DC 37 L. 420, 15 OCB2d 28 (BCB 2022)

(Arb) (Docket No. BCB-4479-22) (A-15882-22)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the DOC violated the parties' collective bargaining agreement by wrongfully disciplining the grievant. The City argued that this is not a disciplinary matter and thus is not covered by the agreement's grievance procedure. The Union argued that this is a disciplinary matter and that the agreement encompasses discipline within the definition of a grievance. The Board found that the Union established the requisite nexus. Accordingly, the petition challenging arbitrability was denied, and the request for arbitration was 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 DEPARTMENT OF CORRECTION,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 420, on behalf of THOMAS ADMORE,

Respondent.

DECISION AND ORDER

On March 14, 2022, the City of New York ("City") and the New York City Department of Correction ("DOC") filed a petition challenging the arbitrability of a grievance filed by District Council 37, Local 420 ("Union") on behalf of Thomas Admore ("Grievant"). The Union's request for arbitration claims that the DOC violated the Hospital Technicians Agreement ("Agreement") by wrongfully disciplining Grievant. The City argues that this is not a disciplinary matter and thus not covered by the Agreement's grievance procedure. The Union argues that the grievance is

arbitrable because this is a disciplinary matter and Article VI, §§ l(e) & (h) of the Agreement defines a grievance, in relevant part, as "a claimed wrongful disciplinary action." (Pet., Ex. A) The Board finds that the Union established the requisite nexus. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

Grievant is a barber employed by the DOC. Prior to the events summarized here, he was assigned to the Northern Infirmary Command ("NIC") on Rikers Island. Generally, each DOC facility has a full-time barber, who supervises inmates who have received haircutting and hair styling training to provide barbershop and beautician services to inmates at DOC facilities. The Union is the duly certified collective bargaining representative for Grievant's non-competitive civil service title, Licensed Barber. The Union and the DOC are parties to the Agreement, which expired on March 2, 2008, but was extended through May 25, 2021, in a Memorandum of Agreement between the Union and the City, and which remains in full force and effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), § 12-311(d).

On March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98, which declared a state of emergency within the City. In an effort to mitigate the spread of COVID-19 in DOC facilities, the DOC temporarily suspended visitation and non-essential services, including barbershop services, at its facilities.

In mid-March 2020, the DOC implemented telework operations for all non-essential employees. Due to the suspension of barbershop services, Licensed Barbers remained on payroll pending reassignment. Licensed Barbers were subsequently reassigned to a different facility on

Rikers Island, the Environmental Health Unit ("EHU"), to support essential tasks at the facilities and were not authorized to report to the inmate facilities. The Union asserts that the tasks Grievant was assigned at EHU were unsafe, out of title, and outside his regular command. It is undisputed that Grievant was informed of his reassignment to EHU.[1] The parties agree that Grievant continued to report to NIC after June 4, 2020.[2] There were no work assignments for him at NIC, and he was not allowed to enter or work. Grievant was not paid from approximately July 2020 onwards.[3]

The City claims that barbershop services recommenced on October 21, 2020. These services were provided in the day rooms of inmate residential facilities rather than at a DOC barber shop. It is undisputed that Grievant was directed to report to the day rooms to perform barber services. Nevertheless, Grievant continued to report to NIC and continued to be denied admission. On October 26, 2020, Grievant submitted a letter to the acting Warden at NIC. In this letter, Grievant expressed his unwillingness to cut hair in a day room inside the residential facility, as opposed to a barbershop. His stated reasons were a fear of infectious disease and the fact that inmates were allowed to eat and drink in that same dayroom, conduct which, according to Grievant, violated the DOC's sanitary standards for barber facilities. Grievant also objected to providing barber services without the inmate barbers that he is assigned to train and supervise pursuant to his job description. The City claims that it announced on November 22, 2020, that all barbershop

[1] According to the City, Grievant was informed of the reassignment on June 4, 2020.

[2] The City claims that Grievant reported to EHU once, on July 13, 2020, and otherwise continued to report to NIC.

[3] Grievant continued to receive his regular paycheck after June 4, 2020 until July 13, 2020. However, Grievant received only two or three partial paychecks on unspecified dates after July 14, 2020. The Union filed the underlying grievance in August 2020.

services were once again being suspended.

