SSEU, L. 371, 4 OCB2d 27 (BCB 2011)

(IP) (Docket No. BCB-2907-10).

***Summary of Decision*:** The Union alleged that HHC unilaterally altered the parties' collective bargaining agreement in violation of NYCCBL § 12-306(a)(1) and (4) by failing or refusing to provide notice of a Step II grievance hearing to individual employees. HHC argued that the Union failed to state a claim under NYCCBL § 12-306(a)(1) and (4). HHC also sought to defer the matter to arbitration on the grounds that a resolution of the Union's allegations requires interpretation of the parties' collective bargaining agreement and the issues raised in this matter are identical to those in a pending grievance. Because the collective bargaining agreement is the ultimate source of the rights asserted and arbitration will resolve all of the Union's claims, the Board deferred the matter to arbitration. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On November 9, 2010, Social Service Employees Union, Local 371 ("Union") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("HHC") violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union claims that HHC unilaterally altered the terms of the parties' collective bargaining agreement by failing to provide

direct notification to Union members of the date, time and place of their Step II hearing, in violation of the agreement's Grievance Procedure. HHC contends that the Union failed to state a claim upon which relief may be granted. HHC further argues that the Board should defer the dispute to arbitration because resolution of the Union's claims requires interpretation of the collective bargaining agreement. Because the collective bargaining agreement is the ultimate source of the rights asserted and arbitration will resolve all of the Union's claims, the Board defers the matter to arbitration.

BACKGROUND

The Union and HHC are parties to the Social Services & Related Titles Collective Bargaining Agreement ("Agreement"), covering the period from July 1, 2005 to March 2, 2008.[1] Article VI of the Agreement provides a Grievance Procedure for certain disputes or claims defined under the term "Grievance," including disputes concerning the application or interpretation of the Agreement's terms and alleged wrongful disciplinary actions taken against permanent and non-competitive class employees of HHC. (Pet. Ex. A, at 48-49). Specifically, §§ 5 and 6 of Article VI provide a four-step disciplinary procedure for permanent competitive and non-competitive HHC employees covered by the Agreement. The initial step of the procedure is a Step A or Step I hearing.

Section 5 of the Agreement, titled "Disciplinary Procedure for Permanent Competitive Employees," provides, in pertinent part:

> STEP A Following the service of written charges, a conference with such Employee shall be held with respect to such charges by the

[1] The Agreement remains in *status quo*, pursuant to NYCCBL § 12-311(d).

person designated by the agency head to review a grievance at STEP I of the Grievance Procedure set forth in this Agreement. The Employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a determination in writing by the end of the fifth day following the date of the conference.

If the Employee is satisfied with the determination in STEP A above, the Employee may choose to accept such determination as an alternative to and in lieu of a determination made pursuant to the procedures provided for in Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation. As a condition of accepting such determination, the Employee shall sign a waiver of the Employee's right to the procedures available to him or her under Section 75 and 76 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation.

STEP B(I) If the Employee is not satisfied with the determination at STEP A above then the Employer shall proceed in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation. As an alternative, the Union with the consent of the Employee may choose to proceed in accordance with the Grievance Procedure set forth in this Agreement, including the right to proceed to binding arbitration pursuant to STEP IV of such Grievance Procedure. As a condition for submitting the matter to the Grievance Procedure the Employee and the Union shall file a written waiver of the right to utilize the procedures available to the Employee pursuant to Sections 75 and 76 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitrator's award, if any. Notwithstanding such waiver, the period of an Employee's suspension without pay pending hearing and determination of charges shall not exceed thirty (30) days.

STEP B(ii) If the election is made to proceed pursuant to the Grievance Procedure, an appeal from the determination of STEP A above, shall be made to the agency head or designated representative. The appeal must be made in writing within five (5) work days of the receipt of the determination. The agency head or designated representative shall meet with the Employee and the Union for review of the grievance and shall issue a determination to the Employee and the Union by the end

> of the tenth work day following the day on which the appeal was filed. The agency head or designated representative shall have the power to impose the discipline, if any, decided upon, up to and including termination of the accused Employee's employment. In the event of such termination or suspension without pay totaling more than thirty (30) days, the Union with the consent of the grievant may elect to skip STEP C of this Section and proceed directly to STEP D.

(Pet. Ex. A, at 51-52).

Section 6 of the Agreement, titled "Disciplinary Procedure for Non-Competitive Employees," provides, in pertinent part:

> STEP I Following the service of written charges, a conference with such Employee shall be held with respect to such charges by the person designated by the agency head to review a grievance at STEP I of the Grievance Procedure set forth in this Agreement. The Employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a determination in writing by the end of the fifth day following the date of the conference.
>
> STEP II If the Employee is dissatisfied with the determination in Step I above, he or she may appeal such determination. The appeal must be made within five (5) working days of the receipt of such determination. Such appeal shall be treated as a grievance appeal beginning with Step II of the Grievance Procedure set forth herein.

(Pet. Ex. A, at 52-53). In accordance with the Grievance Procedure, a party may proceed from a determination at Step I or Step A to a Step II hearing.

