DC 37, L. 983, 13 OCB2d 7 (BCB 2020)

(Arb.) (Docket No. BCB-4368-20) (A-15692-19 and A-15694-19)

Summary of Decision*:** The City challenged the arbitrability of two grievances alleging that the NYPD wrongfully disciplined Grievants by transferring them to new work locations and placing them on different shifts. The City argued that the Union did not demonstrate that a substantial issue exists as to whether Grievants' transfers were for disciplinary purposes. The Board found that the Union established the requisite nexus because it raised a substantial question as to whether the transfers were disciplinary in nature. Accordingly, the City's petition challenging arbitrability was denied, and the Union's requests for arbitration were granted. ***(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 POLICE DEPARTMENT,

Petitioners,

- and-

DISTRICT COUNCIL 37, LOCAL 983, AFSCME, AFL-CIO,
on behalf of its members Gary Pearson and James Felder,

Respondent.

DECISION AND ORDER

On January 26, 2020, the City of New York ("City") and the New York City Police Department ("NYPD") filed a petition challenging the arbitrability of two grievances brought by District Council 37, Local 983, AFSCME, AFL-CIO ("Union"), on behalf of its members Gary Pearson ("Pearson") and James Felder ("Felder") (collectively, "Grievants"), alleging they had been wrongfully disciplined by being involuntarily transferred to new work locations and placed

on different shifts. The City argues that the Union has not demonstrated that a substantial issue exists as to whether Grievants' transfers were for disciplinary purposes. The Board finds that the Union has established the requisite nexus because it raises a substantial question as to whether the transfers were made for disciplinary purposes. Accordingly, the City's petition challenging arbitrability is denied, and the Union's requests for arbitration are granted.

BACKGROUND

Grievants are employed by the NYPD as Traffic Enforcement Agents Level III ("TEA III"). Their job duties include operating tow trucks, issuing summonses, and removing illegally parked vehicles. The Union is the duly certified collective bargaining representative for TEA IIIs. The City and Union are parties to the Motor Vehicle Operators Agreement ("Agreement"), which expired on March 2, 2010, and remains in effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law ("NYCCBL"). Article VII of the Agreement sets forth the parties' grievance procedure. In relevant part, it defines a "grievance" as follows:

> (e) A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status.
>
> (f) Failure to serve written charges as required by Section 75 of the Civil Service Law . . . upon a permanent Employee covered by Section 75(1) of the Civil Service Law . . . where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.

(Pet., Ex. A)

Pearson's Transfer

Pearson was hired in 1987 as a Traffic Enforcement Agent Level I and became a TEA III later that year. He is certified to drive any of the tow trucks used by the employer, including 30-ton heavy-duty tow trucks. TEAs receive a salary differential for driving a heavy-duty tow truck. From the late 1990s until 2019, Pearson was assigned to the Queens Tow Pound in Flushing. On or about January 6, 2019, Pearson's supervisor, Michael Jiles, gave him a transfer slip notifying him that he was being permanently transferred to the Manhattan Tow Pound effective January 10, 2019. Jiles did not give Pearson a reason for the transfer. Pearson's work hours, which had been 6:00 a.m. to 2:00 p.m. when he was assigned to the Queens Tow Pound, were changed to 2:00 p.m. to 10:00 p.m. The Union alleges, and the City denies, that Pearson's commute increased from 15-to-20 minutes each way to at least two hours each way. The Union grieved Pearson's transfer, arguing that it was disciplinary.

In the weeks immediately preceding Pearson's transfer, he received three Command Disciplines ("CDs"). On December 17, 2018, he received a CD from Queens Tow Pound Traffic Manager John Ottosen alleging that he took an excessive amount of time in leaving the tow pound for patrol after the conclusion of roll call on December 12, 13, and 14, 2018. On December 18, 2018, he received a CD from Ottosen alleging that he had failed to perform a vehicle inspection on December 17, 2018. On December 27, 2018, he received a CD from Ottosen alleging that he had failed to leave the Queens Tow Pound in a timely manner on December 21 and 24, 2018.

