 2004, FDNY transferred ten firefighters to different units spread out across the City of New York, and on March 13, 2004, FDNY transferred the remaining members into different units.<sup>1</sup>

FDNY, in effecting these reassignments, relied upon All Units Circular (“AUC”) 297, which states:

[I]t is the policy of the Fire Department to assign and transfer firefighters in a manner that will insure optimum levels of service to the public. In the execution of this policy, the needs and convenience of the individual firefighters shall be taken into consideration, but the safety and welfare of the public will take priority. In order to provide this level of service, an efficient, capable and experienced firefighting force is necessary. Therefore, it shall be the policy of the Department to assign, reassign and transfer firefighters as deemed appropriate.

On March 24, 2004, the Fire Commissioner issued a memorandum announcing the suspension and issuance of administrative charges against the three firefighters and three fire officers involved in the December 31, 2003 altercation. The memorandum also indicated that an investigation was ongoing and that FDNY would bring charges against any other member if warranted. To date, aside from the three firefighters and three fire officers, none of the 50 remaining members of Engine 151 and Ladder 76 was served with a disciplinary charge.

In response to FDNY’s decision to transfer every remaining firefighter in these two units, the Union filed a group grievance at Step III alleging that the transfers were a form of discipline levied against these firefighters without affording them their contractual and regulatory rights, in

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<sup>1</sup> In order to re-staff these two units, FDNY solicited volunteers from other units.

violation of: Article XVIII, §§ 1 and 3 of the Agreement; Article XVII of the Agreement; PA/ID 3/75; and Chapter 26.<sup>2</sup>

On March 29, 2004, the Step III grievance was denied on the grounds that the Union failed to demonstrate that FDNY violated, misinterpreted, or misapplied any of the cited provisions. On March 31, 2004, the Union filed a Request for Arbitration claiming that the reassignment of approximately 50 firefighters from these two units was a form of discipline without charges and violated the rights protected by the Agreement, PA/ID 3/75, and Chapter 26, and seeking, as a remedy, an order to restore the firefighters to their original units.

The Union states that between April and June 2004 at least six firefighters from these two units submitted requests for subsequent transfers either to their original unit or to a unit located

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<sup>2</sup> Article XVIII, § 1, states, in pertinent part:

A grievance is defined as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment.

Article XVIII, § 3, states, in pertinent part:

It is understood and agreed by and between the parties that there are certain grievable disputes which are of a department level or of such scope as to make adjustments as Step I and Step II of the grievance procedure impractical, and, therefore, such grievance shall be instituted at Step III of the grievance procedure.

Article XVII sets out the rights of employees subject to interrogations, interviews, trials and hearings conducted by authorized representatives of FDNY.

PA/ID 3/75 addresses command discipline policy and procedures, and allows superiors to correct minor infractions of rules, policies or procedures at the unit level. Command discipline also encourages quick resolution, in a non-adversarial setting, while allowing the subordinate to avoid formal proceedings concerning charges and penalties.

Chapter 26, entitled "Discipline, Charges," sets forth FDNY's formal discipline procedures and provides the bases for violations, the process which must be adhered to, the employees' rights created, and the possible penalties.

within the same division; however, none of these requests was granted. According to the Union, two of these firefighters were told by FDNY captains that their requests would not be granted because of their previous affiliation. Further, the Union asserts that another one of these firefighters inquired about his subsequent transfer request, and was informed by an unnamed FDNY employee that his request would not be granted because of the “New Year’s Eve incident.” The Union also asserts that the subsequent transfer requests of the three other firefighters were ignored deliberately because of the December 31, 2003, altercation. In addition, the Union states that unnamed FDNY officials dissuaded at least two other firefighters from requesting a subsequent transfer by informing them that any such request would not be honored due to their prior affiliation. However, according to the Union, despite the systematic refusal of the firefighters’ subsequent transfer requests, FDNY returned one fire officer, who was originally transferred out of Engine 151 and Ladder 76, to his original unit.

### **POSITIONS OF THE PARTIES**

#### **City’s Position**

The City contends that the Union failed to demonstrate a nexus between the act complained of and the source of the alleged right because the provisions invoked do not address the transfer of employees. Article XVIII, §§ 1 and 3, address the Agreement’s grievance procedure, while Article XVII guarantees certain procedural rights to firefighters relating to interviews, interrogations, hearings and trials conducted by FDNY. Neither Article addresses the transfer of employees. PA/ID 3/75 deals with Command Discipline, and Chapter 26 addresses more formal disciplinary procedures. None of the cited provisions is reasonably related to the

instant grievance because the transfer of these employees was not disciplinary. In addition, the City contends that the Union's claim that the transfers were disciplinary is facially insufficient. The Union, with the burden of proof, has failed to allege substantial facts that are traditionally characteristic of wrongful disciplinary action.

Furthermore, the City argues that New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3 ("NYCCBL") § 12-307(b) guarantees the City the unilateral right to assign, direct, and transfer employees to address the needs and duties of FDNY.<sup>3</sup> Unless this authority is specifically limited by the Agreement, the City can exercise this right to maintain complete control over its organization. After the altercation on December 31, 2003, FDNY believed that the former members of Engine 151 and Ladder 76, whose duty it was to rapidly combat fires and minimize potential injury in their neighborhood, could not perform as a cohesive unit in furtherance of these duties. Thus, splitting up these members and transferring them to other firehouses best served the interests of the City of New York.

### **Union's Position**

The Union contends that it has established a reasonable relationship between the transfer of the firefighters in Engine 151 and Ladder 76 and the provisions invoked in the grievance. This transfer constitutes a violation and an inequitable application of the provisions cited in the

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<sup>3</sup> 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 service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; . . . and exercise complete control and discretion over its organization. . . .

grievance because it was disciplinary in nature. Thus, the City's failure to file any charges against these employees denied them their rights under the Agreement and relevant regulations.

In support of its claim that the transfers were disciplinary in nature, the Union asserts that the transferred firefighters have been subjected to ridicule, mockery, and disparate treatment by members of FDNY. Moreover, as a result of their transfers, several firefighters lost monetary increments that are related to their Certified First Response ("CFR-D") and chauffeur duties, thus decreasing their annual income. Further, in a demonstration of disparate treatment by FDNY, the subsequent transfer requests of at least six of these firefighters were not granted because FDNY systematically refused any transfer requests from the firefighters formerly of Engine 151 and Ladder 76. Additional evidence of disparate treatment can be found in the return of one Lieutenant, who was transferred along with the other firefighters, but was subsequently returned to Engine 151 and Ladder 76.

Additionally, the Board has recognized that transfers, similar to the ones in the instant matter, are arbitrable if those transfers are effected for disciplinary reasons and the City's reliance on its managerial prerogative is merely pretextual. FDNY charged six participants involved in the altercation, reassigned every member of these two units regardless of their role in incident, and yet reinstated at least one member to his original unit. Thus, FDNY clearly intended to discipline the firefighters who it felt were disruptive to the firehouse, while rewarding others, thereby revealing FDNY's rationale as pretext. Since the transfers were punitive in nature, the rationale proffered by FDNY is pretextual, and arbitration is favored when doubtful issues of arbitrability arise, the City's petition should be denied.





**DISCUSSION**

Although this Board's statutory directive is to promote and encourage impartial arbitration as the selected means for the resolution of grievances, NYCCBL § 12-302; *New York State Nurses Ass'n*, Decision No. B-21-2002, citing *Matter of Board of Education [Watertown Education Ass'n]*, 93 N.Y. 2d. 132 (1999), we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 4. To determine arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employment Union*, Decision No. B-2-69 at 2; see *District Council 37, AFSCME*, Decision No. B-47-99 at 8-9, or, in other words, whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement. *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7.

Here, the first prong of the arbitrability test has been met. The parties are obligated to arbitrate their controversies through the grievance procedure set forth in the Agreement. Since we find that no statutory, contractual or court-enunciated public policy restrictions apply to the instant matter, we turn to whether a reasonable relationship exists between the act complained of in the grievance, the transfer of the firefighters out of Engine 151 and Ladder 76 following the incident on December 31, 2003, and the rights invoked, Articles XVII and XVIII of the Agreement, PA/ID 3/75, and Chapter 26.

When the City challenges arbitrability by asserting that it had a right to take action, such as effecting transfers, reassignments, and terminations, but a union contends that management's action was punitive and thus subject to the contractual grievance procedures, the Board examines the pleadings to ascertain whether a reasonable relationship, though not apparent, indeed exists between the subject matter of the dispute and the contract. *Social Service Employees Union, Local 371*, Decision No. B-27-2002 at 6-7; *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7. When a union alleges that the City's action was pretextual, the Board scrutinizes the sufficiency of the specific allegations. *Social Service Employees Union*, Decision No. B-34-2002 at 5. If the union's assertion that the employer's actions were disciplinary in nature is unsupported by sufficient facts to make out such a claim, the petition challenging arbitration will be granted. *Id.*

In *District Council 37, AFSCME*, Decision No. B-52-89, the grievant, a driver for the Health and Hospitals Corporation, was transferred from the midnight to the day shift following an incident with an Associate Director. Although the employer solicited other employees to fill the midnight shift, which paid an additional night differential, and the transfer occurred the day after the incident, the Board determined that the union failed to set forth sufficient factual allegations to demonstrate the transfer's punitive nature. *Id.* at 9-10.

