New York City District Council of Carpenters, UBCJA, **3 OCB2d 9 (BCB 2010)**
(Arb.) (Docket Nos. BCB-2798-09).

Summary of Decision: NYCHA filed a petition challenging the arbitrability of a Union grievance concerning the assignment of work locations. NYCHA asserted that the Union did not identify a specific provision of a collective bargaining agreement or of any other NYCHA rule or regulation and that, nevertheless, the assignment of work is a managerial right. The Union grieved NYCHA's violation of a written statement regarding borough assignments, which it argued was arbitrable. The Board found that the Union had articulated an arbitrable grievance. Accordingly, the petition was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

THE NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS, UBCJA,

Respondent.

DECISION AND ORDER

On September 18, 2009, the New York City Housing Authority ("NYCHA" or "Authority") filed a petition challenging the arbitrability of a grievance filed by the New York City District Council of Carpenters, UBCJA ("Union") on behalf of Peter Martucci ("Grievant"). The Union's grievance, filed on August 14, 2009, alleged that Grievant was "denied the right to select a borough assignment based on seniority, in violation of NYCHA's rules, requirements and collective

bargaining procedures concerning bi-annual 'job picks.'" (Pet. Ex. 1). NYCHA challenges the arbitrability of this grievance asserting that the Union did not identify a specific provision of a written collective bargaining agreement or of any other NYCHA rule or regulation and that the assignment of work is a managerial right. The Union argues that it stated an arbitrable grievance, alleging that NYCHA violated its written policy regarding the way in which work assignments are made, ("Job Picks") when it failed to assign Grievant to a borough assignment based upon the the order of seniority. The Board finds that the Union articulated an arbitrable grievance. Accordingly, the City's petition challenging arbitrability is denied.

BACKGROUND

Grievant is employed by NYCHA in the title of Supervisor Carpenter and is represented by the Union. The parties do not have a collective bargaining agreement; however NYCHA's Human Resources Manual ("HR Manual") contains a grievance procedure applicable to the Union's members.[1] In pertinent part, the HR Manual defines the term "grievance" as follows:

> 1. A dispute concerning the application and interpretation of the terms of:
>
> > a. Written collective bargaining agreements and written rules or regulations...
>
> 2. A claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority affecting the terms and conditions of employment.

(Pet. Ex. 2) (emphasis in original).

[1] In *CSBA*, 75 OCB 5 (BCB 2005), the Board found that the HR Manual created grievance and arbitration rights.

As part of its process of making work assignments to certain employees, NYCHA utilizes a document referred to as a "Skilled Trades Pick Sheet" ("Pick Sheet" or "Pick Form"). (Pet. Ex. 4). In May 2007, Grievant submitted a Pick Form listing Brooklyn as his first choice borough assignment. He was assigned to work in Brooklyn and worked in that borough until February 2, 2009, when he was transferred to Manhattan. According to NYCHA, this transfer was implemented because "[t]here was a concern regarding the relationship between two employees who had difficulty working together and [NYCHA] determined to err on the side of caution by separating these two employees." (Pet. at 5, fn. 2). The Union affirmatively stated that Grievant was not one of the employees with the difficulty and was not involved in a dispute with another employee requiring his transfer. It appears Grievant was transferred in order to effectuate the separation of other employees.

When Grievant was transferred to Manhattan, another employee with less seniority than Grievant was assigned to the Supervisor Carpenter position in Brooklyn. In a letter dated January 26, 2009, the Union objected to this transfer, stating:

> It is our understanding that . . . [the Supervisor Carpenter with less seniority] would not be assigned to the position for which he was hired, but rather assigned to Brooklyn.
>
> If there is a reason [the Supervisor Carpenter with less seniority] cannot be assigned to the Manhattan Management Office, the situation, if one exists, is not rectified by the transfer of [Grievant].
>
> Please let us know why [Grievant] was transferred against NYCHA's past practice and procedures, and how this rectified the problem, if one exists, in the Manhattan Area Office, or the Brooklyn Area Office.

(Ans. Ex. 2). On February 10, 2009, NYCHA responded, stated:

> This responds to your January 26, 2009 letter that objects to the

> transfer of [Grievant] and claims his transfer was "against the Authority's past practice and procedures." These items in and of themselves are not grievable. As you know, management has the right to assign staff. Here you have not identified any applicable and specific NYCHA written Rule or Regulation affecting the terms and conditions of employment that NYCHA allegedly violated in its decision to transfer [Grievant] to work in Manhattan. Accordingly, [Grievant] will remain in Manhattan.

(Ans. Ex. 3).