On January 5, 2021, DOC management sent Grievant a letter advising him that due to the suspension of barbershop services he was not authorized to enter NIC and ordering him to report to EHU instead. The letter concludes by stating that continued refusal to report to EHU "will constitute insubordination and you may be subject to suspension and disciplinary action." (Pet., Ex. G) Grievant did not subsequently report to EHU.

Article VI, § 1 of the Agreement defines the term "grievance" as applied to the various categories of covered employees – permanent, provisional, non-competitive, and per diem. As Grievant is a permanent, non-competitive employee, his grievance procedure is governed by Article VI, § § 1(e) & (h).[4] (Pet., Ex. I) In addition, § 1(f) defines a grievance as:

> Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation upon a permanent Employee covered by Section 75(1) of the Civil Service Law or a permanent Employee covered by the Rules and Regulations of the Health and Hospitals Corporation where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.

[4] Article VI, § 1(e) states:

> [The term "*Grievance"* shall mean] [a] claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law or a permanent Employee covered by the Rules and Regulations of the Health and Hospitals Corporation 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. (emphasis omitted)

Article VI, § 1(h) states:

> [The term "*Grievance"* shall mean] [a] claimed wrongful disciplinary action taken against a non-competitive Employee as defined in Section 11 of this Article. (emphasis omitted)

(*Id*.)

The Union filed a Step IA grievance dated August 13, 2020, on behalf of Grievant which states:

> There has been a violation, misapplication and/or misinterpretation of the Institutional Service Contract Article VI section 1(h) which claimed wrongful disciplinary action taken against a provisional employee in which Mr. Thomas Admore, License[d] Barber at DOC was refused entrance to clock in for duty while fit to work. In denying Mr. Admore to report to duty without just cause he was not paid from on or about July 23, 2020 to present.[5]

(Pet., Ex. I) The DOC did not issue a Step IA response, and the Union advanced the grievance to Step II on November 12, 2020. The DOC did not issue a Step II response. The Union submitted a Step III grievance on or about January 26, 2021.

Several months later, on August 21, 2021, the DOC served Grievant with disciplinary charges related to this matter. On that date, Grievant received two sets of Charges and Specifications. The first, dated July 8, 2021, charged him with violating rules and regulations from November 2020 to July 2021, by his failure " to efficiently perform his duties in that he failed as required to perform his duties and failed to follow lawful orders in that he refuses to cut incarcerated individuals' hair." (Pet., Ex. L)

The second Charges and Specifications, dated August 19, 2021, charged Grievant with violating rules and regulations on the basis that on 35 specified days between June and August 2021, and continuing to the date of issuance, Grievant "failed to efficiently perform his duties in that he refused to cut incarcerated individuals' hair," and on four dates in August 2021 and continuing to the date of issuance, he "failed to efficiently perform his duties in that he failed as

[5] On January 7, 2021, the Union filed an amendment to the Step I grievance, to change the citation to Article VI, § 1(e) of the Agreement.

required to report for his scheduled tour of duty without permission or authority." (Pet., Ex. L)

A reply to the Step III grievance was issued by OLR on December 27, 2021, finding that the disciplinary grievance was premature because no disciplinary action had been taken when the grievance was filed and thus there was no violation.

On January 26, 2022, the Union filed the request for arbitration upon which the instant petition challenging arbitration is based. The request for arbitration described the grievance to be arbitrated as: "Whether the employer, the Department of Corrections, violated the collective bargaining agreement by wrongfully discipling the grievant, and if so, what shall be the remedy?" (Pet., Ex. B) The specific remedy sought by the Union was "Back-pay with interest, and any other remedy necessary to make the grievant whole." (*Id.*)

POSITIONS OF THE PARTIES

City's Position

The City claims that the grievance in question is not arbitrable because there is no nexus between it and the Agreement. The City argues that the Union's claim is not a disciplinary matter and thus not covered by the Agreement's grievance procedure. It notes that at the time of the Union's initial grievance filing, no disciplinary charges had been brought against Grievant. The City asserts that, in the absence of written charges served against Grievant, arbitration is only available when there is a credible showing that the employer's action had punitive motivation. It argues that there was no such motivation in this case. Instead, the City contends that Grievant was reassigned to a new work location as a response to the COVID-19 crisis along with all other DOC barbers. It claims this was a necessary action resulting from the COVID-19 pandemic that applied to all barbers and was in no sense a disciplinary action.

