

Uniformed Firefighters Ass'n, 75 OCB 29 (BCB 2005)

[Decision No. B-29-2005] (Docket No. BCB-2472-05, A-11085-05).

Summary of Decision: The City and FDNY filed a petition challenging the arbitrability of a grievance filed by the UFA. The grievance asserts that the reassignment of firefighters in Engine 75 and Ladder 33 to other companies was a form of discipline without charges, and thus violated their rights as protected by the parties' agreement, PA/ID 3/75, and Chapter 26 of FDNY's Regulations. The Board found that the Union established a nexus between the transfer of the firefighters and the discipline provisions invoked. Thus, the Union's request for arbitration was granted and the City's petition challenging arbitrability 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 &
THE NEW YORK CITY FIRE DEPARTMENT**

Petitioners,

- and -

UNIFORMED FIREFIGHTERS ASSOCIATION,

Respondent.

DECISION AND ORDER

On April 25, 2005, 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 seven firefighters from Engine 75 and Ladder 33 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 the grievance is not arbitrable because the Union failed to establish a nexus between the subject of the grievance and the source of the alleged right. According to the City, even if a reasonable relationship existed, the City may exercise its managerial right to transfer employees. We find that the Union has established a sufficient nexus between the transfer of these firefighters and the discipline provisions invoked. Accordingly, the Union’s request for arbitration is granted and the City’s petition challenging arbitrability is denied.

BACKGROUND

On August 20, 2004, a woman made a 911 call and reported an alleged rape by firefighters assigned to Engine 75 and Ladder 33 in the Bronx. According to the City, at that time, Engine 75 and Ladder 33 consisted of four Battalion Chiefs, two Captains, six Lieutenants, and 50 firefighters. Immediately after the reported allegation, FDNY detailed ten firefighters assigned to Engine 75 and Ladder 33 to administrative duties pending an investigation by the Department of Investigation (“DOI”). Of these ten, three firefighters were served with disciplinary charges, and on October 11, 2004, the remaining seven were transferred to different houses. Four were detailed to Engine 83 and three were detailed to Ladder 29. Thereafter, the Union made requests to have the seven firefighters returned to Engine 75 and Ladder 33. As of July 1, 2005, they have not been returned to the house. The City provides no information as to the reasons these seven firefighters were transferred.

On February 24, 2005, the Union filed a grievance, claiming that the transfers affect the

health and safety of the transferred firefighters as well as the community, and are a form of discipline without charges and specifications. In its request for arbitration, the Union alleges that Article XVII and Article XVIII, §§ 1 and 3, of the Agreement were violated, as well as PA/ID 3/75 and Chapter 26 of FDNY's Rules and Regulations.¹ As a remedy, the Union seeks to have an arbitrator hear their grievance and to restore all firefighters who were improperly transferred to their original units.

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union failed to show the required *prima facie* relationship

¹ Article XVII sets out the rights of employees subject to interrogations, interviews, trials and hearings conducted by authorized representatives of FDNY.

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.

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

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, and hearings and trials conducted by FDNY. Neither Article addresses the transfer of employees. PA/ID 3/75 deals with Command Discipline, Chapter 26 addresses more formal disciplinary procedures, and neither provision is reasonably related to the instant grievance because the transfer of these employees was not disciplinary. The City also contends that the Union's claim that the transfer of the firefighters from the Engine 75 and Ladder 33 was a form a discipline is facially insufficient. The Union has the burden to demonstrate that the transfers were effected for a disciplinary purpose, but has failed to allege substantial facts that are traditionally characteristic of a 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.² Unless this authority is specifically limited by the Agreement, the City can exercise this right to maintain complete control over its organization. After the incident on August 20, 2004, FDNY believed that the former members of Engine 75 and Ladder 33, whose duty it was to rapidly combat fires and minimize potential injury in their neighborhood, could not perform as a

² 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. . . .

cohesive unit in furtherance of these duties. Therefore, FDNY acted in accordance of its internal regulations and transferred these individuals.³ In support of this argument, the City submits an affidavit from Chief of Operations of the FDNY, Salvatore Cassano, which states, “In light of the events of August 20, 2004, it is my opinion that the firefighters assigned to Engine 75 and Ladder 33 cannot perform cohesively as a unit and that transferring them to other firehouses would best serve the Department.”