In addition to these CDs, there were two other incidents in the weeks preceding Pearson's transfer that the Union alleges motivated the transfer. On or about December 21, 2018, Jiles sent a memorandum to Ottosen stating that Pearson became "hostile and aggressive" and

"disrespectful and discourteous" when Jiles and Ottosen sought to speak to him that day about his vehicle inspection time and that Pearson refused to obey a direct order to remain on the work premises. (Pet., Ex. G; Ans., Ex. 8) On or about January 2, 2019, Ottosen sent a memorandum to the Commanding Officer of the Queens Tow Pound alleging that Pearson failed to report to work for a scheduled overtime tour on December 31, 2018.

The City avers that Pearson was transferred because the Manhattan Tow Pound needed heavy-duty tow truck operators. It states that the Manhattan Tow Pound requires four TEA IIIs a day that can drive a heavy-duty tow truck, whereas, at the time of Pearson's transfer, the Queens Tow Pound had four operators certified to drive a heavy-duty tow truck but only possessed one heavy-duty tow truck, which was frequently used by other boroughs. However, it is undisputed that since he started working at the Manhattan Tow Pound on January 10, 2019, Pearson has never been assigned to drive a heavy-duty tow truck. According to the City, this is because of safety concerns that arose after the NYPD discovered, in April 2019, that Pearson had been involved in an accident driving a standard, non-heavy-duty tow truck.[1]

Felder's Transfer

Felder was hired in 1982 and has been a TEA III since 1985. He is certified to drive a regular tow truck weighing 8 tons. Unlike Pearson, he is not certified to drive a heavy-duty tow truck. From 1985 until 2019, Felder was assigned to the Manhattan Tow Pound. On or about January 10, 2019, he was transferred to the Queens Tow Pound.

[1] The Union asserts that, when Pearson worked at the Queens Tow Pound, he was assigned to a heavy-duty tow truck every day, and therefore received a heavy-duty tow truck salary differential. According to the City, Pearson rarely drove the heavy-duty tow truck in the months preceding his transfer and therefore was not regularly receiving a heavy-duty tow truck salary differential.

In the weeks preceding his transfer, Felder was the subject of an NYPD investigation regarding alleged acts of misconduct that later resulted in the issuance of a CD. On or about December 20, 2018, NYPD investigators questioned Felder as the subject of an official investigation. They told Felder he had been observed in the field for the prior three weeks. Felder later received a CD stating that on four days he failed to make required radio transmissions before taking his meals and personal breaks, failed to remain alert while on duty, and failed to remain within his assigned geographic region.

On January 10, 2019, Felder was given a written notification that he was being transferred to the Queens Tow Pound effective the following day. He was not given a reason for the transfer. His work hours, which had been 6:00 a.m. to 2:00 p.m. when he was assigned to the Manhattan Tow Pound, were changed to 1:00 p.m. to 9:00 p.m. The Union avers that Felder's commuting distance increased by 36 miles each day. It contends that, due to his transfer and the change in his work shift, Felder is no longer able to care for his sick wife.[2]

According to the City, Felder was transferred because the Queens Tow Pound lacked regular tow truck operators. It states that the Queens Tow Pound requires 40 regular tow truck operators to be fully staffed, but only had 27 regular tow truck operators as of November 2019.

On March 15, 2019, the Union filed grievances with the NYPD on behalf of Grievants alleging that their involuntary transfers constituted wrongful discipline in violation of Article VII, §§ l(e) and l(f), of the Agreement. Pursuant to the Agreement, the Union later filed for arbitration of both grievances. The City, with the consent of the Union, requested permission

[2] The Union alleges that the NYPD was aware this hardship would occur because it had previously approved intermittent FMLA leave for Felder.

from OCB's Deputy Director to file a single petition challenging the arbitrability of both grievances. The Deputy Director granted the request, and the City filed the instant petition.

POSITIONS OF THE PARTIES

City's Position

The City argues that Grievants' transfers were unrelated to the CDs they received and that the Union cannot meet its burden to demonstrate the transfers were disciplinary solely based on the proximity in time between the issuance of the CDs and Grievants' transfers. The City contends that the decision to transfer Pearson from the Queens Tow Pound was based on business necessity because the Manhattan Tow Pound needed TEA IIIs certified to drive a heavy-duty, 30-ton tow truck. It argues that Pearson has not been assigned to drive a heavy-duty tow truck since he was transferred to the Manhattan Tow Pound due to safety concerns stemming from an accident that he was allegedly involved in while operating a regular tow truck, which the NYPD learned of in April 2019. Conversely, the City asserts that the NYPD's operational needs were best met by reassigning Felder to the Queens Tow Pound, where there was a severe shortage of TEA IIIs to drive the eight-ton, regular tow trucks. The City argues that because the decisions to transfer Grievants were made based on business necessity they fall within the NYPD's statutory management prerogative pursuant to NYCCBL § 12-307(b).[3]

