CWA, L. 1180, 5 OCB2d 9 2012

(Arb.) (Docket No. BCB-2976-11) (A-13879-11)

Summary of Decision*:** HHC challenged the arbitrability of a grievance alleging that it improperly filed a second set of charges against the Grievant after she had been terminated but before she won reinstatement in arbitration and then terminated her for a second time based upon those charges. HHC argued that the request for arbitration must be denied because the Union sought to enforce an arbitrator's award, which is beyond the scope of the parties' obligation to arbitrate and must be raised through an Article 75 court proceeding. HHC further argued that since the Union contended that the Grievant was not an employee when the second set of charges was filed against her, there could be no nexus between those charges and the parties' agreements. The Union argued that the second set of charges and resultant second termination were not raised in the prior arbitration and are within the scope of the disciplinary arbitration provision of the parties' agreements. The Board found that the Union 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-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, on behalf of CONZALES TURNER,

Respondents.

DECISION AND ORDER

On August 11, 2011, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging arbitrability of a grievance brought by the Communications Workers of America, Local 1180 ("Union"), on behalf of Conzales Turner ("Grievant"). In the request for arbitration, the

Union alleges that HHC improperly filed a second set of charges against the Grievant after she had been terminated but before she won reinstatement in arbitration and then terminated her for a second time based upon the second set of charges. The Union seeks dismissal of the second set of charges and reinstatement. HHC argues that the request for arbitration must be denied because the Union seeks to enforce an arbitrator's award, which is beyond the scope of the parties' obligation to arbitrate and must be raised through an Article 75 court proceeding. HHC further argues that since the Union contends that the Grievant was not an employee when the second set of charges was filed against her, there could be no nexus between those charges and the parties' collective bargaining agreements. The Union argues that the second set of charges and resultant second termination were not raised in the prior arbitration and are within the scope of the disciplinary arbitration provision of the parties' agreements. The Board finds that the Union 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

HHC and the Union were parties to collective bargaining agreements effective from September 6, 2006, through October 5, 2008, and October 6, 2008, through October 5, 2010 ("Agreements"). The Agreements contained identical grievance provisions. Article VI, §1, defines a grievance, in pertinent part, to include:

> b. A claimed violation, misinterpretation, or misapplication of the rules or regulations, or procedures of the agency affecting terms and conditions of employment . . .;
>
> f. Claimed wrongful disciplinary action taken against a full time non-competitive Employee with one (1) year's service in title . . .

(Pet., Ex. A)

Article VI, §2, Step IV, of the Agreements states, in pertinent part: "An appeal from an unsatisfactory determination at Step III may be brought . . . for impartial arbitration . . . . The arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with Article 75 of the Civil Practice Law and Rules." (*Id.*)

Article VI, §6, of the Agreements is titled "Disciplinary Procedure for Non-Competitive Employees" and provides that for a grievance brought under Article VI, § 1(f), written charges of incompetence or misconduct must be served "upon an Employee." (*Id.*)

The Grievant was a Coordinating Manager at HHC from May 2000 through May 2007. The initial set of written charges was filed in April 2007 and accused the Grievant of violating HHC's nepotism policy and engaging in inappropriate conduct at a meeting. A Step 1A disciplinary hearing was held on April 19, 2007, and HHC terminated the Grievant on May 8, 2007. The Union grieved this action.

After the Grievant was terminated on May 8, 2007, but prior to the resolution of her grievance, a second set of written charges was filed against her on August 3, 2007. The second set of charges accused the Grievant of threatening a HHC employee on May 10, 2007, for refusing to sign a petition calling for the Grievant's return to work. A Step 1A hearing on the second set of charges was held on October 11, 2007, and a determination sustaining those charges and recommending termination was issued on October 15, 2007.

After the Step III review of the first set of written charges and the Grievant's May 8, 2007 termination was denied, the Union filed a request for arbitration. A hearing was held on April 12, 2010. On June 8, 2010, the Arbitrator dismissed the first set of charges and ordered the Grievant's reinstatement with full backpay from May 8, 2007, until the date of the Grievant's reinstatement ("June

8, 2010 Arbitration Award"). The Arbitrator retained jurisdiction pending compliance by HHC with the terms of the award.

On August 2, 2010, HHC, by letter, informed the Grievant of how it intended to implement the June 8, 2010 Arbitration Award. The letter states, in pertinent part:

> In a determination issued on October 15, 2007 you were terminated effective that date. . . .
>
> The [June 8, 2010 Arbitration Award] does not cover or include the result of the October 15, 2007 determination. As a result, in terms of implementing the [Arbitrator's] order, we will be implementing only that part which provides that we must provide back pay from the date of the first termination of May 8, 2007 until reinstatement and up until your termination of October 15, 2007 which resulted as a determination from different charges and disciplinary process.

(Pet., Ex. B)

In response, on August 20, 2010, the Union wrote HHC: "In an attempt to circumvent an Arbitrator's decision, it appears that HHC has revived charges against our member which were issued several months after her termination and are without merit." (*Id.*) Thus, on August 20, 2010, the Union for the first time filed two Step II grievance forms regarding the October 15, 2007 determination.