On or about December 7, 2010, the Union filed a Step II grievance claiming that HHC violated Article VI, §§ 5 and 6 of the Agreement by failing to provide its members who are subject to disciplinary charges with notice of the Step II conference. The Board takes administrative notice that a Step III appeal was filed on December 15, 2010, a request for arbitration was filed on January 4, 2011, and a hearing was subsequently scheduled before an arbitrator.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that HHC violated NYCCBL § 12-306(a)(1) and (4) by failing and refusing to notify Union members covered by the Agreement's Grievance Procedure of the date, time and place of their scheduled Step II hearing.[2] HHC has been providing notification of Step II hearings only to the Union, with instructions to the Union to provide such notification to the affected employees. The Union contends that, under the Agreement's terms, it is HHC's responsibility to directly notify such employees of the date, time and place of their scheduled Step II hearings. The Agreement does not permit HHC to transfer this notification obligation to the Union. Moreover, notification to the Union does not constitute notification to the affected employees. Union members have individual rights under the Agreement and, therefore, they are entitled to receive direct notice

---

[2] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (4) to refuse to bargain in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

NYCCBL § 12-305 provides, in pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

from HHC of the Step II hearing. Finally, the Union has communicated to HHC its objection to this practice and has demanded that HHC directly notify its employees of the date, time and place of the Step II hearing, but the Union contends that HHC has failed and refused to provide such notification.

The Union does not dispute that there has been no material change to HHC's policy and practice for notification of Step II hearings. The Union has further stated that it does not object to a deferral of the instant dispute to arbitration.

HHC's Position

HHC asserts that the Board should defer the dispute to arbitration because the issues raised by the Union are "unmistakably intertwined" with the interpretation of the language in Article VI, Sections 5 and 6 of the Agreement, and resolution of the improper practice claims requires the interpretation of this language. (Ans. ¶ 30). HHC denies that it made any unilateral change and contends that its practice for "at least, the past 15 years" is to notify the Union representative, designated hearing officer, and relevant HHC facility labor relations liaison, but not the individual grievant, of the Step II hearing. (Ans. ¶ 23). HHC further argues that, after the Union filed its petition, the Union filed a grievance on behalf of its members regarding this same issue. By deferring the matter to arbitration, the parties may resolve both the improper practice charge and issues related to the interpretation of the Agreement.

HHC also contends that the Union has not alleged facts demonstrating that HHC failed to bargain in good faith over a mandatory subject of bargaining.[3] Instead, the Union has presented

[3] HHC further asserts that the Union's claim that HHC interfered with, restrained, or coerced its members in the exercise of their statutory rights under NYCCBL § 12-305 must be dismissed because the Union failed to offer any facts independent of those alleged in support of its claim under NYCCBL §12-306(a)(4) to support a § 12-306(a)(1) claim. Moreover, since the Union is unable to establish that HHC failed or refused to bargain in good faith over a mandatory subject of bargaining

conclusory statements to support its theory that HHC's failure to present notification directly to individual grievants violated the Agreement. While HHC does not deny that this issue relates to working conditions and is a mandatory subject of bargaining, it contends that the parties have already negotiated a process to address and review disciplinary grievances. Moreover, there is nothing in the grievance procedure that requires HHC to provide Step II hearing notices directly to employees, and the Union has failed to allege any facts or identify any specific provision in the Agreement which sets forth this requirement. Further, the Union has not presented any evidence that a grievant has been deprived of his right to appeal to Step III of the Grievance Procedure or that the Union has been hindered from proceeding to arbitration as a result of its claims.

DISCUSSION

Although this Board has exclusive jurisdiction under NYCCBL § 12-309(a)(4) to prevent and remedy improper practices, we will typically defer disputes "where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, consistent with the declared policy of the NYCCBL to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." DC 37, L. 1508, 79 OCB 21, at 21 (BCB 2007) (internal quotations and citations omitted). This Board will, therefore, defer improper practice claims where the allegations "arise from and require interpretation of a collective bargaining agreement and in cases where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement." DC 37, L. 1322, 1 OCB2d 4, at 8-10 (BCB

---

in violation of NYCCBL § 12-306(a)(4), HHC asserts that there is no derivative violation of § 12-306(a)(1).

2008). On the contrary, where an improper practice claim exists that would not be resolved by the arbitration of the contractual claims arising out of the same transactions, we have held that "such statutory claims are committed to adjudication under the NYCCBL rather than the arbitral forum." ADW/DWA, 3 OCB2d 8, at 12 (BCB 2010) (citations omitted).

In its contractual arbitration grievance, the Union raises the issue of whether HHC violated the Agreement's disciplinary procedure by failing or refusing to provide notice directly to an individual grievant of the date, time and place of his or her scheduled Step II hearing. Resolution of this question would require an interpretation of the grievance and disciplinary provisions of Article VI of the Agreement to determine whether HHC has an obligation to notify the affected employee of the Step II hearing or whether it is sufficient to provide such notice only to the Union. This exact issue is the subject of the parties' dispute in the instant improper practice petition. Thus, because both the grievance and the instant petition turn on the meaning and interpretation of the same provisions of the Agreement, arbitration will fully resolve the claims asserted, and deferral is warranted. *See, e.g., PBA,* 1 OCB2d 14, at 14 (BCB 2008).

Because the issue before us is based upon, and requires an interpretation of, the parties' Agreement, and is the subject of a pending grievance, we defer this matter to arbitration. However, this deferral is without prejudice to reopen the charge should HHC raise any argument during the arbitration that forecloses a determination on the merits of the grievance or should any award be repugnant to rights under the NYCCBL. *See NYSNA,* 3 OCB2d 36, at 12 (BCB 2010) (citing *UFA*, 1 OCB2d 16, at 10 (BCB 2008)); *see also Captains Endowment Assn.*, 79 OCB 39, at 17 (BCB 2007) (finding that contractual matters "should be determined in the arbitral forum, while retaining jurisdiction in the event that the arbitration decision does not conform with the NYCCBL.") (quoting

DC 37, 79 OCB 21, at 21(BCB 2007)).

4 OCB2d 27 (BCB 2011)

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 improper practice petition, docketed as BCB-2907-10, filed by Social Service Employees Union Local 371, be, and the same hereby is, deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

Dated: June 1, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

CHARLES G. MOERDLER
MEMBER