SSEU, L. 371, 4 OCB2d 44 (BCB 2011)

(Arb) (Docket No. BCB-2937-11) (A-13755-11)

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the District Attorney's Office violated an employee handbook provision by terminating the grievant's employment. The City argued that there was no nexus between the grievance and the contract because the grievance alleged a wrongful termination and the disciplinary grievance provisions do not apply to District Attorney's Office employees. Furthermore, the City argued that there was no nexus between the grievance and the employee handbook because the cited provision does not require employer action, and, therefore, it could not be violated, misinterpreted or misapplied by the District Attorney's Office. The Union argued that it did not allege a wrongful disciplinary action, but, rather, alleged that the District Attorney's Office violated the employee handbook by treating an e-mail from the grievant as a resignation and by subsequently refusing to rescind it. The Board found that the requisite nexus had not been established, and, accordingly, granted the petition challenging arbitrability and denied the request for arbitration. ***(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 COUNTY DISTRICT ATTORNEY'S OFFICE,

Petitioners,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondent.

DECISION AND ORDER

On March 14, 2011, the City of New York ("City") and the New York County District Attorney's Office ("DA's Office") filed a verified petition challenging the arbitrability of a grievance

brought by the Social Service Employees Union, Local 371 ("Union"). On January 26, 2011, the Union filed a request for arbitration on behalf of Michelle Ragusa ("Grievant"), claiming that the DA's Office violated § 6.1 of the DA's Office 2009 Support Staff Employee Handbook ("Employee Handbook") and Article VI of the 2005-2008 Social Services and Related Titles Agreement ("Agreement") by terminating the Grievant's employment on the erroneous basis that she had resigned from her position. The City argues that the grievance alleges a wrongful termination and that the Agreement's disciplinary grievance provisions do not apply to employees of the DA's Office. Furthermore, the City alleges that the DA's Office cannot violate, misinterpret, or misapply § 6.1 of the Employee Handbook because it does not require any employer action and it is not a rule or policy as contemplated by Article VI, § 1(b), of the Agreement. The Union argues that it is not grieving a wrongful disciplinary action, but, rather, it alleges that the DA's Office violated § 6.1 of the Employee Handbook by treating the Grievant's e-mail as a resignation and by subsequently refusing to rescind it. The Union contends that the Grievant's e-mail only showed an intent to resign and that such intent was negated in a timely and legally effective manner. This Board finds that the requisite nexus has not been established. Accordingly, the City's petition challenging arbitrability is granted and the Union's request for arbitration is denied.

BACKGROUND

The Grievant commenced her employment at the DA's Office on July 28, 2003. The Grievant was employed in the non-competitive title of Community Associate and worked within the Cyber-Crimes Unit of the Trial and Investigation Division. On her last day of employment, she held the in-house title of Investigative Analyst in the Cyber-Crime and Identity Theft Bureau.

The City and the Union are parties to the Agreement, which terminated on March 2, 2008, and currently remains in effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Article VI of the Agreement sets forth the parties' grievance procedure and § 1 thereof defines the types of disputes that are arbitrable. Grievances subject to arbitration include, among others:

> b. 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 . . .;
>
> * * *
>
> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status[;]
>
> f. A claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title, except for Employees during the period of a mutually agreed upon extension of probation. This provision shall not apply to non-competitive class Employees with rights pursuant to Section 75(1) of the Civil Service Law[;]
>
> g. Failure to serve written charges as required by Section 75 of the Civil Service law . . . upon a permanent Employee covered by Section 75(1) of the Civil Service law . . . where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed[; and]
>
> h. A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

(Pet., Ex. 2).

The City and the Union executed a letter agreement ("Side Letter") modifying the types of disputes that are arbitrable under the Agreement. The Side Letter states, in relevant part:

> This is to confirm our mutual understanding regarding Article VI of the Social Services and Related Titles Agreement and its applicability to the District Attorneys' Offices.
>
> 1. It is understood that the District Attorneys have not elected to be covered by subsections 1(e), 1(f), 1(g), and 1(h) of said Article VI and that these subsections do not currently apply to the employees of the District Attorneys' Offices.
>
> 2. It is further understood that disciplinary procedures are a mandatory subject of bargaining for non-exempt, non-confidential employees of the District Attorney Offices.
>
> 3. This letter shall be deemed an appendix to the 2005- 2008 SSRT. The terms set forth herein shall remain in force until the termination date of the 2005-2008 SSRT, except as may be modified by any written agreement(s) approved by the District Attorneys' Offices, collectively or individually.

(Pet., Ex.3).

The Employee Handbook, "and the *policies* and statements contained in it," have been effective since April 2009. (Pet., Ex. 6) (emphasis added). The Employee Handbook states that "[i]ts purpose is to acquaint you [the employee] with office policies and procedures governing your work life; to provide you with information on various personnel issues; and to give you guidelines on access to, and appropriate use of, certain office resources and services." It contains "general guidelines [that are] not meant to cover all work place situations. They are not meant to replace or modify the terms of any collective bargaining agreement in effect. The office may deviate from a particular policy or procedure if, in its sole discretion, it deems such deviation to be appropriate in

a specific case." (*Id*.). Section 6.1 of the Employee Handbook, entitled "Notice of Resignation," states:

> You must give two weeks notice of your intent to resign your position with the office. You should notify your supervisor in writing. Either you or your supervisor must advise Human Resources of all resignations promptly.

(*Id*.).

According to the Union, in late 2009, the Grievant told her supervisors that she was planning on attending school on a full-time basis in the fall of 2010. The Union alleges that when a new Cyber-Crimes Unit Bureau Chief ("Bureau Chief") was hired in March 2010, the Grievant verbally informed him of her plans to return to school.

On April 28, 2010, the Bureau Chief sent the Grievant an e-mail, the subject of which was entitled "Exit Date." It states:

> Michelle-
> We are starting to schedule interviews to replace the 3 of you so I would like to know if you have a firm departure date. Please advise.
> Many thanks-
> David

(Pet., Ex. 5). On the following day, April 29, 2010, the Grievant replied to the Bureau Chief's e-mail, which resulted in the following e-mail correspondence:

> [Grievant:] Not as of yet. As of now it's a tentative July 30 but that is still subject to change to a later date.
>
> [Bureau Chief:] Okay. Thank you. When you say later, what is the latest date? When does school start for you? Trying to get a real sense for planning purposes.
>
> [Grievant:] It all depend[s] on where I end up going and if you need me to stay on board later. School would begin the last week of August but since I am going to school locally I can stay on board

> longer if need be. So the la[]test I would think would be August 13. Is that okay?
>
> [Bureau Chief:] So in between July 30 and August 13th. Is this a firm decision on your part so we should plan on filling your position?
>
> [Grievant:] Yes sir . . . . .
>
> [Bureau Chief:] Ok. Thank you.

(*Id*.). The City alleges that the DA's Office made personnel decisions regarding staffing based on the above e-mail correspondence. (Pet. ¶ 23).

According to the Union, on May 31, 2010, the Grievant sent an e-mail to the Bureau Chief from her cell phone, "informing him that her plans had changed, that she would not be attending school in the Fall, and that she would be remaining in her position in the DA's Office and not leaving."[1] (Ans. ¶ 34). The Union alleges that on the following day, June 1, 2010, the Bureau Chief verbally informed the Grievant that she could not remain in her position after August 13, 2010. The Union also alleges that the Bureau Chief told the Grievant that he discussed the matter with the office manager and that she should speak with her. According to the Union, the Grievant spoke with the office manager, who told her that nothing could be done because she resigned. The Grievant allegedly responded that she never officially resigned and that she had neither submitted the standard letter of resignation nor completed the standard paperwork required when an employee resigns. The Union contends that these documents were utilized in connection with the resignations of two of the Grievant's co-workers in the spring of 2010.

On August 9, 2010, the Grievant sent an e-mail to the Bureau Chief and copied several other

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[1] The Union alleges that it does not have a physical copy of the e-mail because it was sent from the Grievant's cell phone.

individuals on the message. The subject of the e-mail was entitled "future at DANY[.]" The e-mail states:

> Earlier in the year I had contemplated going back to school full-time and advised the Unit of my [in]tentions. When the bureau was reorganized and you were selected as chief back in March, I informed you as well as a courtesy.
>
> However, on June 1, 2010 I informed you that my plans had changed due to personal circumstances and that I was not going to attend school full time and instead would continue my employment. Be advised that I have never submitted any resignation letter. I simply informed you of my intention as a courtesy. At your insistence I had indicated that the time frame of my intended departure might be the end of July or mid-August but that I could not give you a definitive answer since I was still awaiting responses from my school applications.
>
> I hope that this clears up any misunderstandings that may have occurred and I apologize for any inconvenience as well. It is my intention to continue my career here at DANY for the immediate future. I realize that you are new to the bureau, but it had long been a practice of the paralegals and analyst[s] to inform ou[r] chiefs of intended departures as a courtesy, even if at a later date the plans or intentions changed.

