SSEU, L. 371, 11 OCB2d 2 (BCB 2018)

(Arb.) (Docket No. BCB-4252-17) (A-15342-17)

Summary of Decision*:** HHC challenged the arbitrability of a grievance alleging that it violated the collective bargaining agreement and its operating procedure when it failed to afford procedural counseling to the grievant prior to disciplining her. HHC argued that arbitration of the Union's claim is precluded because the allegations fall outside the contractual definition of a grievance and because the grievant was a provisional employee excluded from the due process rights afforded under the Provisional Due Process Agreement. The Board found that the Union established the requisite nexus between the grievance and the cited contractual provision. Accordingly, it denied HHC's petition challenging arbitrability and granted the Union's request for arbitration. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NYC HEALTH + HOSPITALS,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
on behalf of its member Syeda Ali,

Respondent.

DECISION AND ORDER

On October 13, 2017, NYC Health + Hospitals[1] filed a petition challenging the arbitrability of a grievance brought by District Council 37, AFSCME, AFL-CIO, Social Service Employees

[1] We refer to New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

Union, Local 371 ("Union") on behalf of the its member, Syeda Ali ("Grievant"), alleging that HHC took disciplinary action against Grievant without affording her procedural counseling, in violation of Article VI, § 1(b) of the Social Services and Related Titles Agreement ("Agreement") and HHC Operating Procedure 20-10 ("OP 20-10"). HHC argues that arbitration of the Union's claim is precluded because the allegations contained in the request for arbitration fall outside of the Agreement's definition of a grievance and because Grievant was a provisional employee who worked in a title that was excluded from the provisional due process rights afforded under the Provisional Due Process Agreement. The Board finds that the Union established the requisite nexus between the grievance and the cited contractual provision. Accordingly, it denies HHC's petition challenging arbitrability and grants the Union's request for arbitration.

BACKGROUND

The Union and HHC are parties to the Agreement. Grievant commenced work as a provisional Hospital Care Investigator at Queens Hospital Center on or about December 8, 2014. Hospital Care Investigator is a civil service title covered by the Agreement.[2]

By letter dated March 15, 2017, HHC notified Grievant that she was being suspended for ten days without pay "as a result of excessive lateness and unscheduled absence."[3] (Pet., Ex. H.) The following day, the Union filed a grievance alleging that HHC took disciplinary action against Grievant "without affording the employee procedural counseling, or a warning session to address

[2] On or about December 19, 2014, an "eligible list" was established for the Hospital Care Investigator title. An eligible list is a civil service list of candidates eligible to fill a position in a particular title.

[3] HHC subsequently reduced the Grievant's suspension to five days without pay.

the identified behavior," in violation of Article VI, § 1(b) of the Agreement and OP 20-10. (Ans., Ex. D.) Article VI, § 1(b) defines a "grievance" as:

> A claimed violation, misinterpretation, or misapplication of the rules and regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration[.]

(Pet., Ex. B) OP 20-10 provides, in pertinent part:

> Except in cases of incompetence or misconduct of a more serious nature, disciplinary action shall be taken after reasonable supervisory/managerial efforts have been made to assist an employee in correcting a deficiency in performance or conduct. In cases of incompetence or misconduct of a more serious nature, written charges may be preferred in accordance with applicable rules, regulations, and collectively bargained agreements.

(Pet., Ex. C)

Having not received a timely response to the Step 1(a) grievance, on or about May 17, 2017, the Union filed a Step II grievance on Grievant's behalf. On June 6, 2017, HHC denied the Step II grievance on the ground that Grievant was a provisional employee who is not entitled to any due process rights to challenge disciplinary actions under the Provisional Due Process Agreement ("Provisional Agreement").[4] The Step II denial letter cited § (b)(ii) of the Provisional Agreement, which provides that its disciplinary procedure is unavailable for employees in

[4] The Provisional Agreement provides "disciplinary due process rights" to provisional employees at HHC, subject to various eligibility criteria. (Pet., Ex. G) Section (b)(ii) of the Provisional Agreement states: "[t]his Disciplinary Procedure shall not be available to any employee appointed on a provisional basis to any position for which one or more appropriate eligible lists have been established." (*Id.*) (emphasis in original)

positions in which eligible lists have been established, and noted that an eligible list exists for the Hospital Care Investigator title.

The Union filed a Step III grievance, which the New York City Office of Labor Relations ("OLR") denied by letter dated September 5, 2017. In the Step III denial letter, the OLR Review Officer stated that, among other reasons for its denial, "[t]he record shows that Grievant was notified and counseled regarding her excessive tardiness in August 2016." (Pet., Ex. J) The Union maintains that Grievant was not afforded the counseling procedures set forth in OP 20-10.

Prior to the issuance of the Step III denial letter, HHC issued Grievant a letter dated May 12, 2017, in which it informed her that her provisional appointment was being terminated due to hiring from a civil service list. As a result, Grievant was laid off, effective June 2, 2017.

