NYSNA, 3 OCB2d 55 (BCB 2010)

(Arb) (Docket No. BCB-2861-10) (A-13467-10).

***Summary of Decision*:** HHC filed a petition challenging the arbitrability of a grievance brought by NYSNA. NYSNA had filed a Request for Arbitration alleging that HHC violated two provisions of the parties' Agreement by failing to produce an agenda for a labor-management meeting at least four weeks in advance of that meeting. HHC argued that NYSNA failed to establish a nexus between the subject of the grievance and the Agreement because neither cited provision pertains to scheduling informal meetings. The Board found that the issue to be arbitrated raised an issue of contract interpretation that only an arbitrator can decide and denied the petition challenging arbitrability. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

DECISION AND ORDER

On May 24, 2010, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by the New York State Nurses Association ("NYSNA"). On April 27, 2010, NYSNA filed a Request for Arbitration alleging that HHC violated Article V and Article XX of the Staff Nurse Agreement ("Agreement") by failing to produce an agenda for a labor-management meeting at least four weeks in advance of that meeting.

HHC argued that NYSNA failed to establish a nexus between the subject of the grievance and the Agreement because neither cited provision pertains to scheduling informal meetings. The Board finds that the issue to be arbitrated raises an issue of contract interpretation that only an arbitrator can decide, and therefore it denies the petition challenging arbitrability.

BACKGROUND

On December 11, 2008, Ilene Sussman, a NYSNA representative, called Nancy Romero, the Associate Director of Human Resources, Labor Relations and EEO at HHC's Health and Home Care Division and requested a meeting with representatives from the Home and Health Care Division to discuss a variety of issues. On December 15, 2008, Sussman placed her request for a "Labor/Management Meeting" in writing, offered February 19 or 26, 2009 as possible dates for the meeting, and stated that she "[understood] the necessity of having an agenda prior to the date of the meeting." (Ans., Ex. A). She wrote further that NYSNA was prepared to fax the agenda to Romero by February 12, 2009.

Romero responded on December 16, 2008, writing that she could not confirm a date until she received an agenda for that meeting. Romero explained that she needed an agenda so that she could invite the relevant HHC representatives and fully address NYSNA's concerns. Romero requested that Sussman forward an agenda to her by January 5 with three suggested dates so that they could then confirm the meeting. On January 5, Sussman provided the agenda and three suggested dates. The first two agenda items concerned Family and Medical Leave Act ("FMLA") workshops, the third was titled, "Additional items to be presented," and the fourth was titled, "Open Agenda." (*Id.*). Sussman did not elaborate as to the content of the third or fourth agenda items beyond the titles.

Romero responded on January 6 that the FMLA workshops were not run by Human Resources, but rather the Benefits Department, and that the meeting might not be able to resolve NYSNA's remaining "open" items because she could not be sure which HHC individuals to invite to address these undefined concerns. The meeting was never held.

On January 23, 2009, NYSNA filed a Step II grievance alleging that HHC violated both Article V and XX of the Agreement. The grievance stated that:

> [the Health and Home Care Division] failed to confirm scheduling a Labor/Management meeting even after an agenda was submitted more than one week in advance of an offered date as per the [Agreement], requiring the agenda to be sent prior to being submitted at least 4 weeks in advance, in addition, an agenda was submitted by NYSNA was not satisfactory to Labor Relations of [HHC's Health and Home Care Division].

(Pet., Ex. B).

Article V of the Agreement is titled "Productivity and Performance," and it concerns the "mutual obligation" of both parties to utilize their best efforts to achieve the highest levels of productivity and performance in the delivery of care to patients. (Pet., Ex. A). The provision also "acknowledges the Employer's right to pay additional compensation for outstanding performance" after it notifies the Union of its intentions to do so. (*Id.*).

Article XX of the Agreement provides that HHC and NYSNA " . . . shall jointly maintain and support a labor-management committee in each of the agencies." (Pet., Ex. A). It also provides that each labor-management committee "shall consist of six members" with three members designated by NYSNA and three by HHC. Article XX then states that "at least one week in advance of a meeting, the party calling the meeting shall provide, to the other party, a written agenda of matters to be discussed . . .". (Id.).

On February 17, 2009, the grievance was dismissed at Step II because "there is no nexus between the sections you cite in the [Agreement] and your statement of the grievance." (Pet., Ex. C). NYSNA appealed the dismissal to Step III on February 20, 2009. The parties did not hold a Step III hearing and, on April 27, 2010, NYSNA filed a Request for Arbitration. NYSNA described the nature of the grievance as a "[f]ailure to schedule labor/management meeting without having an agenda at least four weeks in advance," while citing to both Articles V and XX of the Agreement. (Pet., Ex. E).

POSITIONS OF THE PARTIES

HHC's Position

HHC claims that NYSNA has not established a nexus between the controversy it presented and the cited provisions of the Agreement. First, Article V, which pertains to productivity and performance, has absolutely no application to the scheduling of labor-management meetings or the submission of an agenda prior to the scheduling of such a meeting.

Second, Article XX provides for the creation of a standing committee, with an equal number of designated members from both the agency and NYSNA, but the Health and Home Care Division is not an agency within the meaning of Article XX of the Agreement. HHC is the agency and Health and Home Care is one of 23 divisions of the agency. The provision does not mention anything regarding the prospect of a division scheduling an informal meeting between NYSNA and HHC representatives to address local issues as they arise.

HHC argues that even if Health and Home Care is considered an agency within the meaning of Article XX, nothing in that provision prohibits Health and Home Care from requiring NYSNA

to submit an agenda prior to scheduling a meeting with NYSNA. The requirement that the party calling the meeting provide an agenda at least one week in advance of said meeting does not in any way preclude an agency from requiring one prior to confirming the date of the meeting. Since NYSNA has cited to two different provisions in the Agreement, and neither of those provisions have a reasonable relation to the act complained of, NYSNA has failed to state an arbitrable claim. Thus, HHC's petition challenging arbitrability should be granted.

NYSNA's Position

NYSNA argues that it has established a nexus in this matter. The act complained of is the manner in which the facility handled NYSNA's request for a labor-management meeting and the source of the alleged right is Article XX of the Agreement, which addresses HHC's obligation with respect to labor-management meetings. NYSNA's arbitration demand concerns whether the refusal of a facility to schedule a meeting until it receives a full agenda constitutes compliance with these obligations. HHC's contentions that the Health and Home Care Division is not an agency within the meaning of Article XX and that Article XX refers to a single standing committee raise an issue of contract interpretation for the arbitrator to decide.

Furthermore, HHC's contention that it is not prohibited from requiring NYSNA to submit an agenda prior to scheduling a meeting is incorrect, but the contention addresses the merits of the matter, which is also for an arbitrator to decide. NYSNA argues that the issues raised here are arbitrable, but to the extent that the Board may harbor any doubt, it must resolve the doubt in favor of arbitration. Finally, HHC's obligation to deliver services in a courteous manner is explicitly set forth in Article V of the Agreement.

DISCUSSION

The policy of the NYCCBL, "as is made explicit by § 12-302 of the NYCCBL, . . . is to favor and encourage arbitration to resolve grievances." *Local 1182, CWA*, 77 OCB 31, at 7 (BCB 2006); *see also NYSNA*, 69 OCB 21 (BCB 2002) (in-depth discussion of public sector arbitration and the Board's role therein). This Board has exclusive power under NYCCBL § 12-309(a)(3) "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter." This Board has long held that "the presumption is that disputes are arbitrable, and that 'doubtful issues of arbitrability are resolved in favor of arbitration.'" *Id*. (quoting *OSA*, 77 OCB 19, at 10 (BCB 2006); *DC 37*, 13 OCB 14, at 12 (BCB 1974). This presumption is not without limits, of course; "we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties." *DC 37*, 77 OCB 13 at 8-9 (BCB 2006) (citations omitted).

This Board applies a two-prong test to determine arbitrability: "(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.'" *NYSNA*, 69 OCB 21, at 7 (BCB 2002), quoting *SSEU*, 3 OCB 2, at 2 (BCB 1969) (additional citations omitted). In other words, the Board will inquire "whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." *Id*. at 8.

In this case, there is no dispute that the Agreement provides for grievance and arbitration procedures, and there is no claim that arbitration of the issue would violate public policy. The first prong of the test to determine arbitrability has been met.

The issue we must determine is whether the parties' obligation is broad enough in scope to include the present controversy. To make this determination, we must examine whether NYSNA has shown "a *prima facie* relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *Local 924, DC 37*, 1 OCB2d 3, at 12 (BCB 2008); *COBA*, 45 OCB 41, at 12 (BCB 1990). A *prima facie* showing, by definition, 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 17 (BCB 2008); *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008). Rather, we "have long held that where the interpretation that each party proffers is plausible, the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *Id.*, quoting *Superior Officers' Assn., NYCHA Police Union*, 13 OCB 18, at 8 (BCB 1974).

Here, the Agreement in question presents a viable source of a claimed right subject to arbitration. The Request for Arbitration poses the question to be decided in arbitration as whether HHC violated Articles V and XX of the Agreement by failing to schedule a labor-management meeting without having an agenda in advance. We find that NYSNA has established the requisite nexus, in that it has advanced a "plausible" reading of the provisions of Article XX of the Agreement which may be construed as giving rise to rights subject to arbitration. *Local 1157, DC 37*, 1 OCB2d 24, at 9. Article XX employs mandatory language regarding the provision of an agenda for labor-management meetings and the general conduct of those meetings. NYSNA's primary claim concerns its provision of the agenda and HHC's failure to comply with the remainder of Article XX. Accordingly, there is a reasonably arguable source of right and claim of deprivation to make out "a

prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *Local 924, DC 37*, 1 OCB2d 3, at 12.

HHC argues that the language of the Agreement, when it speaks of a "labor-management committee" refers to a single standing committee comprised of the "agency," referring solely to HHC, a discrete entity, and NYSNA. NYSNA argues that the determination of whether the term "agency" refers to HHC exclusively, or also includes its divisions, such as the Health and Home Care Division, raises an issue of contract interpretation for an arbitrator to decide. We agree with NYSNA's contention: the parties' disagreement over the meaning of the terms in Article XX, namely the meaning of the term "agency," and the effect of the language regarding the provision of an agenda, are matters of contract interpretation over which this Board lacks jurisdiction. *CCA*, 3 OCB2d 43, at 10 (BCB 2010); *Colella*, 79 OCB 27, at 52 (BCB 2007). HHC's remaining argument, that it is not prohibited from requiring NYSNA to submit an agenda prior to scheduling a meeting, goes to the merits of the matter. "[I]t is well established that the Board in deciding questions of arbitrability will not inquire into the merits of a dispute"; as such, we will not address these arguments, which concern the merits and not the matter of arbitrability. *CCA,* 3 OCB2d 43, at 10; *PBA,* 79 OCB 16, at 16 (BCB 2007) (quoting *Local 371, SSEU*, 29 OCB 31, at 13 (BCB 1982)).

Accordingly, we find that the requisite nexus has been established, and, as was the case in *DC 37*, 39 OCB 28, we find that NYSNA has shown a reasonably arguable source of right in support of the claim for arbitration herein. Further determination as to the nature of the terms in Article XX and its application to the instant case are matters to be decided by an arbitrator and not this Board. For the reasons stated above, we deny the City's petition challenging arbitrability and grant the Request for Arbitration as to the Union's claim that the grievance is arbitrable under Article XX.

However, we dismiss the Union's claim that the grievance is arbitrable under Article V, as no nexus to that provision has been shown.

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 the arbitrability docketed as BCB-2861-10 is hereby denied, and it is further

ORDERED, that the request for arbitration filed by the New York State Nurses Association docketed as A-13467-10 hereby is granted as to the Union's claim under Article XX.

Dated: November 29, 2010
New York, New York

MARLENE A. GOLD
CHAIR

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