(Ans., Ex. A).

The City alleges that, on August 10, 2010, the Grievant submitted a Step I grievance form to the Director of Human Resources at the DA's Office. The form referenced § 6.1 of the Employee Handbook, attached the April 28-29, 2010, e-mail correspondence between the Grievant and the Bureau Chief, and included the following statement:

> I had informed the office on June 1, 2010 that I would <u>not</u> be attending school full time in the fall [and] therefore would be continuing my full time employment here. I was informed that a replacement had been hired [and] that I had to leave effective Friday, Aug. 13, 2010.

> I did not submit a resignation letter. I merely indicated my intention to go to school full time. I gave ample notice of my intention to remain in the employment of the NY County DA's Office.

(Pet., Ex. 7) (emphasis in original).

On August 13, 2010, the Grievant sent another e-mail to the Bureau Chief and copied several other individuals on the message. The subject of the e-mail was entitled, "PLEASE BE ADVISED." The e-mail states:

> This is to confirm that as of May 31, 2010 I informed you that I was not going to be attending school full-time and was [to] continue my full-time employment here.
>
> I am a permanent employee that was assigned to the Identity Theft Unit at [its] inception. At the time, I was the only support staff person. Now that the unit has expanded and been re-organized to the Cybercrimes and Identity Theft Bureau I consider myself the senior employee.
>
> I see my employment here as enriching both myself and the office. Over the years I have refined my skills and have been able to acquire an extensive contact list which I utilize to further e[n]hance my work in an expeditious manner.
>
> I have never been a party to any disciplinary action, on the contrary, I have been praised for all my efforts over the years.
>
> Again, I have no intention of resigning. If I am asked to leave, it will be because I am being terminated without cause.
>
> Thank you for your attention to this matter[.]

(Ans., Ex. B) (emphasis omitted). August 13, 2010, was the Grievant's final day of employment at the DA's Office. When the Grievant reported for work the following Monday, August 16, 2010, the DA's Office's Labor Relations Administrator told her to go home and she was escorted out of the building.

On December 13, 2010, the Union submitted a Step I grievance, alleging a violation of Article VI of the Agreement and § 6.1 of the Employee Handbook. On December 30, 2010, the Union submitted a Step II grievance, alleging the same and stating that the DA's Office did not respond to the Step I grievance. On January 4, 2011, the DA's Office informed the Union, by two separate letters, that the Step I and Step II grievances were denied. On January 12, 2011, the Union filed a Step III grievance with the Office of Labor Relations and requested the scheduling of a Step III hearing.

On January 26, 2011, the Union filed a request for arbitration with the Office of Collective Bargaining. The request for arbitration included the requisite waiver and set forth the following statement of the issue to be arbitrated:

> On or about August 16, 2010, Grievant was denied entry to the work location and told that she would no longer be permitted to work, on the erroneous basis that she had allegedly resigned her position of employment, which she had not done. . . .

(Pet., Ex. 1). The Union is seeking:

> [An] [o]rder directing the agency to: permit grievant to return to work forthwith; pay grievant her lost salary and benefits from on or about August 16, 2010 until the date she is permitted to return to work; credit grievant with seniority for all purposes for the period during which she is awarded back pay; and granting her such other and further relief as determined by the Arbitrator to be just and proper.

(*Id*.).

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has failed to establish a nexus between the grievance and the

Agreement because the grievance alleges a wrongful termination, and, therefore, it is inextricably related to Article VI, §§ 1(e), 1(f), 1(g), and 1(h), of the Agreement (collectively, "wrongful disciplinary provisions").[2] Pursuant to a side letter agreement, these provisions do not apply to employees of the DA's Office. The City maintains that the claim is one of wrongful termination because the Grievant alleges that she was denied entry to the work location and told that she would no longer be permitted to work. The City argues that the Grievant acknowledged that the grievance relates to a wrongful termination because she stated in an e-mail to the Bureau Chief, "If I am asked to leave, it will be because I am being terminated without cause." (Rep. ¶ 14) (emphasis omitted).