The first grievance form cited Article VI, § 6, of the Agreements as the section of the contract violated and described the grievance, in pertinent part, as:

> At the time of issuance of said charges, dated August 3, 2007, the [G]rievant had already been terminated and was no longer an employee.
>
> It is our opinion that administrative charges cannot be filed against, nor can a penalty be imposed upon an individual who has been separated from service and no longer subject to the authority of a former employe[r]. The [G]rievant, Ms. Turner, was terminated on May 8, 2007, therefore the additional charges are without merit.

(*Id.*) The relief sought was for HHC to "cease and desist the pursuit of said charges." (*Id.*)

The second grievance form cited Article VI, § 2, Step IV, of the Citywide Agreement as the section the contract violated and described the grievance as:

> [HHC] is in violation of this contractual agreement, specifically the portion which states: "The arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accordance with Article 75 of the Civil Practice Law and Rules."

(*Id.*) The relief sought was the "immediate enforcement and compliance with arbitrator's decision and award." (*Id.*)

HHC denied the Step II grievances. On June 8, 2011, the Union filed the instant request for arbitration, citing Article VI, § 6, of the Agreements as the provision violated and describing the nature of the grievance as "charges should never been filed because [the Grievant] was no longer an employee of HHC." (*Id.*) The relief sought was for HHC to "cease and desist the pursuit of said charges (attached) and have the Grievant be reinstated to her job." (*Id.*)

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the request for arbitration must be denied on several grounds. First, the Union cannot seek enforcement of the June 8, 2010 Arbitration Award through the grievance process. Enforcement of an award is beyond the scope of the parties' obligation to arbitrate. It is well established that enforcement of an arbitrator's award must be sought through an Article 75 court proceeding. Moreover, the August 3, 2007 charges are distinct from the earlier charges considered in the June 8, 2010 Arbitration Award, so there is no basis to submit the later charges to the previous arbitrator. Therefore, to the extent the Union complains of HHC's alleged non-compliance with the June 8, 2010 Arbitration Award, the grievance is not arbitrable.

HHC next argues that the Union's contradictory claims do not bear a nexus to the Agreements. The cited section of the Agreements, Article VI, § 6, addresses "service of written charges of incompetence or misconduct upon an Employee." (Pet., Ex. A) The Union asserted initially that the August 3, 2007 written charges were invalid because the Grievant was not an employee at the time the charges were served upon her. As to that claim, HHC argues that the parties are not required to arbitrate matters involving non-employees, therefore the question of whether the service of those charges on a non-employee was proper cannot be submitted to an arbitrator. Even if the Board were to find that the scope of the parties' obligation to arbitrate included non-employees, the specific contract provision cited by the Union applies only to employees. Thus, no nexus can be shown, and this claim cannot to proceed to arbitration.

Alternatively, the Union in its answer claims that the August 3, 2007 charges address the Grievant's actions at a time when she was a "covered employee." However, this new theory nullifies the claim advanced in the grievance and the request for arbitration that HHC lacked the authority to issue those charges to a non-employee. The effect of this change in theory is to effectively withdraw the underlying grievance. Accordingly, the request for arbitration should be denied.

Union's Position

The Union argues that its grievance does not seek enforcement of the June 8, 2010 Arbitration Award. The proper avenue to address the August 3, 2007 charges is a new arbitration and not a proceeding under Article 75 of the Civil Practice Law and Rules. A proceeding in court to confirm the June 8, 2010 Arbitration Award, which addressed the May 8, 2007 termination, would not decide the issue of the October 2007 termination. The second set of written charges and the October 2007 termination were not placed before the Arbitrator, arose from the Grievant's actions occurring during

her covered employment by HHC, and, pursuant to Article VI of the Agreements, are separately arbitrable.

Alternatively, the Union argues that the Arbitrator retained jurisdiction over the June 8, 2010 Arbitration Award to ensure compliance. Accordingly, the Arbitrator would have jurisdiction to determine whether the October 2007 termination was meritorious and a defense to reinstatement.

DISCUSSION

NYCCBL § 12-302 states that it is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." As the NYCCBL "explicitly promotes and encourages the use of arbitration," the presumption is that disputes are arbitrable, and "that doubtful issues of arbitrability are resolved in favor of arbitration." *PBA*, 4 OCB2d 22, at 12 (BCB 2011); *see also DC 37*, 13 OCB 14, at 11 (BCB 1974). NYCCBL § 12-309(a)(3) grants this Board 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." The Board, however, "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).

