SSEU, L. 371, 4 OCB2d 38 (BCB 2011)

(Arb.) (Docket No. BCB-2880-10) (A-13527-10).

Summary of Decision*:** The City filed a petition challenging the arbitrability of a Union grievance alleging that the City violated the parties' collective bargaining agreement by denying the Grievant placement in ACS's Professional Development Program. The City asserted that the Union's request for arbitration should be dismissed because it cited no contractual provisions and that no nexus existed between the agreement and the underlying dispute. The City also contended that ACS's Professional Development Program was not a written rule or regulation of the Agency and that ACS's actions did not affect any term or condition of the Grievant's employment. The Union argued that an ACS memorandum and a letter regarding the Professional Development Program constitute written policies of the employer, which are grievable under the terms of the agreement. The Board found no nexus between the grievance and the ACS memorandum and letter. Accordingly, the Board granted the City's petition challenging arbitrability. ***(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 ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioners,

-and-

SOCIAL SERVICES EMPLOYEES UNION LOCAL 371, on behalf of BELISA NIEVES,

Respondent.

DECISION AND ORDER

On July 28, 2010, the City of New York ("City") and the New York City Administration for Children's Services ("ACS") filed a petition challenging the arbitrability of a grievance brought by Social Services Employees Union, Local 371 ("Union") on behalf of Belisa Nieves ("Grievant").

The Union filed a Request for Arbitration alleging that the City violated the parties' collective bargaining agreement by denying the Grievant placement in ACS's Professional Development Program. The City asserts that the Union's request for arbitration should be dismissed because it cites no contractual provisions and no nexus exists between the Agreement and the underlying dispute. The City also contends that admission to ACS's Professional Development Program is not a creation of, or governed by, ACS written rule or regulation and that ACS's actions did not affect any term or condition of the Grievant's employment. The Union argues that an ACS memorandum and an ACS letter regarding the Professional Development Program constitute written policies of the employer, which are grievable under the terms of the parties' collective bargaining agreement. The Board finds no nexus between the grievance and the ACS memorandum and letter. Accordingly, the City's petition challenging arbitrability is granted.

BACKGROUND

Since 1999, the Grievant has been employed by ACS in the title Child Protective Specialist. The Grievant is a member of the Union. The City and the Union are parties to the Social Services & Related Titles Agreement ("Agreement"), which covers the period July 1, 2005 to March 2, 2008, and remains in *status quo*. Article VI, § 1(b) of the Agreement defines the term "grievance" as:

> 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 grievant affecting terms and conditions of employment.

(Pet., Ex. 2).

ACS maintains a program entitled the Professional Development Program ("PDP"). ACS established the PDP in 1988 in order to increase the number of professionally trained social workers

at ACS and to coordinate the ACS scholarship program. The PDP provides release time, field placements, and internships to ACS employees who are in the program.

On March 19, 2010, ACS issued a memorandum ("Memorandum") from the Director of the PDP to ACS staff, which states, in pertinent part:

> The [PDP] provides two basic professional development services to staff: release time to attend classes, and field placement/internships.
>
> Employees must meet the following minimum eligibility requirements in order to qualify for PDP services:
>
> - Permanent or non-competitive civil service employee status
> - Two years of satisfactory job performance at Children's Services
> - An overall rating of "Very Good" or "Outstanding" performance evaluation
> - No pending disciplinary action
> - Favorable recommendation from their borough/location director and immediate supervisor
>
> Enclosed please find the PDP packet. Please note that all applicants must have approval from their borough commissioner, location director, manager, and supervisor in order to proceed.
>
> The PDP packet contains the following documents:
> 1. PDP Application
> 2. ACS PDP Agreement (Contract)
> 3. Release Time Form
> 4. Informational Release Form (School Waiver)
>
> The ACS PDP Agreement and the Informational Release must be notarized correctly. Additionally, applicants must submit a current employee performance evaluation along with their PDP packet materials. Incomplete submissions, including materials that are not properly notarized, will be returned. . . .
>
> **Please Note:** Submission of PDP packet materials does not guarantee release time or field placement from the PDP . . . .