Regarding other possible contractual bases for the grievance, the City argues that the grievance does not pertain to the definitions set forth in Article VI, § 1(a), 1(c), or 1(d), of the Agreement. As for Article VI, § 1(b), of the Agreement, the City maintains that there is no nexus between the grievance and that provision because the DA's Office cannot violate, misinterpret, or misapply § 6.1 of the Employee Handbook. The City argues that a policy grieved under Article VI, § 1(b) "requires some sort of employer *action* and *compliance*." (Pet. ¶ 53) (emphasis in original). Here, the City contends that § 6.1 of the Employee Handbook does not require employer action, but, rather, pertains solely to the steps an employee must follow when resigning. Therefore, it does not require the DA's Office to act in any manner that could be construed as a "violation, misinterpretation or misapplication" within the meaning of Article VI, § 1(b), of the Agreement. Moreover, the City argues that § 6.1 of the Employee Handbook is not a rule or policy contemplated by Article VI, § 1(b), of the Agreement because it is merely a "guideline" for which an employee

[2] The City further argues that any interpretation of the Employee Handbook by an arbitrator will necessarily involve analysis of the wrongful discipline alleged by the grievance and, thus, be inextricably related to the wrongful disciplinary provisions.

should adhere, requires no action on behalf of the DA's Office, and contemplates no consequences for the employer in the event of non-adherence. (Pet. ¶ 58).

Despite the foregoing, the City argues that the grievance is moot because the Grievant resigned from her position, and, therefore, the remedy of reinstatement with backpay and benefits is not available. The City alleges that the e-mails between the Grievant and the Bureau Chief indicate that the Grievant effectively resigned when she confirmed that he could begin planning to replace her. The City contends that the Grievant's "firm decision" to depart from employment, allowing the DA's Office to fill her position, demonstrated that the Grievant resigned on April 29, 2010, and that the Grievant's employment ended on August 13, 2010. (Pet. ¶ 64).

Union's Position

The Union argues that the grievance is arbitrable pursuant to Article VI, § 1(b), of the Agreement because alleged violations of agency personnel manuals are arbitrable and no resignation occurred within the meaning of the Employee Handbook. The Union contends that the DA's Office violated § 6.1 of the Employee Handbook by treating the Grievant's April 29, 2010, e-mails as a resignation. According to the Union, the Grievant did not submit a letter of resignation and did not complete the standard exit paperwork routinely utilized by the DA's Office. Thus, the Union alleges that the DA's Office's treatment of her e-mails as a resignation conflicted with how § 6.1 of the Employee Handbook has been applied to other employees.

The Union maintains that the Grievant did not resign via e-mail on April 29, 2010, but, rather, only stated an intention to resign. Furthermore, the Grievant's subsequent e-mail to the Bureau Chief on May 31, 2010, and her verbal notice to the Bureau Chief on June 1, 2010, negated her prior statement of intent in a timely and legally effective manner.

The Union additionally argues that the fact that the wrongful disciplinary provisions do not apply to DA's Office employees does not bar the arbitration of the grievance because the Union is not alleging that the Grievant was the subject of a wrongful disciplinary action. On the contrary, the Union contends that, with respect to the Grievant, the DA's Office misapplied or misinterpreted its policy, practice, and procedure regarding the resignation of employees.

DISCUSSION

The NYCCBL provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes.[3] *See ADW/DWA*, 4 OCB2d 21, at 10 (BCB 2011); *NYSNA*, 69 OCB 21, at 6 (BCB 2002). To carry out this policy, the "Board is charged with the task of making threshold determinations of substantive arbitrability."[4] *DEA*, 57 OCB 4, at 9-10 (BCB 1996). The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). The "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

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[3] NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

[4] NYCCBL § 12-309(a)(3) grants the Board the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure . . . ."

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which considers:

> (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.

UFOA, 4 OCB2d 5, at 8-9 (BCB 2011) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969).

In short, we inquire whether there is a "relationship between the act complained of and the source of the alleged right" to arbitration. *CEA*, 3 OCB2d 3, at 13 (citations omitted); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371*, 17 OCB 1, at 11 (BCB 1976). This inquiry does not require a final determination of the rights of the parties because the Board 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). Accordingly, the Board generally will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).