On September 18, 2017, the Union filed its request for arbitration of the grievance. As a remedy, the Union requested that HHC abide by OP 20-10 and "ensure consistent, equitable treatment" of its employees; make Grievant monetarily whole by retracting the suspension; and cease and desist in engaging in similar practices. (Ans., Ex. K)

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the request for arbitration must be dismissed because the Union cannot identify a nexus between the grievance and any applicable provisions of the Agreement. It further argues that Grievant has no due process rights as a provisional Hospital Care Investigator.

HHC contends that the Provisional Agreement explicitly provides that its disciplinary procedure is not available to any employee appointed on a provisional basis to a position for which an eligible list exists. It asserts that, because an eligible list exists for the Hospital Care Investigator

title, Grievant is excluded from the due process rights afforded under the Provisional Agreement. Moreover, HHC contends that the Union cannot logically argue that she can grieve her discipline as a violation of OP 20-10, when she is excluded from the disciplinary due process rights of the Provisional Agreement.

Next, HHC asserts that, in the alternative, there is no nexus between the Agreement and the Union's grievance because the allegations contained in the request for arbitration do not fall within any definition of a "Grievance" under Article VI of the Agreement. It argues that Article VI, § 1(b), the contractual provision cited by the Union, is not applicable because that provision addresses violations affecting the terms and conditions of employment, and no term or condition of Grievant's employment was affected by HHC's actions. Instead, HHC contends, the instant grievance arises from an allegation of wrongful discipline, which is not a term or condition of employment. According to HHC, the Agreement specifically identifies "wrongful discipline" under Article VI, § 1(e), (f), and (h), as a category of grievance "separate and aside" from "terms and conditions of employment."[5] (Pet. ¶ 39)

HHC does not dispute that OP 20-10 is a "written policy" or that Grievant, as a provisional employee, could grieve a written policy that affects her terms and conditions of employment. However, it maintains that "[a]s OP 20-10 is a disciplinary procedure, it is not a written policy affecting the terms and conditions of employment under Article VI, § 1(b)." (Rep. ¶ 24) As such, OP 20-10 may only be grieved in accordance with the provisions of the Agreement or other contracts or rules that are applicable to disciplinary due process or wrongful disciplinary procedures.

[5] HHC contends that § 1(e), (f), and (h) are not applicable to the instant grievance because § 1(e) and (f) address permanent and full-time non-competitive employees, respectively, and § 1(h) applies only to an "eligible provisional employee of a Mayoral Agency." (Rep. ¶ 28)

Finally, HHC argues that finding that OP 20-10 is grievable would yield "an absurd and circular result" because it would mean that any discipline issued to a provisional employee who is excluded from the Provisional Agreement's due process disciplinary procedures, is now grievable if issued without counseling and a warning. (Rep ¶ 47) It contends that such a result cannot have been intended and cannot be imposed on HHC. Moreover, HHC argues that allowing the instant matter to proceed to arbitration would create a new procedure for issuing discipline to provisional employees outside of any written rule, policy or agreement, and does not conform to any "common practice" performed by HHC. (Rep. ¶ 49)

Therefore, HHC argues, the grievance is not arbitrable and should be dismissed.

Union's Position

The Union contends that Article VI, § 1(b) of the Agreement defines the term "grievance" to include a claimed "violation, misinterpretation or misapplication of the . . . written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment . . . ." (Ans. ¶ 48) It argues that Grievant's suspension is fully grievable because the source of right upon which her claim is based, OP 20-10, constitutes a written policy and procedure applicable to her. The Union cites numerous Board decisions that it claims support the proposition that violations of employer policies and procedures are arbitrable.

The Union argues that HHC failed to comply with the counseling procedures set forth in OP 20-10 prior to issuing the March 15, 2017 disciplinary letter to Grievant. Acknowledging HHC's position that it counseled Grievant regarding her tardiness prior to issuing the discipline, the Union asserts that whether these procedures were followed with respect to the Grievant is a factual issue to be decided by an arbitrator.

OP 20-10 is separate and apart from any right, or lack thereof, available to Grievant under the Provisional Agreement, the Union argues. It asserts that Grievant does not grieve her discharge from employment effective June 2, 2017, and emphasizes that her discharge was not and is not the subject of her grievance. In addition, according to the Union, Grievant fully concedes that under the terms of the Provisional Agreement, her discharge was not grievable due to the existence of an eligible list for her title at the time of her discharge. The Union contends, however, that Grievant's right to receive the benefits of OP 20-10 is in no way nullified or abrogated by any exception to her coverage under the Provisional Agreement. It emphasizes that the fact that Grievant was not entitled to the protections of the Provisional Agreement does not mean that she and other similarly situated provisional employees are not entitled to the protections of a "separate and distinct" agency policy under which she was covered. (Ans. ¶ 50)

For these reasons, the Union requests that the Board deny the petition challenging arbitrability and grant the request for arbitration.

DISCUSSION

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). As such, "the NYCCBL explicitly promotes and encourages the use of arbitration, and 'the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration.'" *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)).

Under NYCCBL § 12-309(a)(3), the Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." However, it "cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established

by the parties" in their collective bargaining agreements. *DC 37, L. 768*, 4 OCB2d 45, at 12 (BCB 2011). *See also CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L.371*, 69 OCB 34, at 4 (BCB 2002). The Board applies a two-pronged test to determine whether a grievance is arbitrable. This test considers:

> (1) whether the parties are 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.