The Board employs 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 a "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.'" *CCA*, 4 OCB2d 49, at 9 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 13); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). By definition, this showing "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact constitute 'an interpretation of the [agreement] that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)); *see also* CSL § 205.5(d). Therefore, "[o]nce an arguable relationship is shown, the Board will not consider the merits of the grievance . . . where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

Responding to a claim raised by the Union in one of its two August 20, 2010 grievances, HHC argues that the enforcement of an arbitration award is not a proper subject for a new arbitration. This claim, however, was not identified by the Union as the basis for its request for arbitration in this matter. Although both grievance forms were attached to the request for arbitration herein, the request for arbitration form does not cite to the Arbitrator's award.[1] Rather, it seeks review and reversal of the second set of charges, arguing that HHC violated Article VI, § 6, of the Agreements by filing charges against the Grievant when she was not employed by HHC and then imposing a penalty. The second set of charges and the second termination are distinct actions from the first set of charges and the first

[1] On August 20, 2010, the Union filed two distinct Step II grievances. One claimed that HHC's failure to reinstate the Grievant, in compliance the June 8, 2010 Arbitration Award, was a violation of Article VI, § 2, Step IV, of the Citywide Agreement. That grievance, however, was not pursued in the instant request for arbitration. The second Step II grievance claimed that the filing of disciplinary charges against an individual who had been separated from service and was no longer an employee was a violation of Article VI, § 6, of the Agreements, and that the second set of charges filed against the Grievant thus was without merit. It is that section of the Agreements, relied upon by the Union in the second grievance, that is cited in and forms the predicate for the request for arbitration submitted by the Union in this case.

termination. Indeed, HHC acknowledged in its August 2, 2010 letter to the Grievant that the matter of the second set of disciplinary charges, which culminated in the October 2007 termination, was not at issue before the Arbitrator in the prior April 2010 arbitration. That, in the earlier stages of the grievance process, the Union sought enforcement of the June 8, 2010 Arbitration Award is not determinative of the arbitrability of the instant request for arbitration. We reiterate that "where a union's statement of its grievance, on its face, complains of an alleged failure by the City to comply with arbitration awards, a dispute which clearly is not arbitrable, this does not negate the fact that an otherwise arbitrable claim has been stated." *CCA*, 3 OCB2d 43, at 9-10 (BCB 2010) (quotation and editing marks omitted); *see also UPOA*, 43 OCB 55, at 8 (BCB 1989).

On the merits of HHC's claim that the grievance is not arbitrable, it has not been alleged in the instant case that there are court-enunciated public policy, statutory, or constitutional restrictions barring the arbitration of the grievance. Rather, HHC argues that inasmuch as the Union has contended that the Grievant was not an employee at the time the August 3, 2007 charges were served, the parties are not obligated to arbitrate matters involving a non-employee; and, even if the scope of the parties' obligation to arbitrate encompassed non-employees, the cited provision relied upon by the Union does not apply to non-employees.

We find these arguments to be unpersuasive. The scope of the parties' obligation to arbitrate wrongful disciplinary claims necessarily extends to employees who have been terminated based on charges accusing them of misconduct occurring during their employment. *See DC 37, L. 768*, 4 OCB2d 41, at 13-14 (BCB 2011). Just as HHC was obligated to arbitrate the first set of charges and the first termination of the Grievant, it is obligated to arbitrate the second set of charges and the second termination. Whether the Grievant was an employee as defined by the parties' Agreements is a matter for the arbitrator to decide. *See Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008).

We find that the nexus is clear. Article VI, § 6, of the Agreements sets forth procedures to be followed in cases involving claims of wrongful discipline under Article VI, § 1(f). The Union alleges that the Grievant was improperly terminated because HHC, by serving charges upon a non-employee, failed to follow the procedures set forth in Article VI, § 6, and that the second set of charges, therefore, were without merit.

HHC contends that the claim in the Union's answer that the Grievant's second termination arose from her "covered employment" by HHC, contradicts the assertion in the Union's underlying grievance that the August 3, 2007 charges were invalid because they were served when the Grievant was no longer an employee. We find that while the Union may have changed its theory as to *why* the termination was wrongful, HHC has been on notice since the filing of the grievance that the Union believed the second termination to be "without merit" and to constitute wrongful discipline.[2] The nexus to Article VI, § 6, of the Agreements is not negated by the fact the Union earlier advanced a different ground for why the termination was wrongful.[3] Accordingly, the petition challenging arbitration is denied and the request for arbitration is granted.

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[2] The August 20, 2010 letter from the Union to HHC, transmitting the two Step II grievances filed that day, provided: "In an attempt to circumvent an Arbitrator's decision, it appears that HHC has revived charges against our member which were issued several months after her termination and are without merit." (Pet., Ex. B)

[3] We note that it is neither unusual nor improper for a party to plead or argue in the alternative. *See, e.g.*, *CSBA, L. 237*, 65 OCB 9, at 12 (BCB 2000) (City argued alternative positions); *Local 621, SEIU*, 45 OCB 31, at 4 (BCB 1990) (City argued alternative positions).

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 New York City Health and Hospitals Corporation, docketed as No. BCB-2976-11, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Communications Workers of America, Local 1180, docketed as A-13879-11, hereby is granted.

Dated: New York, New York
March 6, 2012

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