When the City challenges the arbitrability of a grievance based on a lack of nexus, "[t]he burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached." *Local 371, SSEU,* 65 OCB 39, at 8 (BCB 2000) (citations omitted)*; see also DC 37,* 61 OCB 50, at 7 (BCB 1998); *Local 371*, 17 OCB 1, at 11. If the Union's "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).

Here, it is undisputed that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance procedure, which provides for final and binding arbitration of specified matters. The Union's request for arbitration set forth the following statement of the grievance: "On or about August 16, 2010, Grievant was denied entry to the work location and told that she would no longer be permitted to work, on the erroneous basis that she had allegedly resigned her position of employment, which she had not done." (Pet., Ex. 1). The documents attached to the request for arbitration indicate that the Union is bringing the grievance pursuant to Article VI of the Agreement and § 6.1 of the Employee Handbook. Accordingly, for the grievance to be arbitrable, this Board must find a reasonable relationship between the cited provisions of the Agreement and the Employee Handbook and the subject of the grievance, which we view as the refusal of the DA's Office to permit the Grievant to continue to work after it determined that she had resigned. For the reasons set forth below, we find that the requisite nexus has not been established.

Pursuant to Article VI, § 1(b), "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policies or orders of the Employer . . . affecting terms and conditions of employment" is arbitrable. Here, the Union claims that the DA's Office violated, misinterpreted, and/or misapplied § 6.1 of the Employee Handbook by treating the Grievant's April 29, 2010, exchange of e-mails with the Bureau Chief as a resignation and refusing to permit her to rescind it thereafter. Consistent with Board precedent, we find that § 6.1 of the Employee Handbook constitutes a "rule[] or regulation[], written polic[y] or order[]" within the meaning of Article VI, § 1(b), of the Agreement, and, therefore, is subject to arbitration. *Compare Local 246, SEIU*, 63 OCB 32, at 10-11 (BCB 1999) (finding that an employee handbook met the criteria of a written

policy) *and DC 37, L. 1549*, 43 OCB 67, at 9 (BCB 1989) (finding that an employee handbook constituted a "written policy" of the employer because it imposed specified standards and requirements and was communicated to the employees) *with NYSNA*, 2 OCB2d 6 (BCB 2009) (finding that a cited rule was explicitly excluded from the grievance procedure, and, therefore, could not provide the basis for the arbitrability of a grievance, which concerned whether the grievant submitted a letter of resignation or requested a voluntary demotion).

We find unpersuasive the City's argument that § 6.1 of the Employee Handbook "is not considered a rule or policy as contemplated under Section 1(b) of the Agreement because it is merely a 'guideline' for an employee to adhere to."[5] (Pet. ¶ 58) (citation omitted). While the Employee Handbook states that it consists of "general guidelines," it also states that it contains policies and that one of its purposes is to "acquaint [employees] with office policies and procedures . . . ." (Pet., Ex. 6). In *Social Services Employees Union, Local 371*, the Board explained that "[w]ritten policy generally consists in a course of action, a method or plan, procedures or *guidelines* which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency." 31 OCB 28, at 11 (BCB 1983) (emphasis added). Certainly, § 6.1 of the Employee Handbook was promulgated for some or all of these reasons. Therefore, it is immaterial that § 6.1 of the Employee Handbook is "merely" a guideline, as asserted by the City. (Pet. ¶ 58). *See Local 246, SEIU*, 63 OCB 32, at 10 (finding

[5] Nor are we persuaded by the City's argument that a policy grieved under Article VI, § 1(b), requires employer action and compliance and that § 6.1 of the Employee Handbook is not grievable because it solely pertains to an employee's actions. While the City is correct that § 6.1 of the Employee Handbook concerns the steps an employee shall take when resigning, it is plausible that the DA's Office could violate Article VI, § 1(b), of the Agreement by misinterpreting or misapplying the policy contained within § 6.1 of the Employee Handbook.

that an employee handbook constituted "guidelines of the employer" and was grievable); *DC 37, L. 1549*, 43 OCB 67, at 10 (finding that an employee handbook provided "guidelines for the observation of rules and regulations" and was grievable).

