***District Council 37*, 27 OCB 9 (BCB 1981) [Decision No. B-9-81], *rev'd*, *City of New York v. Board of Collective Bargaining*, N.Y.L.J., Oct. 23, 1981, at 5-6 (Sup. Ct. N.Y. Co.).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

- and -

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.
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DECISION NO. B-9-81

DOCKET NO. BCB-463-80
(A-1124-80)

DECISION AND ORDER

On September 17, 1980, District Council 37, AFSCME, AFL-CIO (hereinafter D.C. 37 or the Union) filed a request for arbitration of a grievance concerning the decision to transfer a district foreman employed in the Department of Transportation to another work location. The Union alleges that the transfer was disciplinary in nature and violates the 1978-1980 collective bargaining agreement between the parties. The City of New York, through its Office of Municipal Labor Relations (hereinafter the City or OMLR), filed a petition challenging arbitrability on November 5, 1980 contending that no grievance had been stated as the Union failed to comply with conditions precedent to the filing of a claim of wrongful disciplinary action. D.C. 37 filed an answer to the petition dated November 14, 1980. Also considered in the determination of this case is a reply filed by the City on March 4, 1981.

BACKGROUND

The facts leading up to the filing of the instant request for arbitration, as reported in the Step III decision of the OMLR Review Officer, and not contested by the Union, are substantially as follows.

The grievant has been employed by the City's Department of Transportation (hereinafter the Department) as a district foreman for twenty-one years. For the last seven years he has been in command of the work location referred to as the Sunrise Highway Yard. In January 1980, while the grievant was on vacation, the Department conducted an investigation which resulted in the service of misconduct charges and subsequent findings of guilt of nine employees at the Sunrise Yard. Two of the nine were transferred to other locations, while seven remained. In May 1980, the grievant was ordered transferred to the Flatlands Yard. No charges were ever served against him and no hearing was held before the transfer.

OMLR notes that the Department, rather than accusing the grievant of wrongdoing, commended him for his performance, and stated in its Step II determination "...it is evident that grievant as supervisor of Sunrise Yard was held in high esteem by the Department. It is also evident that excellent productivity was a result of his supervision and command of more than 28 employees assigned to him...." The Department took the position that "the move was made because the Yard had become demoralized and the effectiveness of the Supervisor had become impaired." The

Step III Review Officer concluded that, in transferring the grievant, the Department was "merely exercising its administrative discretion", adding that "no claim has been made that it lacks authority to do so."

At Step II, however, D.C. 37 had presented its grievance as follows: "Wrongful Disciplinary Action - involuntarily transferred from previous work location pending a hearing on the allegations of incompetency". The Step II determination denied the grievance but reported that at meetings held between Union representatives and management immediately following the transfer of the grievant the following language was used: "incompetent", "he should have known what was going on" and, "if there hadn't been any misconduct, there would have been no need to transfer the District Foreman."

POSITIONS OF THE PARTIES

The Union alleges that the decision to transfer the grievant from the Sunrise Yard to the Flatlands Yard against his will constitutes a wrongful disciplinary action within the meaning of Article VI, Section 1 (E) of the contract between the parties.[1]

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[1] The relevant contract is the 1978-1980 Parks, Custodial and General Maintenance Titles Contract. Article VI, Section l(E) of that contract defines "grievance" as follows:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(l) of the Civil Service Law or a permanent competitive 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.

D.C. 37 maintains that the act of transfer resulted directly from the Department's investigation, after which written charges were served against nine of the grievant's subordinates. Although the grievant was allegedly a subject of the investigation, no written charges were issued against him. Nevertheless, the Union asserts, the grievant was penalized by the transfer as much as two of his former subordinates who were transferred only after receipt of written charges, a hearing, and findings of guilt.

In its petition challenging arbitrability, the City takes the position that the Union has failed to state a grievance under the contract because it has failed to meet the conditions precedent to the pursuit of a grievance under Article VI, Section i(E). In particular, OMLR points to the fact that no written charges were served upon the grievant. OMLR also asserts that no written waiver was provided and that the specific steps required by Article VI, Section 4, which sets forth the procedure for processing a Section l(E) type grievance, were not followed.[2] The City urges that the request for arbitration be denied as "there is no cognizable grievance under the Agreement to submit for resolution before an Arbitrator".

[2] The City refers to the fact that the Union's demand for arbitration was made under Article VI, Section 2 of the contract. Section 2 specifically excepts grievances as defined in paragraphs (D) and (E) of Section 1 from the grievance procedure described therein. The procedure for the pursuit of a Section l(E) grievance is set forth at Section 4.

In response, D.C. 37 argues that the City does not deny that the transfer was an unwarranted disciplinary action. The Union also asserts that the City's interpretation of Article VI, Section 1(E) as requiring that written charges be served upon a grievant before he can avail himself of the grievance procedure for disciplinary actions must be rejected because such an interpretation would give the City license to discipline an employee without having served formal written charges, thus leaving him without a remedy under the contractual grievance procedure or under Section 75 of the Civil Service Law.

As a remedy, D.C. 37 seeks the immediate transfer of the grievant back to the Sunrise Yard.

DISCUSSION

In determining questions of arbitrability, it is the function of the Board to decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the controversy presented is within the scope of that obligation.[3] The Board will not, in performing this function, inquire into the merits of the dispute.[4]

[3]Decisions Nos. B-2-69; B-8-69; B-4-72; B-8-74; B-14-74; B-18-74; B-28-75; B-1-76; B-5-76; B-11-76; B-1-77; B-10-77.

[4]Decisions Nos. B-12-69; B-8-74; B-19-74; B-1-75; B-5-76; B-10-77.

In the instant case, it is clear that the City and D.C. 37 are obligated to arbitrate their controversies. Article VI of the 1978-1980 Parks, Custodial and General Maintenance Titles Contract to which they are parties sets forth a grievance procedure for this purpose. It is also clear that the City and Union herein have agreed to submit disputes concerning the propriety of disciplinary actions to the arbitral forum. Article VI, Section l(E) of their contract defines grievance as "a claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(l) of the Civil Service Law...."

The Board has held in prior decisions that the question of whether an employee was disciplined within the meaning of a contractual term is for an arbitrator to determine.[5] In those cases, however, the employer action alleged to constitute discipline was a deduction from employees' pay (Decision No. B-25-72) and denial of union representation at an alleged disciplinary hearing (Decision No. B-8-74). Here, the subject of the alleged wrongful disciplinary action is the transfer of an employee which, in the usual case, is an area of managerial prerogative not subject to arbitration.

Pursuant to Section 1173-4.3b of the NYCCBL, the City has the right unilaterally to:

[5]City of New York v. Local 1180, Communications Workers of America, AFL-CIO, Decision No. B-25-72; City of New York V. Communication of America, AFL-CIO, Decision No. B-8-74.

> 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; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work....

In Association of Building Inspectors v. Housing and Development Administration,[6] we recognized that rotation of assignments "manifestly is within the City's reserved rights to determine the method and means by which government operations are to be conducted and to maintain the efficiency of governmental operations". Similarly, we recognize that the transfer of employees is within the City's reserved managerial rights unless the City limits its prerogative to transfer by contract or otherwise. However, the City should not be permitted to assert its managerial prerogative to transfer employees as a rationalization for actions which may violate the contractual rights of its employees. In City of New York v. District Council 37, AFSCME, Decision No. B-8-81, we established a rule to accommodate both the City's statutory right

[6]Decision No. B-4-71.

to transfer its employees and the contractual rights asserted by the Union. We shall apply that rule in the instant matter as well.