Union’s Position

The Union argues that the transfer of these firefighters violates their due process rights protected by the Agreement, PA/ID 3/75, and Chapter 26 because the transfers were a form of discipline without disciplinary charges. Removal of firefighters, who had nothing to do with the incident, from a company where an unfortunate act took place creates a stigma on those firefighters and is clearly disciplinary and punitive in nature. A serious incident resulted in charges against three firefighters, but the remaining seven firefighters, although detailed out and subsequently transferred, did not face charges. The Union further asserts that Chief Cassano offers only an anecdotal, vague statement as to why the seven firefighters were transferred, with no explanation regarding why their original company will be better served without them. Thus, the Union asserts, the only reason for their transfers must be disciplinary.

³ The City cites All Units Circular 297 (“AUC 297”), which states:
It 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.

Finally, the Union argues that the transfers affected the health and safety of the transferred firefighters as well as the community.

DISCUSSION

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). 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 seven firefighters out of Engine 75 and Ladder 33 following the incident on August 20, 2004, 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 supported by sufficient facts to make out a claim of pretext, the petition challenging arbitrability will be denied. *International Union of Operating Engineers, Local 14-14B*, Decision No. B-30-92; *District Council 37, AFSCME*, Decision No. B-52-89.

In *Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-57-90, the union's grievance alleging that FDNY's transfer of the grievant, was found to be 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, thus avoiding another discipline proceeding. *Id.* at 11-12.

Similarly, 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.

Furthermore, in *Local 14-14B*, Decision No. B-30-92, the Board held that a grievant's transfer may have been punitive because grievant, prior to his transfer, was accused, without any formal charges, of delaying jobs at the expense of the City. Prior to the transfer, the grievant's supervisors made several anti-union comments, claimed he was incompetent and unproductive and threatened to transfer him on two occasions. The Board held that if such accusations were substantiated, then the grievant would have established a punitive motive behind his transfer, thereby demonstrating a nexus between the transfer of the grievant and the discipline provisions. *Id.* at 13.

In contrast, 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. *See also International Brotherhood of Teamsters, Local 237*, Decision No. B-44-98 (union did not assert sufficient factual allegations, such as claims of incompetence and misconduct on the part of the grievant, that may have precipitated disciplinary action).

In the instant matter, we deny the City's petition because the Union has made sufficient factual allegations to demonstrate that the transfers may have been a pretext for discipline following the incident on August 20, 2004. We find that a question has been presented whether the grievants' transfers were punitive in nature and, if so, whether the summary imposition of such a transfer without a hearing is violative of the rules and regulations of the FDNY.

The record shows that an allegedly criminal incident occurred at Engine 75 and Ladder 33 on August 20, 2004. The FDNY, in response, re-assigned 10 of the 50 firefighters assigned to that fire house to administrative duties pending an investigation into the incident. Thereafter, FDNY brought formal disciplinary charges against three of the ten firefighters, while transferring the remaining seven to other houses. The other 40 firefighters assigned to the house were not affected by FDNY's actions. After disciplinary charges had been served against three firefighters, the seven transferred firefighters were not returned to the house. While the City claims that the transfers of these seven firefighters were effected because the house could no longer effectively function as a unit if they remained, the City offers no explanation as to why those particular firefighters, as contrasted to others, either on-duty or off-duty on August 20, 2004, would impede the ability of the unit to perform in a cohesive manner. Thus, we find that a question is raised whether FDNY's actions in transferring those seven firefighters was punitive.

The facts of this case stand in contrast to *Uniformed Firefighters Ass'n*, Decision No. B-xx-2005. In that case, we granted the City's petition challenging arbitrability, finding that the City's transfer of every firefighter in a house following an incident was consistent with FDNY's stated intention to reconstruct the entire composition of the units for the benefit of the community it serves. There, transfers were effected regardless of whether an individual

firefighter was off-duty, on medical leave, or on vacation, thereby undercutting the Union's contention that the transfers were intended to be disciplinary. This Board concluded that, in the face of the consistent evidence of a restructuring of the fire house, the Union's allegations failed to establish a reasonable relationship between the transfers and discipline.

Here, because the Union has asserted sufficient factual allegations to raise a question regarding the City's intentions in transferring only seven of the firefighters who were not disciplined following the investigation of a serious incident at the fire house, its request for arbitration is granted and the City's petition 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-2472-05, filed by the City of New York be and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration docketed as A-11085-05, filed by the Uniformed Firefighters Association be, and the same hereby by is, granted.

Dated: New York, New York
September 21, 2005

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent.

ERNEST F. HART
MEMBER