Although we find that a claimed violation, misinterpretation or misapplication of the Employee Handbook may be subject to arbitration pursuant to Article VI, § 1(b), of the Agreement, we find that there is no nexus between § 6.1 and the Union's claim that the DA's Office erroneously treated the Grievant's exchange of e-mails with her supervisor as a resignation and improperly refused to permit her to rescind it thereafter. Because we find that there is no nexus, the grievance is not arbitrable.

Section 6.1 of the Employee Handbook, on its face, contains three provisions: (1) an employee must give two weeks notice of her intent to resign; (2) an employee should notify her supervisor in writing; and (3) an employee or her supervisor must advise Human Resources of all resignations promptly. Thus, this section requires that an employee give two weeks notice of intent to resign and that Human Resources be advised promptly of the resignation. Section 6.1 of the Employee Handbook also states that notification in writing *should* be provided to the employee's supervisor.

Here, no plausible interpretation of the Employee Handbook has been advanced which could result in a finding that the resignation was invalid; moreover, such is not the essence of the Union's claim. While the Union raised allegations that the Grievant's co-workers submitted standard letters of resignation and completed standard paperwork in connection with their resignations, § 6.1 of the Employee Handbook does not require the use of such documentation. In fact, § 6.1 of the Employee Handbook is devoid of any reference to a standard letter of resignation or standard paperwork. On

the instant record, if we were to find a nexus, we would be relying upon parol evidence "to create a contractual right independent of some express source in the underlying agreement." *SBA*, 3 OCB2d 54, at 11, n. 9 (BCB 2010).

Likewise, there is no nexus between § 6.1 of the Employee Handbook and the Union's claim that DA's Office impermissibly refused to rescind the Grievant's resignation, which the Union contends that the Grievant requested in a timely and legally effective manner. Section 6.1 of the Employee Handbook, the sole source upon which the Union bases the Grievant's right to arbitration, does not bear any relationship to the question of the rescission of an employee's resignation. Indeed, no plausible interpretation of this provision could be advanced under which it addresses the acceptance or rejection of requests to rescind an employee's resignation. We note that in a similar case, the Third Department found the question of whether an employer permissibly refused to accept an employee's request to rescind his resignation to be "beyond the scope of [an arbitrator's] authority under the terms of" a collective bargaining agreement. *Matter of Melber v. N.Y. State Educ. Dept.*, 71 A.D.3d 1216, 1217 (3d Dept. 2010). The court's consideration of that issue was not barred by an arbitral determination as to the efficacy of the resignation itself.[6] *Id*.

Based on the foregoing, we find that there is no nexus between the subject of the grievance

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[6] In *Melber*, the petitioner submitted a resignation by e-mail despite the fact that the employee handbook specifically stated that "[t]he use of electronic mail is not an acceptable method of notification [of a resignation] unless a hard copy, signed by the employee is also received." 71 A.D.3d at 1217 (alteration in original). Based on this language, the petitioner claimed that the employer improperly accepted his resignation. Despite the unequivocal language contained in the employee handbook stating that e-mail is not an acceptable method of resigning, the court found that the employer did not act in an arbitrary or capricious manner when it accepted the petitioner's e-mail resignation. The court opined that in order for language in an employee handbook to effectively limit the employer's ability to accept an employee's resignation, the former employee is obliged to "demonstrate reliance upon [the employee handbook's] terms and resulting detriment." *Id*. (alteration in original) (citations omitted).

and § 6.1 of the Employee Handbook.[7] Accordingly, this Board grants the City's petition challenging arbitrability and denies the Union's request for arbitration.

[7] We note that the issue of a refusal to permit the rescission of an employee's resignation may present questions of improper motivation and/or discriminatory treatment that derive from the statute and not from the Agreement or the Employee Handbook. *See Schweit*, 61 OCB 36, at 14-15 (BCB 1998), *affd*., *Matter of Schweit v. Abate*, 200 A.D.2d 522 (1st Dept. 1994); *Biegel*, 42 PERB ¶ 3013 (2009). No such claims have been articulated here. Rather, the instant matter concerns only a contractual claim.

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 the City of New York and the New York County District Attorney's Office, docketed as BCB-2937-11, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by Social Service Employees Union, Local 371, docketed as A-13755-11, hereby is denied.

Dated: August 18, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES MOERDLER
MEMBER

PETER B. PEPPER
MEMBER