As we stated in Decision No. B-8-81, before a grievant may have an arbitrator consider a claim that his transfer was a wrongful disciplinary action, he must allege sufficient facts to establish, prima facie, a substantial nexus between the act complained of and the right asserted. The bare allegation that a transfer was for a disciplinary purpose will not suffice. The Board will determine on a case by case basis whether a substantial issue has been presented in this regard.

The term "grievance" is defined in the contract between the parties in the instant case to include, inter alia, "a claimed wrongful disciplinary action taken against a permanent employee upon whom the agency head has served written charges of incompetency or misconduct ..." (emphasis added).[7] Under this definition, both misconduct and incompetency are bases for disciplinary action within the contemplation of the parties.

Applying the first part of the two-part rule set forth in Decision No. B-8-81, we note that, in the course of meetings between Union representatives and management held after the transfer of the grievant, the grievant was characterized as "incompetent" and it was asserted that "he should have known what was going on."[8]

[7]Article VI, Section 1(E).

[8]Letter dated August 6, 1980 from Elbert C. Hinkson, Associate Counsel, NYC Department of Transportation to Mr. John Calendrillo, Blue Collar Representative, District Council 37, denying the grievance at Step II. It was also emphasized at these meetings that te grievant was "not connected to the actual misconduct" which gave rise to the investigation of the Yard.

The grievance as presented at Step II asserted that the district foreman had been "involuntarily transferred from previous work location pending a hearing on the allegations of incompetency" (emphasis added).

The grievant has established that his transfer was related to an investigation of the yard under his command, which investigation led to nine of his subordinates being formally charged and found guilty, and to two of these nine being transferred. He claims that allegations of incompetency were made against him and that his transfer to the Flatlands Yard constituted disciplinary action taken on account of the alleged incompetency. The fact that the meetings between the Union and management held after the transfer involved discussion as to whether the grievant was or was not "incompetent" and whether or not "he should have known what was going on" supports the conclusion that such considerations bear sufficient relation to the decision to transfer the grievant to warrant further examination in the arbitral forum.

Three transfers - that of the grievant and two of his sub-rdinates - were made in the wake of an investigation by the Depart-ent. Although the Board has not been apprised of the specific events that provoked the investigation, clearly management was dis-satisfied with some aspect of the functioning of the Sunrise Yard and sought to remedy the problem perceived. This it did, in part, by transferring the grievant and two other employees. That allegedly the same type of action, namely transfer, was taken against

the grievant as was taken against two employees who were found guilty of misconduct before being penalized, together with the allegations of incompetency discussed above provides an arguable basis for the grievant's claim that his transfer was for a disciplinary purpose within the meaning of Article VI, Section (E).

In light of the above, we conclude that there is a sufficient nexus between the transfer of the grievant and the contractual right to grieve a claimed wrongful disciplinary action to find that D.C. 37 has met the first part of the rule. This is in no way a determination on the merits of whether the transfer was disciplinary. Such a determination is for an arbitrator.

In reaching the conclusion that a sufficient nexus has been established, we are of course mindful of the fact that no written charges of misconduct or incompetency were served on the grievant. This fact does not alter our holding however. Whether or not written charges are served in a given case is solely within the control of the employer. Were this Board to accept the City's argument that the service of written charges is a condition precedent to the pursuit of a disciplinary grievance we could, in effect, and as D.C. 37 has contended, give license to the taking of disciplinary action by an agency without serving charges, thus depriving the employee of his contractual remedy.

This Board has the power and duty "to make a final determination as to whether a dispute is a proper subject for grievance

and arbitration procedure...."[9] We have defined this function in numerous prior decisions to include determining whether a particular controversy is within the scope of the parties' contractual obligation to submit their disputes to arbitration.[10] Implicit in this function is the power and duty to interpret the article of a contract which sets forth the parties' grievance procedure in order to determine the scope of that obligation even though, as a general rule, questions of contract arbitration are for an arbitrator to resolve.[11]

In order to determine whether the controversy herein is within the scope of the parties' agreement to arbitrate claimed wrongful disciplinary actions it is necessary to "interpret" the meaning of the words "upon whom the agency head has served written charges of incompetency or misconduct." It is the longstanding policy of the NYCCBL to promote and encourage arbitration as the selected remedy to redress grievances.[12] In addition, Section 75(1) of the Civil Service Law forbids the removal of or the taking of other disciplinary actions against a permanent competitive employee without

[9] NYCCBL §1173-5.0a(3).