The City argues that the reassignment of employees to new work locations and new duties is a management right under § 12-307(b) of the NYCCBL. When reassigned, Grievant refused to report to his new assignment and instead stopped performing any work for the City. Thus, the City asserts that Grievant not being paid was simply a consequence of not reporting to his assigned work location, and therefore it was not a disciplinary action.

Union's Position

The Union argues that there is a nexus between the Agreement and the dispute. It notes that the Agreement defines a grievance in relevant part as "a claimed wrongful disciplinary action." *See* Article VI, § (e) & (h); (Pet., Ex. A) While no disciplinary charges had been issued at the time of the initial alleged adverse action or at the time the Union filed its grievance, such charges were later issued on August 21, 2021. The Union argues that Grievant was willing to perform his regular duties and continued to report to his regular command.[6] Thus, the Union argues that removing Grievant from payroll and blocking him from reporting to his usual command constituted a suspension. The Union claims that the charges issued and actions taken constitute disciplinary actions against Grievant and thus fall under the Agreement's Article VI, § 1 definition of a grievance.

In addition, the Union claims that removing Grievant from payroll without issuing written disciplinary charges is a separate basis for a grievance under Article VI, § 1(f) of the Agreement, which defines the failure to serve written charges when imposing a penalty upon an employee as a grievance. The Union notes that to the extent there is a dispute over whether this matter is

[6] The Union claims that the DOC attempted to assign Grievant to unsafe and unsanitary, out-of-title assignments outside of his regular command, including plumbing and electrical work, and cutting inmates' hair in the housing area of the facility, where he was not trained or equipped to work.

disciplinary in nature, that question is for the arbitrator to determine.

In sum, the Union argues that it has alleged sufficient facts to demonstrate that the removal of Grievant from payroll and instruction to report to a different command was disciplinary in nature and, therefore, it has established the requisite nexus between the grievance and the Agreement.

DISCUSSION

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "to make a final determination as to whether a dispute is a proper subject for [the] grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter." The Board employs a two-pronged test to determine whether a matter is arbitrable:

> (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 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.

SBA, 3 OCB2d 54, at 7 (BCB 2010) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). Our inquiry is focused upon whether there exists a "relationship between the act [or omission] complained of and the source of the alleged right" sufficient to warrant arbitration of the dispute. *CEA*, 3 OCB2d 3, at 13 (BCB 2010) (citations and internal quotation marks omitted); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371, AFSCME, AFL-CIO*, 17 OCB 1, at 11 (BCB 1976). The Board does not make a final determination of the rights of the parties because it lacks jurisdiction over matters of contract interpretation and is not empowered to interpret the source of the rights. *See NYSNA*, 3 OCB2d 55, at 7 (BCB 2010). Thus, the Board will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).

Here, the first prong of the test has been met. There is no disagreement that the parties have agreed to submit certain disputes to arbitration. Article VI, § 1's definition of a grievance under the Agreement includes "a claimed wrongful disciplinary action" taken against an employee, and the City does not argue the existence of any court-enunciated public policy, statutory or constitutional restrictions. (Pet., Ex. A) Thus, the Board's inquiry focuses on whether the Union has shown a reasonable relationship between the act complained of and the source of the alleged right.

We have long held that, where a grievant makes a sufficient showing that an action ostensibly within management's discretion is in fact undertaken as a form of discipline, such action may be arbitrable under the wrongful discipline provisions of the parties' grievance procedure. *See, e.g., Local 375, DC 37*, 51 OCB 12 (BCB 1993), *affd., Matter of NYC 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 pleading such a claim, the petitioner is required to allege sufficient facts to establish an arguable relationship between the act complained of and the source of the alleged right. The bare allegation that an action was for a disciplinary purpose will not suffice. *See Local 375, DC 37*, 51 OCB 12, at 12 (BCB 1993). Instead, "the Union will be required initially to establish to the satisfaction of the Board that a substantial issue is presented in this regard." *Id*. We have previously stated that "[w]hether an act constitutes discipline depends on the circumstances surrounding the act and, therefore, the Board examines whether specific facts have been alleged that show that the employer's motive was punitive." *DC 37, L. 768*, 4 OCB2d 45, at 13 (BCB 2011) (quoting *Local 375, DC 37*, 51 OCB 12, at 13 (BCB 1993)).