[3] NYCCBL § 12-307(b) provides, in pertinent part, as follows:

> It is the right of the [C]ity . . . acting through its agencies, to . . . direct its employees . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization . . . Decisions of the [C]ity . . . on those matters are not within the scope of

The City argues that the transfers were not punitive because Grievants have not suffered any change in permanent job title nor a reduction in salary. It also asserts, based on Google Maps travel-time estimates, that the Union has overstated the increase in Grievants' commuting times. It states that Grievants are not guaranteed a convenient commute and that the NYPD has the right to change their work locations.

Union's Position

The Union argues that it has alleged sufficient facts raising a substantial issue as to whether Grievants' involuntary transfers were disciplinary in nature and has established a *prima facie* nexus between the transfers and the wrongful disciplinary provisions of Article VII of the Agreement. The Union asserts that the disciplinary intent of the transfers is evidenced by Grievants receiving CDs and being accused of acts of incompetence and misconduct close in time to their being transferred out of the boroughs in which they each worked for more than 20 years. According to the Union, the punitive nature of the transfers is evidenced by Grievants having significantly longer commutes and increased transportation costs as a consequence of their transfers. The Union argues that Pearson's transfer was also punitive because he no longer receives the heavy-duty tow truck salary differential that he received when he worked at the Queens Tow Pound. The Union further contends that, based on Felder's previously-approved intermittent FMLA leave to care for his wife, the NYPD was aware of the hardship it would cause Felder if he were transferred to a distant location and had his shift changed.

> collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

The Union argues that the City's assertion that the transfers were based on business necessity is pretextual. It alleges that there were other qualified, less senior TEA IIIs that the NYPD could have chosen to transfer between the Manhattan and Queens Tow Pounds if its actions were motivated by business necessity but that it instead transferred Grievants for disciplinary purposes. The Union argues that the NYPD's failure to ever assign Pearson to drive a heavy-duty tow truck since transferring him to the Manhattan Tow Pound contradicts its asserted reason for the transfer.

DISCUSSION

The well-established policy of the NYCCBL is "to favor and encourage . . . [the] final, impartial arbitration of grievances." NYCCBL § 12-302; *see also CIR*, 12 OCB2d 33, at 5 (BCB 2019).[4] NYCCBL § 12-309(a)(3) empowers the Board "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." "[T]he presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *COBA*, 8 OCB2d 30, at 7 (BCB 2015) (citations and quotation marks omitted).

To determine whether a dispute is arbitrable, the Board applies the following two-pronged test:

[4] NYCCBL § 12-302 provides, in whole, as follows:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

> (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.

COBA, 12 OCB2d 31, at 6-7 (BCB 2019) (quoting *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (citations omitted)).

In the present case, it is undisputed that the parties have agreed to submit certain disputes to arbitration. Article VII, § 1, of the Agreement contains a grievance procedure that provides for final and binding arbitration, and the City does not argue the existence of any court-enunciated public policy, statutory, or constitutional restrictions. Therefore, the first prong has been met, and we consider whether the Union has met its burden "to demonstrate a reasonable relationship between the act complained of and the source of the alleged right." *OSA*, 10 OCB2d 9, at 10 (BCB 2017) (internal editing marks, quotations, and citations omitted); *see also L. 371*, 17 OCB 1, at 11 (BCB 1976). "'Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide.'" *COBA*, 13 OCB2d 4, at 9 (BCB 2020) (quoting *PBA*, 4 OCB2d 22, at 13 (BCB 2011)).