On April 24, 2009, NYCHA's Executive Department issued a memorandum ("2009 Memorandum") regarding the 2009 Job Picks for several job titles, including Supervisor Carpenter. This memorandum, sent to the directors of management of the various boroughs as well as to the Director of Technical Services, and to the Union, states in pertinent part:

> Attached is a list of employees in the above-listed titles who are assigned to your department as indicated by our records. Also attached are pick forms for each of the titles. Please distribute a copy of the appropriate attached pick form to every employee in these titles in your department. . . . Please insure that every affected employee assigned to your department receives a pick form, even if his/her name is not included on the list provided. . .
>
> Please review collected forms for completeness and signature and return as soon as possible in the window period, but no later than Tuesday, May 5th for the Supervisor titles. . .
>
> Employee assignments resulting from this process will be made in seniority order. Implementation of transfers will be effectuated shortly after completion of the process. Directors and employees will be notified sufficiently in advance of effective dates of moves.

(Pet. Ex. 1) (emphasis in original). In the instant proceeding, NYCHA also provided another, earlier, memorandum regarding Job Picks, dated October 28, 1968 ("1968 Memorandum"). This memorandum, from NYCHA's Director of Management to Skilled Trade Employees, stated:

> Effective April 1, 1969, Skilled Trades Employees will be given the opportunity to choose the area in which they work on the basis of

> their seniority in the Authority. The "Job Pick" will take place every two years in March, to be effective the following month.
>
> Although every effort will be made to assign Skilled Tradesmen to projects within the area selected, it is recognized, of course, that in special situations, employees may be required to work on projects outside the area of their choice.

(Pet. Ex. 3).

The 2009 NYCHA Job Picks were made in May of that year. Grievant completed his Pick Form, dated May 4, 2009. He listed Brooklyn as his first choice and Manhattan as his second choice, the Bronx as his third choice, Queens as his fourth choice, and Staten Island as his fifth choice. The Pick Form states "[y]our seniority number will be confirmed by your union representative. You will be advised of your assignment and the effective date of implementation as soon as possible." (Pet. Ex. 5). On May 8, 2009, the 2009 Job Pick results were listed in an electronic mail message, which stated that Grievant would remain in Manhattan, his second choice; he was not transferred back to Brooklyn.

Grievant filed a grievance regarding the results of the 2009 Job Pick at Steps I, II, and III. All of his grievances were denied or dismissed by NYCHA. Grievant filed his request for arbitration of NYCHA's denial of his grievance on August 11, 2009, stating that he was "denied the right to select a borough assignment based on seniority, in violation of NYCHA's rules, requirements and collective bargaining procedures concerning bi-annual 'job picks.'" (Pet. Ex. 1). As remedy, he sought "[a]n award directing NYCHA to honor [Grievant's] application to transfer his borough assignment from Manhattan to Brooklyn." (Pet. Ex. 1).

POSITIONS OF THE PARTIES[2]

NYCHA's Position

NYCHA challenges the arbitrability of this grievance and asks that the Board dismiss the Union's request for arbitration as it does not identify a specific provision of a collective bargaining agreement between the parties or of any NYCHA rule or regulation. The parties have no collective bargaining agreement; therefore, the Union cannot establish a nexus with any such agreement. The HR Manual provides for a grievance procedure by which Union members may challenge NYCHA's application or interpretation of its rules or regulations.

The Union has also failed to identify a rule or regulation that NYCHA violated. The Union complains that NYCHA did not appropriately apply the 2009 Memorandum regarding Job Picks. NYCHA distributed the Pick Sheets, but such sheets did not state that an employee's choices would be guaranteed and did not give the employee an absolute right to make a job selection. While a document outside of a collective bargaining agreement may be considered a rule or regulation, these Pick Sheets and the memorandum do not qualify as such as neither of them were "promulgated to comply with the law and affect the mission of NYCHA." (Pet. ¶ 47).

Further, NYCHA's decision to give Grievant a particular assignment is within its statutory managerial right to assign work pursuant to New York City Collective Bargaining Law ("NYCCBL") § 12-307(b).[3] The Union has also failed to allege a contractual provision limiting this

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[2] The parties articulated their positions in their pleadings as well as in additional memoranda submitted at the request of the Trial Examiner.

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

> It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be

managerial prerogative. NYCHA asserts that "[t]here is no collective bargaining agreement or rule or regulation that limits management's prerogative with respect to assignments of its employees in the Supervisor Carpenter title. There is only a commitment on the part of the department to allow the Skilled Trades to choose preferences, and for the department to consider these preferences when making assignments. NYCHA effectuated this commitment." (Pet. ¶ 56).

The Union did not assert a claim that would be grievable under NYCHA's grievance procedure. NYCHA agrees with the Union that Grievant has the right to participate in the Job Picks process and Grievant could choose his preferences, which would then be considered by management in making assignments. NYCHA did not deny Grievant the opportunity to choose his preferences.

Further, the only document relevant to this issue is the 1968 Memorandum, which supports NYCHA's position as it states regarding Job Picks that "in special situations, employees may be required to work in projects outside their area of choice." (Pet. Ex. 3). Although this document is neither a rule nor a regulation, it recognizes NYCHA's right to assign its employees as needed.

In response to the Union's contention that this matter is arbitrable, NYCHA reasserted that the HR Manual limits grievance arbitration to "rules and regulations," and does not include policies. (Rep. ¶ 34). Regardless of whether the 2009 Memorandum constitutes a policy, it is not a rule or regulation as discussed in the HR Manual, and the Union has not articulated any specific rule or regulation that was allegedly violated. Although the HR Manual does cover Grievant and the contents of the HR Manual are grievable, the Union has not asserted that NYCHA violated any

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> offered by its agencies; . . . direct its employees; take disciplinary action; . . . 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 . . . .

provision of the HR manual. An employer's adoption of a written policy may become arbitrable under contracts that make non-compliance grievable, but NYCHA's grievance procedure does not allow for arbitration of written policies.

Also, the 2009 Memorandum is not a policy in that it was only distributed to some of the employees working in a specific service area at NYCHA. The 2009 Memorandum was not applicable to all NYCHA employees but only a small group of specialized employees. It also does not further a NYCHA purpose as would a policy; it describes the process by which Job Picks would be made for certain employees. Moreover, the 2009 Memorandum was not distributed directly to employees but was instead distributed to the unions and NYCHA managers. NYCHA also did not unilaterally create the 2009 Memorandum as the Union was consulted before it was distributed.

The rules and regulations that apply to NYCHA employees are set forth in the HR manual, and departmental memoranda are not NYCHA rules and regulations. In support of this contention, NYCHA cites *CSBA*, 75 OCB 5 (BCB 2005), for the proposition that the HR Manual "are the rules of NYCHA." (Sur-surreply ¶ 23)(citing *CSBA*, 75 OCB 5, at 11). Therefore, while an alleged violation of the HR Manual is grievable as a "written rule or regulation," the 2009 Memorandum is not. Further, while the Union attempts to make the 2009 Memorandum a rule or regulation and hence grievable, "arguing that this memorandum is a written policy of [NYCHA] . . . [r]egardless of whether or not the [2009 Memorandum] is a written policy, the [HR Manual] grievance definition does not allow the Union to grieve claimed violations of written policies." (Sur-sur-reply ¶ 26).

The Union failed to establish a nexus between NYCHA's decision to assign Grievant to his second choice job and any grievable rule or regulation. Thus, the Board should grant NYCHA's petition and deny the Union's request for arbitration.

Union's Position

The Union asserts that it has stated an arbitrable grievance, alleging that NYCHA violated its written policy regarding Job Picks when it failed to assign Grievant to a borough assignment based upon the seniority order.[4] As set forth in NYCHA's Personnel Rules and Regulations, the parties are obligated to arbitrate grievances that are subject to arbitration. Such obligations include the claim at issue. The claim alleges a violation of the 2009 Memorandum, and such a violation falls within the HR Manual's definition of grievance. Agency memoranda may constitute written policies subject to arbitration, and the 2009 Memorandum in particular constitutes a written policy because it "sets forth a general policy that furthers NYCHA's purpose," "was communicated to affected employees," and "was promulgated unilaterally." (Union's Mem. of Law at 6). The 2009 Memorandum sets forth a general policy as it applies to all employees in the Skilled Trade titles that were subject to the Job Pick. It also was designed to further NYCHA's purpose as it directs which employees may be appointed to job positions, and the Board has held that such written policies are designed to further an agency's purpose. The 2009 Memorandum, issued unilaterally by NYCHA, was communicated to all affected employees. NYCHA erroneously contends that the 2009 Memorandum is an "advisory statement," not a written policy; this memorandum did not make reference to statutory or other legal rights but instead set forth a new policy that Job Picks would

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[4] The Union cites to NYCCBL § 12-302, which provides that**:**

> 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.

be made in order of seniority. (Union's Mem. of Law at 9).

The Union has established a nexus between the grievance and NYCHA's policy, articulated in the 2009 Memorandum, that borough assignments would be made in order of seniority. The 2009 Memorandum states that job assignments would be made in order of seniority. Further, contrary to NYCHA's contentions, the grievance does not assert that, based upon the 2009 Memorandum, NYCHA was required to appoint employees to their chosen assignment, but instead that NYCHA was required to make assignments in seniority order.

NYCHA points to the 1968 Memorandum to support its contention that it is not required to assign affected employees in order of seniority. However, it is the 2009 Memorandum and not the 1968 Memorandum that is controlling on the May 2009 Job Pick. Further, the 1968 Memorandum concerned a 1969 Job Pick. NYCHA has not provided evidence that the 1968 Memorandum still remained in effect at the time of the May 2009 Job Pick, or that this document superseded the 2009 Memorandum. Even if the 1968 Memorandum was still relevant, that document did not expressly permit NYCHA to disregard seniority when making assignments based on the May 2009 Job Pick. The 1968 policy required that assignments be based on seniority except in "special situations." (Union's Mem. of Law at 13). Even that exception does not apply here because Grievant's seniority was completely ignored. Moreover, NYCHA's argument that its assignment was a managerial right goes to the merits, not the arbitrability, of the grievance. According to the Union, even on the merits, NYCHA's argument fails. Further, the managerial right to exercise discretion in decision making may be limited by other policies and agreements, as did the 2009 Memorandum.

DISCUSSION

In accordance with NYCCBL § 12-302, our policy is to favor the use of arbitration to resolve disputes. While "doubtful issues of arbitrability are resolved in favor of arbitration . . . the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties. *Local 924, DC 37,* 1 OCB2d 3, at 8 (BCB 2008).

This Board has established the following 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 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.

NYSNA, 2 OCB2d 6, at 8 (BCB 2009) (citations and internal quotation marks omitted).

The parties agree that they are obligated to arbitrate certain disputes, pursuant to the HR Manual. Neither party contends that arbitration is restricted by any public policy, statute, or constitution. They disagree, however, on whether the HR Manual covers this particular controversy, specifically whether the Union has articulated a "grievance," as defined in the HR Manual. Thus, the issue presented for our determination is whether the documents identified by the Union as relating to the 2009 Job Pick fall within the meaning of "rules and regulations of the Authority affecting the terms and conditions of employment." (Pet. Ex. 2).

To be considered a written rule, an employer's statement must be "addressed generally to the [agency] and have set forth a general policy applicable to affected employees." *Local 3, IBEW*, 45 OCB 59, at 11-12 (BCB 1990); *see SSEU*, 77 OCB 5 (BCB 2006); *CEU, Local 237*, 77 OCB 27

(BCB 2006). In *Local 3, IBEW*, we found that an employer's promulgation of a memorandum concerning work assignments, distributed within management, established sufficient nexus to constitute a rule subject to arbitration. It is clear on its face that the 2009 Memorandum sent by NYCHA's Executive Department to the directors of management of the various boroughs as well as to the Director of Technical Services was applicable to all Skilled Trades Employees, the affected employees. That the Union may have been consulted before NYCHA issued the 2009 Memorandum is of no consequence. Further, the 2009 Memorandum contained an explicit directive regarding the management of NYCHA; we find that these directions in this memorandum concerned NYCHA's general interest in determining the method to use to assign its employees. As an exercise of its managerial prerogative, NYCHA unilaterally promulgated the 2009 Memorandum, which directs the way that work assignments for Skilled Trade Employees would be made, stating that "[e]mployee assignments resulting from this process will be made in seniority order." (Pet. Ex. 1). Therefore, we find that the 2009 Memorandum is a written rule and arbitrable pursuant to the HR Manual.

NYCHA also argues that the 1968 Memorandum should govern the seniority issue arising here. However, we leave to an arbitrator the relationship, if any, between the 1968 Memorandum and the 2009 Memorandum. We find that the Union has demonstrated its grievance is reasonably related to rights created by the HR Manual, which provides for the arbitration of disputes regarding the "rules and regulations of the Authority affecting the terms and conditions of employment."[5] As a reasonable nexus exists between the grievance and the 2009 Memorandum, this matter may

[5] It has not been shown that the Pick Sheet was anything more than a mere form used by NYCHA management. No basis has been found that the Pick Sheet is itself a rule or regulation and therefore cannot stand as an independent basis for arbitration.

properly go before an arbitrator.

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-2798-09 is hereby denied, and it is further

ORDERED, that the request for arbitration filed by the New York City District Council of Carpenters, UBCJA docketed as A-13207-09 hereby is granted.

Dated: February 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER

MEMBER

CHARLES G. MOERDLER

MEMBER

GABRIELLE SEMEL
MEMBER