DC 37, L. 420, 5 OCB2d 4, at 12 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 9 (BCB 2011)) (citations and internal quotation marks omitted).

Here, it is undisputed that the parties agreed to resolve certain disputes, including a claimed violation of the employer's written policy or orders, through the Agreement's grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute or the constitution. Accordingly, the first prong is satisfied.

"With respect to the second prong, the burden is on the Union to demonstrate a reasonable relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *OSA*, 10 OCB2d 9, at 10 (BCB 2017) (internal editing marks, quotations, and citations omitted); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). The requisite showing "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact constitute 'an interpretation of the agreement that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (citation and internal editing mark omitted). "Once an arguable relationship is shown, the Board will not consider the merits

of the grievance . . . [as] [w]here each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted). *See also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

Here, the Board must determine whether a nexus exists between the Union's claim that HHC failed to comply with the counseling procedure set forth in OP 20-10 prior to issuing Grievant's unpaid suspension, and Article VI, § 1(b) of the Agreement. That contractual provision provides that the term "Grievance" is defined, in pertinent part, as: "A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employees the grievant affecting terms and conditions of employment." (Pet., Ex. B) We have previously held that OP 20-10 constitutes a "written policy or order of the Employer" and that an alleged violation of that policy falls within the scope of the parties' agreement to arbitrate. *See DC 37*, 25 OCB 34, at 6 (BCB 1980).[6] *See also Esposito*, 41 OCB 3, at 13 (BCB 1988) (noting generally that alleged violations of HHC's "written agency policy" are grievable under the parties' collective bargaining agreement). Consistent with Board precedent, we find in the instant matter that OP 20-10 is a "written policy" and that alleged violations of OP 20-10 are grievable under Article VI, § 1(b) of the Agreement. Accordingly, the Union has established a nexus between that contractual provision and its grievance.

[6] In *DC 37*, 25 OCB 34, HHC alleged that the union's grievance was not arbitrable because the grievant was discharged for gross misconduct and was thus exempt from the terms of OP 20-10, which excluded cases of "gross misconduct" from its procedures. *Id.* at 2. The Board found the grievance arbitrable and held that whether the grievant's termination was subject to the gross misconduct exclusion of OP 20-10 was a question for the arbitrator.

We find unpersuasive HHC's argument that there is no nexus with § 1(b) of Article VI because OP 20-10 is a "disciplinary procedure" and therefore cannot be a written policy affecting the terms and conditions of employment under § 1(b).[7] At the outset, whether OP 20-10 is a "disciplinary procedure" and whether such a distinction would exclude it from coverage under § 1(b) of the grievance procedure are questions for the arbitrator to determine. Notwithstanding, it is well-established that disciplinary policies and procedures affect terms and conditions of employment. *See, e.g.*, *DC 37, L. 2507 and 3621*, 4 OCB2d 19, at 30 (BCB 2011) ("[w]e have long held that, while it is an employer's prerogative to take disciplinary action, the procedures necessary for the administration of discipline are mandatorily negotiable.") (citation omitted); *NYSNA*, 51 OCB 20, at 17 (BCB 1993) ("procedures to review and appeal disciplinary actions relate to working conditions and are a mandatory subject of bargaining.").

Notably, in holding that the union had established a nexus between OP 20-10 and the parties' agreement in *DC 37*, 25 OCB 34, the Board relied on the contractual definition of a grievance that mirrors Article VI, § 1(b) of the Agreement, to wit: "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the employer applicable to the agency which employs the grievance affecting the terms and conditions of employment." *Id.* at 2. Moreover, in finding a nexus, the Board did not rely on another contractual provision advanced by the union which included "a claimed wrongful disciplinary action" within the definition of a grievance. *Id.* Nor did the Board consider the existence of a

[7] We also reject HHC's assertion that a provisional employee who is excluded from the Provisional Agreement's due process disciplinary procedures must, in order to avoid "absurd" results, also be prohibited from access to counseling prior to the issuance of discipline. We do not find it illogical or absurd that a provisional employee may be entitled to counseling regarding her performance or conduct, or that the Union would seek to enforce HHC's written policy.

such separate provision to affect the arbitrability of a grievance alleging that a disciplinary action violated OP 20-10.

The parties' remaining disputes, such as whether HHC did, in fact, provide counseling to Grievant prior to issuing her suspension, raise substantive questions of fact for an arbitrator to decide.[8] *See PBA*, 4 OCB2d 22, at 13 ("Once an arguable relationship [exists], the Board will not consider the merits of the grievance.") Accordingly, the request for arbitration is granted, and the petition challenging arbitrability is denied.

[8] Similarly, to the extent the Union is requesting that HHC rescind Petitioner's suspension as a remedy for its alleged procedural violation, fashioning a remedy is within the arbitrator's discretion, should he or she conclude that a violation occurred.

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 New York City Health + Hospitals, docketed as BCB-4252-17, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO, Social Service Employees Union, Local 371, on behalf of its member Syeda Ali, docketed as A-15342-17, hereby is granted.

Dated: February 15, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER