City v. L.1549, DC37, 37 OCB 40 (BCB 1986) [Decision No. B-40-86 (Arb)]

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

-between-

DECISION NO. B-40-86

THE CITY OF NEW YORK,

DOCKET NO. BCB-748-84
(A-1945-84)

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 1549,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

The City of New York, by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), has filed a petition challenging the arbitrability of a grievance submitted by respondent District Council 37, AFSCME (hereinafter "D.C.37" or "the Union"). The Union has filed an answer to the petition, and the City has submitted a reply. Board consideration of this dispute was held in abeyance pending determination of another case involving substantially the same legal issue.[1] However, the other case has been resolved by stipulation, thereby obviating the need for a Board determination. Accordingly, the Board will proceed to the merits of the instant matter.

[1] City v. Communication Workers of America, Docket No. BCB-564-82, which also raised the issue of the arbitrability of a claimed reassignment for disciplinary reasons.

Background

Grievant Frank Dakota[2] is employed by the Department of Social Services in the title of Office Associate, Level II. In the period 1982-1983, the grievant was assigned to supervise messengers in the Office Management section of the Administrative Services Division of the Office of Home Care Services. In March of 1983, the grievant received a performance evaluation which rated his performance as satisfactory or better in certain respects and unsatisfactory in other respects. He exercised his contractual right[3] to submit a written rebuttal to his evaluation. He did not utilize procedures of the Human Resources Administration ("HRA") which provide for appeals of performance evaluations. The collective bargaining agreement does not provide for an employee to grieve or appeal a performance evaluation.

Immediately subsequent to the disputed performance evaluation, the grievant was reassigned to duties in the duplication and reproduction room of the same Division, located in the same building. There was no change in

[2] At the time the original grievance was filed, the grievant's name was Harvey Wiener. During the course of this proceeding, the grievant legally changed his name to Frank Dakota.

[3] City-Wide Contract, Article X.

his job title and level, nor in his salary. He was informed that his reassignment was "... necessary for the office to function effectively." Because the prolonged standing and moving around in this unit proved to be a hardship, due to the grievant's claimed medical problems, he requested a further reassignment to another position. Thereafter, the grievant was reassigned to another office in the same section, performing record keeping and posting duties. The grievant contends that this latest assignment is "meaningless" and "useless" and that his lack of productivity in this position may jeopardize his chances for future promotion. The City notes that the functions performed by the grievant in his current position were performed previously by an assistant office manager.

Positions of the Parties

Union's Position

D.C. 37 argues that the grievant's reassignment, coupled with his receipt of a generally unsatisfactory performance evaluation, constitutes wrongful disciplinary action within the meaning of Article VI, section l(E) of the collective bargaining agreement. This section

defines a grievance as including:

> "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."

The Union contends that the performance evaluation received by the grievant, which contained an overall rating of "unsatisfactory", constitutes written charges of incompetence within the meaning of the contract. The union further notes that the grievant is a permanent employee covered by Section 75.(l) of the Civil Service Law, and thus is eligible for the application of Article VI, section I(E) of the contract.

While acknowledging the City's managerial right to assign its employees, D.C. 37 submits that that right does not insulate from review the reassignment of an employee as a punitive action against an individual viewed as incompetent by management. The Union alleges that such a punitive reassignment may be challenged as wrongful discipline under the collective bargaining agreement.

Finally, the Union argues that the reassignment of the grievant to perform meaningless work, and little work at that, is not within the scope of his job description and thus constitutes an assignment to perform out-of-title work, a matter which is grievable under Article VI, section l(C) of the contract. This section provides that the term "grievance" includes:

> "a claimed assignment of employees to duties substantially different from those stated in their job specifications."

The Union asserts that the City has known of the circumstances of the duties assigned to the grievant, since they are "central" to the grievance that the reassignment was punitive, and therefore it should not be heard to complain that it was unaware of the out-of-title claim, or that such claim should be re-filed at Step I of the grievant procedure.

For these reasons, the Union requests that the grievant's claims be permitted to proceed to arbitration.

City's Position

The City contends that the assignment of an employee to perform specific job tasks within the job specification for his or her title is an unfettered right of the City. The City argues that an employee has no right to demand

that he or she be assigned to specific job duties, and that the Union has failed to show that the City has, in any manner, waived any of its management rights to assign an employee to appropriate job functions. The City observes that pursuant to Section 1173-4.3b of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), the City is reserved the right to:

> "...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...."

The City alleges that, in the present case, the department in which the grievant is employed has the unilateral right to assign the grievant to any Office Associate duties performed in its offices. Whether the grievant prefers one assignment over another or believes that one job function is more prestigious or preferable to another is, in the City's view, totally irrelevant.

Further, it is the City's position that its management prerogatives give it the right to evaluate its employees and utilize its staff in a manner which it feels is most effective to provide services to the public as long as it does not violate the statutory or the contractual rights of its employees. The City notes that under the collective bargaining agreement, an employee cannot grieve a performance evaluation. A dissatisfied employee's contractual recourse is limited to the submission of a written answer or rebuttal. Management is required to attach any rebuttal submitted to the file copy of the evaluatory statement to which it responds, pursuant to Article X of the City-wide Contract. There exists no contractual authority for requesting changes in a performance evaluation.

The City argues that the very purpose of a performance evaluation is to enable management to monitor the performance of its employees and to put an employee on notice of management's assessment of the employee's strengths and weaknesses so that the employee can improve and/or continue good job, performance. It is submitted that it would negate the underlying purpose of performance evaluations if such evaluations were to be

considered the equivalent of disciplinary charges. Rather, according to the City, performance evaluations provide feedback to employees so that discipline will not have to be taken.

The City asserts that no discipline was imposed on the grievant herein. He remained in the same building, on the same shift, in the same title, with the same salary, performing appropriate job duties under the direction of the same assistant office manager. The City submits that the Union has failed to make a prima facie showing of disciplinary action which would demonstrate any nexus between the grievant's reassignment and the wrongful discipline provisions of the contract. For these reasons, the City contends that the wrongful discipline claim is not arbitrable.

Turning to the grievant's out-of-title work claim, the City points out that this purported basis for the grievance was not raised at any of the lower steps of the contractual four-step grievance procedure, but was asserted for the first time in the Request for Arbitration. The City submits that such a belated claim cannot be permitted to bypass the grievance process and to proceed directly to arbitration. Accordingly, the

City states that the out-of-title work claim should be barred from arbitration.

Discussion

It is well established that in determining disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.[4] It is clear in the present case that the parties have agreed to arbitrate grievances, as defined in Article VI of their collective bargaining agreement, and that the Union's claim of wrongful disciplinary action, on its face, is expressly within the contractual definition of an arbitrable grievance.[5] However, the City argues that the management action complained of herein, i.e., the reassignment of the grievant to perform different job duties in the same department and, allegedly, within the job specification for his title, office Associate, is a management prerogative which cannot be considered discipline and thus does not fall within the scope of

[4] See, e.g., Decision Nos. B-1-84; B-6-81; B-15-79, and decisions cited therein.

[5] Article VI, Section 1(E), quoted supra at p-4.

the cited provision of the contract. Moreover, the City argues that the performance evaluation of the grievant's work cannot be construed as being charges of incompetence, the service of which is a condition precedent to the invocation of arbitration under the cited provision of the contract.

Ordinarily, the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator.[6] But, where, as here, it is alleged that the disputed action is within the scope of an express management right, this Board is careful to fashion a test of arbitrability which strikes a balance between often conflicting considerations and which accommodates both the City's management prerogatives and the contractual rights asserted by the Union.[7]

The City asserts that the right to assign appropriate duties to its employees, to evaluate an employee's performance of his or her duties, and to make changes in assignments based upon performance evaluations, clearly is within the scope of the City's statutory management rights, pursuant to NYCCBL §1173-4.3b. on the other

[6] Decision Nos. B-5-84; B-8-74; B-25-75; see B-8-81.

[7] See, Decision Nos. B-5-84; B-9-74; B-8-81.

hand, D.C. 37 asserts the contractual right of employees to grieve allegedly wrongful disciplinary action, pursuant to Article VI, Section I(E) of the collective bargaining agreement.