In determining the arbitrability of a grievance alleging that an act by the employer constitutes discipline, we consider the circumstances surrounding the act. *See DC 37, L. 768*, 4 OCB2d 45, at 13 (BCB 2011) (citing *L. 375, DC 37*, 51 OCB 12, at 13 (BCB 1993)). "[T]herefore, the Board examines whether specific facts have been alleged that show that the

employer's motive was punitive." *Id.* In a case such as this one, where "the union contends that management's action was punitive and thus subject to the contractual grievance procedure . . . [and] alleges that the City's action was pretextual, the Board scrutinizes the sufficiency of the specific allegations." *UFA*, 75 OCB 27, at 10 (BCB 2005) (citing *SSEU*, 69 OCB 34, at 5 (BCB 2002)); *see also UFA*, 73 OCB 3, at 13 (BCB 2004) (same); *SSEU, L. 371*, 71 OCB 22, at 8-9 (BCB 2003) (same). For example, in *DC 37, L. 375*, 5 OCB2d 25 (BCB 2012), the Board found that the proximity in time between work-related conflicts with a supervisor and the grievant's transfer to a distant work location where he was assigned only minor responsibilities inconsistent with his skill and experience raised a substantial question whether his transfer was disciplinary in nature. *Id.*, at 13 (citing *L. 375, DC 37*, 51 OCB 12, at 1, *affd.*, *Matter of N.Y.C. Dept. of Sanitation v. MacDonald*, Index No. 402944/93 (Sup. Ct. N.Y. Co. Dec. 20, 1993) (Ciparik, J.), *affd.*, 215 A.D.2d 324 (1st Dept. 1995), *affd.*, 87 N.Y.2d 650 (1996)). In *DC 37, L. 768,* 4 OCB2d 45, the Board found that there was a substantial question regarding the disciplinary nature of the grievant's reassignment where it followed a series of work-related conflicts with a supervisor and the Union alleged facts that contradicted the employer's asserted reason for the reassignment. *Id.* at 13.

Here, we find that the Union has met its burden of demonstrating a reasonable relationship between Grievants' involuntary transfers and the grievance provisions of the Agreement by alleging sufficient facts in support of its allegation that the transfers were punitive. The Union cites numerous incidents that occurred in the weeks immediately preceding Grievants' transfers on or about January 10, 2019. It is undisputed that Pearson was issued three CDs, was involved in an incident on December 21, 2018, in which his supervisors alleged that he was disrespectful and refused to obey a direct order not to leave the work premises, and that he

allegedly failed to report to work for a scheduled overtime tour on New Year's Eve. It is also undisputed that Felder was the subject of an NYPD investigation, as part of which he was questioned by investigators on December 20, 2018, which later resulted in the issuance of a CD. As evidence of the allegedly punitive nature of the transfers, the Union cites Grievants' longer commute times and increased transportation costs. In the case of Felder, it also contends that the NYPD was aware that his transfer to the Queens Tow Pound and change in his start time would impede his ability to care for his sick wife. The Union also asserts facts to contradict the NYPD's asserted reason for Pearson's transfer: the need for heavy-duty tow truck operators at the Manhattan Tow Pound. The Union notes that Pearson was never assigned to drive a heavy-duty tow truck at the Manhattan Tow Pound after his transfer.[5] These alleged facts may support a conclusion that the transfers were for disciplinary purposes. *See DC 37, L. 375*, 5 OCB2d 25, at 13; *DC 37, L. 768,* 4 OCB2d 45, at 13; *City v. L. 375, DC37*, 51 OCB 12, at 13-14.

For these reasons, we find that the question of whether the involuntary transfer of Grievants constitutes wrongful discipline in violation of the Agreement is arbitrable. *See L. 924, DC 37*, 1 OCB2d 3, at 14 (BCB 2008) (quoting *DC 37, L. 375*, 51 OCB 12, at 11) ("[I]t is well established that 'the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator.'"). Consequently, we deny the City's petition challenging arbitrability and grant the Union's request for arbitration.

[5] While the City claims that a concern arose three months after Pearson was transferred regarding his ability to drive safely, based on the asserted facts, it is not clear how the alleged need for heavy-duty tow truck operators was addressed by his initial transfer. Moreover, the Union argues that there were TEA IIIs less senior than Grievants who could have been transferred, if there was a legitimate business need.

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 Police Department, docketed as BCB-4368-20, is hereby denied; and it is further

ORDERED, that the requests for arbitration filed by District Council 37, Local 983, AFSCME, AFL-CIO, docketed as A-15692-19 and A-15694-19, are hereby granted.

Dated: April 2, 2020
New York, NY

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER