CCA, 4 OCB2d 49 (BCB 2011)
(Arb.) (Docket No. BCB-2962-11) (A-13867-11).

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the Department of Corrections improperly deducted leave time from the Grievant for required attendance at criminal court proceedings stemming from an on-duty incident. The City argued that the matter was not arbitrable because the Union failed to cite in the Request for Arbitration any contract provision as the basis of the grievance and, thus, has not established the requisite nexus. The Union argued that the pertinent rules were referred to by the City in its Step I and II decisions, which were incorporated into the grievance before the filing of the Request for Arbitration. The Board found that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. Accordingly, the Petition Challenging Arbitrability was denied, and the Request for Arbitration was granted. (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 DEPARTMENT OF CORRECTIONS,

Petitioners,

-and-

CORRECTION CAPTAINS ASSOCIATION,

Respondent.

DECISION AND ORDER

On June 8, 2011, the City of New York ("City") and the New York City Department of Corrections ("DOC" or "Department") filed a Petition Challenging Arbitrability of a grievance brought by the Correction Captains Association ("Union") on behalf of Anastasia Henderson

("Grievant"). The Request for Arbitration alleges that DOC improperly deducted leave time from the Grievant for required attendance at criminal court proceedings stemming from an on-duty incident. The City argues that the matter is not arbitrable because the Union failed to cite any contract provision in the Request for Arbitration as the basis of the grievance and, thus, has not established the requisite nexus. The Union argues that the pertinent rules were referred to by the City in its Step I and II decisions and thus incorporated into the grievance well before the filing of the Request for Arbitration. The Board finds that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. Accordingly, the Petition Challenging Arbitrability is denied, and the Request for Arbitration is granted.

BACKGROUND

The City and the Union are parties to the Corrections Captains Agreement ("Agreement"), which covers the period December 16, 2007, through June 30, 2012. Article XX of the Agreement provides for grievance procedures, and § (1)(b) thereof defines a grievance, in pertinent part, as "a claimed violation, misinterpretation, or misapplication of the rules or regulations, or procedures of the agency affecting terms and conditions of employment, . . . the term 'grievance' shall not include disciplinary matters." (Ans., Ex. 1).

The Grievant was promoted to Captain in August 2005 and worked at DOC's Anna M. Kross Center. The record shows that on October 5, 2005, the Grievant was involved in an on-duty incident with an inmate that resulted in criminal charges being filed against her.[1] Between January 9, 2006,

[1] The pleadings do not contain any details related to the on-duty incident, other than the Union's description of it as "a violent inmate incident while on-duty." (Ans. ¶ 26). Although the City generally denies the Union's characterization, the City states that "[o]n October 5, 2005,

and November 30, 2007, the Grievant appeared in court on fifteen occasions related to this on-duty incident, and these fifteen days were deducted from the Grievant's accrued leave. Further, prior to the trial, all but one of the charges against the Grievant "were dropped or thrown out" and the remaining charge, a class B misdemeanor, was dismissed after the trial. (Ans. ¶ 28; Rep. ¶ 7).[2]

On March 12, 2008, the Grievant filed a Step I grievance that described the grievance, in pertinent part:

> On the dates indicated below I was required to attend Criminal Court proceeding as a result of an on duty incident: [list of 15 dates omitted]
>
> I recently discovered that I was docked my accrued leave time in violation of the [Agreement] and Department Rules and Regulations. I am filing this Step I grievance and seek restoration of the accrued leave deducted on the aforementioned dates.

(Pet., Ex. 2).

DOC denied the Step I grievance on March 17, 2008, stating, in pertinent part:

> Regarding your grievance about the deduction of accrued leave time for Court appearances, please be advised of the following:
>
> Directive 7504R-A Suspension from Duty and/or placement on Modified [A]ssignment page 10, F-note states "Members who are defendants in criminal action shall not appear in court for such cases while on duty. Such appearances shall be made on pass days or with leave upon request, charged to the member[']s vacation or [other] accrued time. Other vacation or authorized leave shall only be granted to a member on modified assignment if there is no conflict with appearances at criminal or disciplinary proceedings.["]

[Grievant] reported for her tour of assignment at the Anna M. Kross Center" and that "[o]n that date, an incident took place at the Anna M. Kross Center involving the Grievant" that resulted in criminal charges. (Pet. ¶ 10).

[2] The pleadings do not otherwise describe the charges against the Grievant.

> Therefore, according to Directive 7504R-A the deduction of accrued time for your court appearances was correct.

(Pet., Ex. 4).[3] On March 17, 2008, the Union filed a Step II grievance.

On May 16, 2008, the Union, noting that there had been no response to the Step II grievance request, submitted a Step III grievance to the City's Office of Labor Relations ("OLR"), docketed as OLR No. 45417. On June 26, 2008, OLR wrote the Union, stating that the "information submitted [with the Step III grievance] is insufficient to review the claim" and requested that, "within fifteen (15) business days of the date of this notice," the Union provide the following additional information:

> Copy of the Step I grievance.
>
> Cite specific contractual provisions and/or rules or regulations or policy or orders of the employer that is/are alleged to have been violated, misinterpreted or misapplied pursuant to the definition of grievance in the applicable collective bargaining agreement.
>
> Other: Please provide the date on which the alleged deduction of accrued leave time occurred.

(Ans., Ex. 7) (underlining in original). The letter concluded that "if the information is not received as requested, OLR will not be able to review the claim and the file will be closed." (Id.).

Subsequently, on August 12, 2008–after OLR requested additional information regarding the Step III grievance–DOC's Director of Labor Relations denied the Step II request, writing:

> I respond to your second step grievance filed on behalf of [the Grievant] concerning deductions from her annual leave balances made in connection with her court appearances on criminal charges stemming from an arrest for an on-duty incident.

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[3] Neither party has alleged that the Grievant was on modified assignment when she made the fifteen criminal court appearances.

> Rule & Regulation [§] 3.10.200C provides that leave without charge to annual leave balances shall be granted to attend court where the employee has no personal interest in the case. [The Grievant], being criminally charged as an individual, has a clearly personal interest in the case.
>
> Further, Directive 7504-RA [sic][§] III (at page 10) provides as follows:
>
> > Note: Members who are defendants in criminal action shall not appear in court for such cases while on duty. Such appearances shall be made on pass days or with leave upon request, charged to the member's vacation or other accrued time. Other vacation or authorized leave shall only be granted to a member on modified assignment if there is no conflict with appearances at criminal or disciplinary proceedings.
>
> The charges to [the Grievant's] annual leave were therefore consistent with departmental policy. The grievance is denied.

(Pet., Ex. 6). Rule & Regulation ("RR") § 3.10.200C states, in full: "For court appearances under subpoena or court order. Leave to attend court shall be granted when neither the employee nor anyone related to the employee has a personal interest in the case, and where said attendance is not related to any other employment of the employee."

On December 18, 2008, OLR denied the Step III grievance, stating, in pertinent part:

> Please be advised that the grievant's claim . . . did not contain sufficient information to process. Therefore, on June 26, 2008, a letter indicating the specific information needed was sent to you. As the documentation requested in this letter has not been provided, it is deemed that the complainant has abandoned the [OLR No. 45417] complaint.
>
> Accordingly, the complaint is dismissed and OLR No. 45417 is hereby closed.

(Pet., Ex. 9).

On September 24, 2010, the Union filed a second Step III grievance, to which OLR responded on April 20, 2011. OLR considered the September 24, 2010 letter to be "a new request for a Step III review" and duplicative of the May 16, 2008 Step III request that "was deemed abandoned" and closed on December 18, 2008. (Pet., Ex. 11). OLR found that the September 24, 2010 Step III request to be untimely, as the Agreement requires that a Step III appeal be filed within ten days of the Step II decision, while the September 24, 2010 Step III request was made over two years after the August 12, 2008 Step II decision.

On May 23, 2011, the Union filed the instant Request for Arbitration, which states the grievance to be arbitrated as: "[DOC] improperly deducted leave time for [the Grievant's] required attendance at Criminal Court proceedings resulting from an on-duty incident." (Pet., Ex. 2).[4] The Step I, II, and III denials were attached to the Request for Arbitration. The remedy sought was the "restoration of the accrued leave deducted for court appearances." (Pet., Ex. 2). On June 8, 2011, the City filed its Petition Challenging Arbitrability.

POSITIONS OF THE PARTIES

City's Position

The City argues that there is no nexus between the grievance–the deduction of annual leave for the Grievant's court attendance related to the criminal charges filed against her–and the Agreement. It asserts that the Board "has routinely held that a failure to cite a contractual provision or only vaguely citing to a contractual provision is insufficient to demonstrate the necessary nexus."

[4] On May 12, 2011, OLR consented to an extension of time for the Union to file a Request for Arbitration until May 26, 2011.

(Pet. ¶ 7) (citing Local 30, IUOE, 61 OCB 16, at 7 (BCB 1998); Local Union No. 3, IBEW, 71 OCB 17, at 5 (BCB 2003); SBA, 79 OCB 15 (BCB 2007)). Despite requests from OLR, the Union has failed to cite to any contractual provision, rule, or policy that DOC is alleged to have violated. Thus, the Union has failed to establish the necessary nexus.