In balancing these competing rights, this Board will follow a test utilized in previous cases which have involved similar considerations of management right.[8] This test may be stated as follows: The grievant is required to allege sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged right. The bare allegation that a reassignment was for a disciplinary purpose will not suffice. Thus, in any case in which the City's management right to assign its employees is challenged on the ground that the assignment (or reassignment) is of a disciplinary 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. This showing requires close scrutiny by this Board on a case by case basis.

[8] Decision Nos. B-5-84; B-8-81.

In the present case, the record shows that the grievant has been assigned different job duties, but has suffered no loss which could be considered punitive or disciplinary. His salary has not been decreased. His job title and level (office Associate, Level II) have not been changed. He has not been transferred to some distant or inconvenient work location - he remains in the same building. Moreover, it appears that when the grievant's initial reassignment proved to be a physical hardship because of the amount of standing and moving required, management accommodated the grievant's needs by granting his request for a further reassignment, and assigning him to a desk job.

Furthermore, in the absence of any other persuasive evidence of disciplinary action, we are not prepared to accept the grievant's contention that an unsatisfactory rating on an annual performance evaluation is the equivalent of the service of written charges of incompetence. We find that the better view of the function of a performance evaluation is that offered by the City: its purpose is to put an employee on notice of management's assessment of his or her strengths and weaknesses, and to provide feedback to the employee so that discipline will

not have to be taken. In their contract, the parties recognized the distinction between charges of incompetence and unsatisfactory performance evaluations. The former may form the basis for grievable claims of wrongful. discipline; the latter only entitle their recipients to submit a written answer or rebuttal. Under the circumstances, we cannot ignore the distinction and equate the two.

The facts of this case may be contrasted to the facts alleged in other cases in which we found that the union had made a prima facie showing of disciplinary action. In City v. District Council 37 (Acevedo),[9] it was shown that the grievant was served with actual written charges, was transferred from the Bronx to Manhattan, and had his tour changed from days to nights. In City v. District Council 37 (DeBlasio),[10] it was alleged that the grievant, a foreman, was told by management that he was "incompetent", disciplinary charges were brought against nine of his subordinate employees, and the grievant was transferred to a different work location, as was one subordinate who was found guilty of misconduct. In City v. Communications Workers of America (Maxwell),[11]

[9] Decision No. B-8-81.

[10] Decision No. B-9-81.

[11] Decision No. B-5-84.

the union demonstrated that the grievant was served with written charges of misconduct, was given a hearing, was found guilty, and was reassigned to a lower level of the PAA title with a cut in salary. In each of these cases, this Board found that there was a substantial issue whether the action taken was disciplinary in nature. In the present case, however, we find that the Union has failed to make an arguably prima facie showing that disciplinary action was taken. Rather, we find that the action taken was entirely within the scope of the City's statutory management prerogatives. Accordingly, we will deny arbitration of the wrongful discipline claim.

Concerning the grievant's claim of assignment to perform out-of-title work, we find that the record supports the City's contention that this claim was not raised at the lower steps of the contractual grievance procedure, but was asserted for the first time in the request for arbitration. The actual grievance submitted at Step 1 states the grievance in the following terms:

> "Reassignment is a form of disciplinary action without benefit of charges and hearing."

Nothing is said about inappropriate duties or out-of-title work. Additionally, the decisions at Steps 1, 2 and 3 of the grievance procedure have been submitted, and nothing contained in those documents gives any indication that the City was aware that the grievance included an out-of-title work claim. The Union has failed to submit any documentation or specific allegation of fact to support its conclusory assertion that the City "has known of these circumstances", i.e., presumably, the out-of-title work claim.

We have held consistently that a new claim raised, for the first time, in the request for arbitration may not be taken to arbitration.[12] To permit immediate arbitration of such claims would frustrate the purposes of a multi-step grievance procedure. Accordingly, we will not permit the grievant's out-of-title work claim to proceed to arbitration.

For the reasons discussed above, we will grant the City's petition challenging arbitrability and deny the Union's request for arbitration in all respects.

[12] Decision Nos. B-11-81; B-6-80; B-12-77; B-6-76; B-3-76; B-27-75; B-22-74; B-20-74.

O R D E R

Pursuant to the power vested in the Board of Coilective Bargaining by the New York City Collective Bargaining Law, it is hereby

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

ORDERED, that District Council 37's request for arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.
August 27, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

WILBUR DANIELS
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