(Pet., Ex. 4).

The record also contains an undated letter from the Director of the PDP ("Director's Letter"), which largely parallels the information contained in the PDP Memorandum, but also states, in pertinent part:

> The following is the new eligibility and approval criteria for services. The [PDP] provides four basic professional development services to staff: release time, field placement/internships, MSW Scholarship, and distance learning grants.

(Ans., Ex. C).

For several years, the Grievant has been pursuing a Master's Degree in Social Work at Adelphi University. In 2007, 2008, and 2009, the Grievant informed her supervisor that she wanted to be considered for a PDP field placement in connection with her educational program. Each time, the Grievant's supervisor informed her that she would not be considered for the PDP. The City asserts, and the Union denies, that the Grievant never submitted any documents to apply for the PDP. The City also asserts, and the Union denies, that ACS did not deny the Grievant placement in the Fall 2010 PDP because she did not apply for the PDP.

On July 8, 2010, the Union filed a request for arbitration, claiming "[w]rongful denial of placement for Fall 2010 in ACS [PDP]," and seeking "[a]pproval of field placement for Fall 2010 or next available date, together with such other and further relief as appropriate." (Pet., Ex. 1).

POSITIONS OF THE PARTIES

City's Position

The City asserts that the Union has not established a nexus between the Agreement and the dispute underlying the grievance.[1] The City also argues that the Request for Arbitration should be dismissed because it cites no contractual provisions. Although the Grievant contends that she should have received a placement in ACS's Fall 2010 PDP, the PDP is not mentioned anywhere in the Agreement. The PDP is a discretionary program that falls within ACS's management rights. Participation in the program is a privilege that ACS affords to certain employees; ACS employees have no entitlement or right under the Agreement to participate in the PDP. While ACS requires minimum qualifications to participate in the program, employees meeting those requirements are not guaranteed a placement in the program. The Grievant did not meet the standards that are described in the Memorandum. Moreover, the City contends that the Grievant never submitted an application to the PDP.

Finally, the City contends that the Memorandum concerning the PDP is not a rule or regulation of the Agency, and no term or condition of her employment was affected by the fact that the Grievant was not placed in the program. The Memorandum merely informed employees of the minimum requirements necessary to be considered for placement in the PDP. The Memorandum was issued on March 19, 2010, and served only to inform employees of the PDP, which has existed

[1] The City further argued there was no Step I, Step II, or Step III hearing in this matter and that the City was not able to process the grievance because the Grievant filed for arbitration before the Step III hearing date. Therefore, the underlying grievance was not processed and the City did not have an opportunity to acknowledge the Union's basis for arbitration. While we acknowledge the City's argument, the Board does not enforce the step process of the contractual grievance procedure, which is a matter of procedural arbitrability. *CSBA & IBT*, 67 OCB 43, at 6 (BCB 2001).

at ACS since 1988. Assuming that the Board finds that the Memorandum constitutes a written rule of ACS, the Memorandum in no way affects the terms or conditions of employment because the application requirements do not substantially change any employee's employment.

Union's Position

The Union asserts that, given the Board's longstanding policy to promote and encourage arbitration as a means of resolving disputes, the Board should permit this matter to proceed to arbitration. There is indeed a nexus between the subject matter of the dispute at issue and the Agreement. Article VI, § 1(b) of the Agreement defines the term "grievance" to include a claimed misapplication of an employer's written policy affecting an employee's terms and conditions of employment.

The Union argues that the Memorandum and the undated letter from the PDP Director to ACS staff constitute written policies of the employer, which affect terms and conditions of employment. Therefore, this matter is grievable under Article VI, § 1(b) of the Agreement, and the Union has clearly demonstrated a nexus between the Agreement and ACS's action of wrongfully denying the Grievant the opportunity to participate in the Fall 2010 PDP.