The City argues that it never received clear notice of the Union's claims prior to submission of the Request for Arbitration. The matter was dismissed once because the Union failed to submit sufficient materials for the claim to be processed. DOC's citation in its Step decisions to Directive 7504R-A and RR § 3.10.200C does not equate to having clear notice of the Union's claims. Even after the submission of the Union's Answer, its position with regard to these policies is unclear. The Union merely states that the grievance "is based upon . . . Directive 7504R-A and [RR § 3.10.200C]." (Rep. p. 6) (quoting Ans. ¶ 59). However, the Union does not "specifically states that [DOC] violated (let alone explain how [DOC] violated) Directive 7504R-A and [RR § 3.10.200C]." (Rep. p. 6) (emphasis in original).

Finally, the City argues that the Union is not alleging a violation of Directive 7504R-A and RR § 3.10.200C, but is instead challenging the provisions themselves. The Union states that "it has challenged specific substantive policies and rules of the DOC which have been cited in the Step I and II denials." (Rep. p. 7) (quoting Ans. ¶ 61) (emphasis supplied by the City). The Board has previously sustained challenges to arbitrability where the union's only contention is that it disagrees with a provision, as opposed to arguing a contract violation. Thus, "[t]o the extent that the [Union] seeks to bring this matter to arbitration based upon the fact that they 'challenge' Directive 7504R-A and/or [RR § 3.10.200C], such a challenge is not grievable." (Rep. p. 8)

Union's Position

The Union argues that the Agreement contains an arbitration provision and that the underlying grievance falls within the scope of that provision. The appeal of the unsatisfactory Step III decision–the Request for Arbitration–was properly filed, and it is undisputed that the parties have agreed to arbitrate any "claimed violation, misinterpretation, or misapplication of the rules or regulations, or procedures of the agency affecting terms and conditions of employment." (Ans., Ex. 1). The grievance concerns Directive 7504R-A and RR § 3.10.200C, which were cited by DOC in its Step I and Step II decisions, which were appended to the Request for Arbitration, and thus were "incorporated into the basis" of the grievance. (Ans. ¶ 62). These provisions address the appearance of DOC employees in criminal court and the use of leave. Thus, they have a clear nexus to the grievance, which concerns the improper docking of annual leave due to the appearance of a DOC employee at a criminal proceeding. While the Board has denied the arbitration of claims raised for the first time after a Request for Arbitration has been filed, that is not the instant case, as the grievance is based "upon a violation of substantive contractual provisions which were raised long before the Request for Arbitration was filed." (Ans. ¶ 59).

As to the City's argument that the Request for Arbitration form must cite a specific contract provision, the Union responds that the "Petitioners seek to elevate form over substance." (Ans. ¶ 63). The cases cited by the City are not controlling as, in those cases, either the grievants relied solely upon the arbitration clause in the parties' collective bargaining agreements or relied upon provisions in an agreement to which they were no longer parties. The instant grievance is arbitrable because the Grievant "clearly alleges" a violation, misinterpretation, or misapplication of DOC's written policies. (Ans. ¶ 57).

DISCUSSION

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302. Thus, the NYCCBL "explicitly promotes and encourages the use of arbitration." PBA, 4 OCB2d 22, at 12 (BCB 2011). The presumption is that disputes are arbitrable, and "that doubtful issues of arbitrability are resolved in favor of arbitration." Id.; see also DC 37, 13 OCB 14, at 11 (BCB 1974) (same). Pursuant to NYCCBL § 12-309(a)(3), this Board has the power "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." However, this Board "cannot create a duty to arbitrate where none exists." PBA, 4 OCB2d 22, at 12; see also IUOE, L. 15, 19 OCB 12, at 9 (BCB 1977) (same).

Thus, we employ a two pronged test to determine the arbitrability of a grievance:

> (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 9 (BCB 2011); see also NYSNA, 69 OCB 21, at 7 (BCB 2002).

Establishing the nexus between the collective bargaining agreement and the right that the grieving party asserts only requires that the party demonstrate a "relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." PBA, 4 OCB2d 22, at 13; see also Local 371, 17 OCB 1, at 11 (BCB 1976) (same). This "showing,

by definition, does not require a final determination of the rights of the parties in this matter." OSA, 1 OCB2d 42, at 16 (BCB 2008). Indeed, "such a final determination would in fact constitute 'an interpretation of the [agreement] that this Board is not empowered to undertake.'" Id. (quoting Local 1157, DC 37, 1 OCB2d 24, at 9 (BCB 2008)); see also CSL § 205.5(d).[5] Where the parties assert conflicting interpretations "the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." PBA, 4 OCB2d 22, at 13; see also Local 3, IBEW, 45 OCB 59, at 11 (BCB 1990) (same). Thus, "[o]nce an arguable relationship is shown, the Board will not consider the merits of the grievance." PBA, 4 OCB2d 22, at 13; see also Local371, SSEU, 47 OCB 45, at 8 (BCB 1991) (same).