We reject the City's argument that the absence of written charges against Grievant at the

time the grievance was filed should preclude arbitration. The Board has found that the absence of written charges will not necessarily bar the arbitration of a claim of wrongful discipline based on the same contractual language. *See DC 37, L. 768,* 4 OCB2d 45, at 13 (grievance found arbitrable despite lack of written charges under a grievance provision identical to Article VI, § 1(e)) (citing *Local 375, DC 37*, 51 OCB 12, at 13).

It is undisputed that Grievant has not received regular paychecks since July 2020. The removal from payroll may be considered a disciplinary act. *See Meliti v. Nyquist*, 41 N.Y.2d 183, 185 (1976) (finding the removal from payroll constitutes a suspension without pay); *FMC Corp.*, 207 NLRB 639, 646 (1973) (finding the separation from payroll could be interpreted as a suspension or termination). The Board finds that the Union has alleged facts sufficient to establish that there is a substantial issue regarding whether the City's actions were for a disciplinary purpose. Indeed, the DOC asserts that it reasonably reassigned Grievant to a new location and duties and that he failed to comply with these instructions. Moreover, the DOC's later disciplinary actions for the exact same conduct indicate that its failure to pay Grievant after July 2020 may have been disciplinary. Its January 5, 2021 letter advised Grievant that if his failure to report to EHU continued he "may be subject to suspension and disciplinary action." (Pet., Ex. G) Further, the August 2021 disciplinary charges which relate to the Grievant's failure to perform his job duties for periods of time from November 2020 through August 2021, also support the Union's contention that the earlier removal of Grievant from payroll was akin to a suspension and therefore discipline.

We find that these factual allegations, among others raised by the Union, demonstrate that a substantial question has been raised as to whether Grievant's removal from payroll was disciplinary in nature. Thus, there is a nexus between the Agreement and the Union's claim in the

grievance that "wrongful disciplinary action [was] taken against" Grievant. (Pet., Ex. I)

Accordingly, for the reasons stated above, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

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 Department of Environmental Protection, docketed as BCB-4479-22, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 420, AFSCME, AFL-CIO, docketed as A-15882-22, hereby is granted.

Dated: August 3, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CHARLES MOERDLER
MEMBER

PETER PEPPER
MEMBER

I dissent (see attached dissent)
M. DAVID ZURNDORFER
MEMBER

I dissent (see attached dissent)
CAROLE O'BLENES
MEMBER

Local 376 DC 37, 14 OCB 2d 13 (BCB 2021)

Arb. (Docket No. BCB-4479-22) (A-15882-22)

Dissenting Opinion of Carole O'Blenes and David Zurndorfer

The material facts of this case are simple and undisputed. As a result of the state of emergency caused by COVID-19, the DOC temporarily suspended barbershop services at its facilities. Licensed barbers, including the Grievant, were reassigned to report to the Environmental Health Unit. It is undisputed (i) that the Grievant was notified of the reassignment on June 4, 2020; (ii) that he failed to work on that date or thereafter; (iii) that the DOC ceased paying the Grievant; and (iv) that on August 13, 2020, the Union filed a grievance contesting DOC's failure to pay the Grievant. The Union seeks to arbitrate the discontinuation of Grievant's pay as a "disciplinary action."

In these circumstances, however, we think it clear that ceasing to pay an employee who refuses to work is not "discipline." To the contrary, it is "merely a response to [Grievant's] refusal to comply with a condition of employment." *O'Reilly v. Bd. of Educ. of City Sch. Dist. of N.Y.C.*, 2022 BL 25279, at *2 (Sup. Ct. N.Y. Cnty. Jan. 20, 2022). *See also, e.g.*, *Broecker v. N.Y.C. Dep't of Educ.*, 2022 BL 47318, at *13 (E.D.N.Y. Feb. 11, 2022); and *Garland v. N.Y.C. Fire Dep't*, 2021 BL 464267, at *5-6 (E.D.N.Y. Dec. 6, 2021). Therefore, the DOC's action does not implicate disciplinary processes and the petition challenging arbitrability should be granted.

August 5, 2022

CAROLE O'BLENES
Carole O'Blenes