Similarly, in *International Brotherhood of Teamsters, Local 237*, Decision No. B-44-98, the Board found that no nexus existed between a grievance regarding the delayed reinstatement of a maintenance worker and the discipline provision cited. The maintenance worker, who had been on medical leave, was reinstated two months after he claimed that he was able to return, but the City stated that the grievant failed to submit proper medical clearance from his examining

physician. The Board held that the union did not assert sufficient factual allegations which may have precipitated disciplinary action, such as claims of incompetence and misconduct on the part of the grievant. *Id.* at 8; *see also Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 6-7 (the union's allegations that an employee's termination was a pretext for discipline were conclusory and showed no disciplinary motive).

In contrast, the Board held, in *Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-57-90, that the union's grievance alleging that FDNY's transfer of the grievant was arbitrable. The grievant had a confrontation with a superior, was brought up on charges, and was later acquitted of those charges. Soon after, the grievant had a second incident with the same superior and three months later was transferred even though no charges were ever filed. The Board denied the City's petition challenging arbitrability because the union provided sufficient facts to state a claim that FDNY used the transfer to punish the grievant, while avoiding another discipline proceeding. *Id.* at 11-12.

In *Fire Alarm Dispatchers Benevolent Ass'n*, Decision No. B-33-88, the union alleged sufficient facts that the transfer of two fire alarm dispatchers may have been disciplinary. Following an incident that occurred while the grievants were on duty, FDNY's Board of Inquiry found them to have been derelict in their duties, and internal memoranda stated that the transfers were intended to be punitive. The Board thus found a reasonable relationship existed between the transfers and the discipline provisions cited. *See also Local 14-14B*, Decision No. B-30-92 (grievant's transfer could have been punitive because his superior had previously accused him of being incompetent and unproductive, but never faced any disciplinary charges.)

In the instant matter, we grant the City's petition because the Union has not made sufficient factual allegations that the transfers were a pretext for discipline following the incident on December 31, 2003, thus the Union failed to establish a reasonable relationship between the transfers and the discipline provisions cited. Unlike cases in which we have found a sufficient showing that transfers were intended as or may have been a pretext for discipline, here, the Union has not indicated that these units had a history of disciplinary issues; were threatened, prior to the altercation, with some punitive action; were accused of misconduct, incompetence, or poor performance; or were subject to any other adverse treatment. *Compare International Brotherhood of Teamsters, Local 237*, Decision No. B-44-98, *with Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-57-90. Instead, the Union focuses on the consequences of the transfer, which may occur when any employee is transferred regardless of the intent, such as the loss of the monetary increments related to the CFR-D and chauffeur duties. Further, the Union's assertions of mockery and derision by fellow firefighters after the transfer are not attributable to FDNY management or demonstrative of its intent, and without more, are insufficient evidence to infer disciplinary motive.

In contrast, the undisputed evidence that FDNY transferred every firefighter from these two units, even those who were off-duty, on medical leave, or on vacation on December 31, 2003, is consistent with FDNY's stated intention to reconstitute a firehouse which it believed could no longer provide an optimum level of service to the public. Distinct from this restructuring, FDNY brought disciplinary charges against those individuals who, it determined, had violated its rules and regulations as a result of this incident. Therefore, we find that the consistency between FDNY's stated intention, to reconfigure a firehouse that could no longer

operate cohesively, and its actions, transferring every remaining firefighter out of these units, belies the Union's assertions that the transfers were intended to be disciplinary.

The Union also contends that FDNY's disciplinary intent can be inferred from the denials of subsequent transfer requests by firefighters from Engine 151 and Ladder 76. According to the Union, at least six firefighters requested transfers either to their original posts or to a unit located within the same division, but none was granted. According to the Union, the rejections of the subsequent transfer requests of three of these firefighters, two of whom specifically identify captains within FDNY, were based upon their previous affiliation. However, FDNY returned one fire officer to these units, even though he too was originally transferred. We do not find that these allegations, as presented in the instant matter, are indicative of punitive intent with regard to the initial transfer of these firefighters. If these subsequent transfer requests, which were made within months of the initial transfers, had been granted, then FDNY's intention to reconstitute the two units would have been undermined.

Furthermore, the statements regarding the motivation behind the denials of the subsequent transfer requests are not indicative, in the instant matter, of the motive behind the initial transfer, rather they address denials of subsequent transfer requests that are not before us. In addition, many of the statements alleged to demonstrate a punitive motive were not directly attributed to FDNY management. The remaining statements, which were made months after the initial transfers, are attributed to two FDNY captains, and not the Fire Commissioner, who was responsible for the initial transfer decision. Therefore, we are not persuaded that these statements indicate that FDNY acted with punitive intent when it transferred every firefighter out of these two units following the December 31, 2003, altercation.

Accordingly, the City's petition is granted and the Union's request for arbitration is denied.

**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 docketed as BCB-2398-04, filed by the City of New York be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration docketed as A-10475-04, filed by the Uniformed Firefighters Association be, and the same hereby by is, denied.

Dated: New York, New York  
September 21, 2005

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

ERNEST F. HART  
MEMBER

I dissent. CHARLES G. MOERDLER  
MEMBER

I dissent. BRUCE H. SIMON  
MEMBER