In the instant case, the City has not argued that there are court-enunciated public policy, statutory, or constitutional restrictions barring arbitration of the grievance. Further, the City does not dispute that Directive 7504R-A and RR § 3.10.200C are written policies of DOC affecting terms and conditions of employment.

Rather, the City argues that the Union is unable to establish the requisite nexus because the Request for Arbitration fails to cite to a specific contract provision or policy that DOC allegedly violated, misinterpreted, or misapplied. The Union argues that the Step I and II denials–which were appended to the Request for Arbitration–were incorporated into the Step III requests and the Request for Arbitration, that the Step I and II denials cited Directive 7504R-A and RR § 3.10.200C, and, thus,

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[5] CSL § 205.5(d) reads, in pertinent part:

> the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

those provisions are incorporated into the Request for Arbitration. We agree that the Union has established the requisite nexus between the act complained of and the Agreement.

The lack of an explicit citation to a specific contract provision or rule or regulation in the Request for Arbitration is not, in and of itself, necessarily fatal to the Request for Arbitration. See DC 37, L. 768, 4 OCB2d 33, at 10 (BCB 2011) (citing SSEU, L. 371, 3 OCB2d 53, at 7 (BCB 2010); CWA, 51 OCB 27, at 14 (BCB 1993), affd, Matter of City of New York v. MacDonald, No. 405350/93 (Sup. Ct. N.Y. Co. Sept. 29, 1994) (Fisher-Brandveen, J.), affd, 223 A.D.2d 485 (1st Dept 1996)). In SSEU, L. 371, we once again "reiterated what we have long held: we will 'not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired.'" 3 OCB2d 53, at 6-7 (quoting NYSNA, 2 OCB 2d 32, 11 (BCB 2009)). In CWA, we explained that "if the party challenging arbitrability had clear notice of the nature of the opposing [party's] claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." 51 OCB 27, at 14 (City's challenge to arbitrability denied even though the union failed to cite to the pertinent contract language until it submitted its answer); see also DEA, 43 OCB 73, at 6 (BCB 1989) (petition challenging arbitrability denied despite the union's failure to cite pertinent provision in the request for arbitration because the union had clearly stated the nature of the grievance and the City had "not shown that the omission in the request for arbitration has impaired its ability to respond to the request or otherwise to prepare for arbitration").

The instant case is similar to Local 1549, DC 37, 69 OCB 3 (BCB 2002), in which we denied a petition challenging arbitrability even though the union cited an inapplicable written policy during

the lower steps of the grievance process and in its request for arbitration "since the Department, from the outset, knew the nature of the [u]nion's grievance." Id. at 6-7. Here, the initial grievance provides clear notice of the nature of the claim, i.e. whether deducting days from the Grievant's leave bank for required attendance at a criminal court proceeding resulting from an on-duty incident violated the Agreement and DOC rules. See CWA, 51 OCB 27, at 14 (where the union clearly identified at the Step levels that the issue was whether its members were being assigned out-of-title duties, the City had sufficient notice even though the grievance failed to cite the pertinent contract provision). The City also had clear notice of the pertinent written policies, as it cited them in its Step I and II denials. Further, those Step I and II denials were appended to the Request for Arbitration. Thus, "[s]ince the City had clear notice of the nature of the grievance, the request for arbitration will not be denied based upon the [u]nion's failure to cite specific contract language therein." SSEU, L. 371, 3 OCB2d 53, at 8.

The City had clear notice that the grievance concerned Directive 7504R-A and RR § 3.10.200C. A grievance concerning the applicability of these written policies to attendance at a court case, arising not over off-duty conduct but from a criminal prosecution predicated on an on-duty incident, is one which raises a claimed violation, misinterpretation, or misapplication of those policies. Therefore, whether court appearances regarding criminal charges filed as a result of an on-duty incident constitutes a "personal interest in the case" under RR § 3.10.200C, or whether Directive 7504R-A requires an employee's leave bank to be docked for such attendance, are questions for the arbitrator.

The City's reliance on Local 30, IUOE, 61 OCB 16, Local Union No. 3, IBEW, 71 OCB 17, and SBA, 79 OCB 15, is misplaced, as, in those cases, at no point did the grievants cite to a

contractual provision or written policy applicable to them that was allegedly violated, misinterpreted, or misapplied. In the instant case, we find that the Union, by virtue of incorporation of the Step I and II denials into its Request for Arbitration, has cited to written arbitrable policies of DOC. Accordingly, the Petition Challenging Arbitrability is denied and the Request for Arbitration granted.

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 City Department of Corrections, docketed as No. BCB-2962-11, hereby is denied; and it is further

ORDERED, that the Request for Arbitration filed by the Correction Captains Association, docketed as A-13867-11, hereby is granted.

Dated: October 6, 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 G. MOERDLER
MEMBER

PETER PEPPER
MEMBER