Further, the Union contends that a petition challenging arbitrability is not the proper arena to hear the merits of a grievance. Although ACS claims that it has a meritorious defense to the grievance, such arguments should be heard by an arbitrator and are not properly before this Board. The only issue before this Board is whether the parties have agreed to arbitrate a dispute such as this one, and the parties have indeed made such an agreement. The Union has demonstrated a clear nexus exists between the Agreement and the dispute. Therefore, the Board must allow the grievance to proceed to arbitration.

DISCUSSION

The policy of the NYCCBL is to encourage the use of arbitration to resolve grievances.[2] Accordingly, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 2627,* 3 OCB2d 45, at 7 (BCB 2010) (internal citations omitted); *CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968). However, "[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *DC 37, L. 768 and SSEU L. 371*, 3 OCB2d 7, at 15 (BCB 2010); *COBA*, 53 OCB 14, at 5 (BCB 1994).

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 grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter."[3] We employ 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 particular controversy presented. In other words, whether there is a nexus, that is, a

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[2] Section 12-302 of the NYCCBL provides:

> Statement of policy. 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.

[3] NYCCBL § 12-312 sets forth the parties' rights and responsibilities in arbitration and the Board's role in administering an arbitration panel.

> reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

SBA, 3 OCB 2d 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" to warrant arbitration. *CEA*, 3 OCB2d 3, at 13 (BCB 2010) (citations omitted); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371*, 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 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9 (BCB 2002). Thus, the Board will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981) (citations omitted).

Where challenged to do so, "[t]he burden is on the Union to establish an arguable relationship between the City's acts [or omissions] and the contract provisions it claims have been breached. If the Union cannot show such a nexus, the grievance will not proceed to arbitration." *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000)*; DC 37,* 61 OCB 50, at 7 (BCB 1998); *DEA*, 57 OCB 4, at 9 (BCB 1996). If, however, the Union does demonstrate such a nexus, then the grievance will proceed to arbitration because, where "[e]ach interpretation is plausible[,] the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW*, 45 OCB 49, at 11 (BCB 1990) (citations omitted); *see also PBA*, 3 OCB2d 1, at 11 (BCB 2010).

In the Agreement, the parties obligated themselves to arbitrate certain controversies. Specifically, the Agreement defines an arbitrable grievance to include 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 grievant affecting terms and conditions of employment." We find that the PDP Memorandum, which describes the employer's maintenance of the PDP and sets forth the minimum criteria necessary to be considered for admission, constitutes a written policy of the employer. Therefore, we find that the Union has met the first prong of our arbitrability test.

We also find, however, that there is no nexus between the obligation to arbitrate and the Union's grievance. The question that the Union seeks to arbitrate is whether the Grievant was wrongfully denied the opportunity to participate in the PDP. However, the Memorandum, on its face, does not specify any basis upon which an employee will have a right to be granted admission to the PDP. While the Memorandum sets out a procedure for admission and delineates the minimum requirements for consideration, it does not, however, guarantee an entitlement or right to participate in the PDP. The Memorandum reflects the discretionary nature of placement in the PDP, conditioning even the submission of the application on receipt of a favorable recommendation from a borough/location director and immediate supervisor. Moreover, although the Union denies the City's assertion that the Grievant never submitted an application pursuant to the Memorandum, it has not identified a time or place of submission, nor produced a copy of a completed application. Finally, we also note that the PDP Memorandum expressly provides that the relief the Grievant seeks, a field placement in the PDP program, is not guaranteed.[4]

[4] We find that the PDP Director's Letter is substantially similar to the Memorandum and to the extent that it differs, it does not create any additional grievable right or entitlement.

We find that there is no nexus between the grievance alleging wrongful denial of placement into the PDP and terms of the Memorandum or the Director's Letter. Accordingly, we grant the City's petition challenging arbitrability.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the petition challenging arbitrability, docketed as BCB-2880-10, is granted; and it is further

ORDERED, that the request for arbitration filed by Social Services Employees Union Local 371, docketed as A-13527-10, hereby is denied.

Dated: June 29, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I Dissent.

GABRIELLE SEMEL
MEMBER