[10] See n. 3 supra.

[11] See, e.g., B-8-68; B-4-72; B-25-72; B-1-76; B-2-77; B-6-77; B-10-77.

[12] NYCCBL §1173-2.0. Decisions Nos. B-8-78; B-12-71; B-1-75; B-11-76; B-12-77; B-13-77; B-14-77; B-1-78.

affording him the due process protections provided therein.[13] In light of these policies, we find that the service of written charges, while contemplated by the above-quoted language, is not mandated therein. The quoted language merely defines the point at which, in the usual case, a grievant may seek review of the disciplinary process in arbitration; it does not constitute a rule of procedure which the employer must follow nor does it create a condition precedent to the use of the disciplinary grievance machinery by the Union.

The grievant, having met his threshold burden, is entitled to proceed to arbitration. In the arbitral forum, however, the burden will be upon the grievant to substantiate his claim that the transfer was related to allegations of incompetency and was for a disciplinary purpose. This is the second part of the rule we established in B-8-81. The City may, of course, refute any evidence offered by the grievant on this question. But if the

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[13] Section 75(l) of the Civil Service Law provides, in pertinent part:

> 1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service,...

arbitrator determines that the transfer was disciplinary within the meaning of the contract between the parties, the burden shall be upon the City to establish that the discipline was justified. We note that the grievant has not alleged the right to arbitrate the Department's failure to follow~disciplinary procedures in instituting the transfer. At the arbitration, therefore, the grievant shall be precluded from alleging that the City failed to follow the proper procedures.

The City also urged denial of D.C. 37's request for arbitration because of the Union's alleged failure to follow the steps required by the contract for the pursuit of a grievance concerning an alleged disciplinary action. Specifically, OMLR claims that the Union failed to provide a written waiver of its right to submit the dispute to any other administrative or judicial tribunal, and that it improperly pursued the grievance under Section 2 rather than under Section 4 of Article VI.

With respect to the waiver argument, we take administrative notice that in fact a waiver was submitted by the Union. A copy of same was appended to the request for arbitration. Under clear Board precedent, the issue of compliance with the appropriate steps of a grievance procedure prior to the request for arbitration is a question of procedural arbitrability and is for an arbitrator to consider.[14]

[14]See, e.g., Office of Labor Relations v. Social Service Employees Union, Decision No. B-6-68.

0 R D E R

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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby, is granted.

DATED: New York, N.Y.
March 4, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

CAROLYN GENTILE
MEMBER

MARK CHERNOFF
MEMBER

I dissent* JOHN D. FEERICK
MEMBER

*The dissenting opinion of City Member John D. Feerick follows on page 15.

Dissenting Opinion of John D. Feerick

In City of New York v. District Council 37, AFSCME, Decision No. B-8-81, this Board established a rule to govern cases which involve the question of arbitrability of a transfer allegedly made for a disciplinary purpose. I concurred in that decision because the grievant was transferred immediately after being served with written charges of misconduct. Here no written charges of misconduct or incompetence were served on the grievant. Nor does the collective bargaining agreement place any limitation on the City's right to transfer.

The Board directs arbitration in the instant case essentially because the word "incompetent" was used by some unidentified person at a meeting attended by union and management representatives. In my judgment, these facts do not tend to establish the prima facie relationship as required by the Board's decision in City of New York, supra. Thus, even under the afore-mentioned standard this case should not to to arbitration particularly when the applicable labor agreement places no limitation whatever on the City's statutory right to transfer.