SSEU, Local 371, 6 OCB2d 16 (BCB 2013)

(Arb.) (Docket No. BCB-3063-13) (A-14282-12)

Summary of Decision: In its request for arbitration, the Union alleged that DOHMH violated the parties' collective bargaining agreement when it failed to take corrective action after an employee of another agency acted discourteously towards the Grievant. The City argued that the dispute was not arbitrable because DOHMH's action or inaction did not violate the collective bargaining agreement as the actions of a DOC employee cannot violate the parties' collective bargaining agreement. The Union argued that it presented an arbitrable claim and that an arbitrator should decide whether the DOC employee's actions violated the contract. The Board found the grievance was not arbitrable. Accordingly, the petition challenging arbitrability was granted and the request for arbitration denied. ***(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 HEALTH AND MENTAL HYGIENE

Petitioners,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondent.

DECISION AND ORDER

On January 15, 2013, the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH" or "Agency") filed a petition challenging the arbitrability of a grievance brought by the Social Services Employees Union, Local 371 ("Union"), on behalf of Diana Askew ("Grievant"). In the request for arbitration, the Union alleges that DOHMH violated the parties' collective bargaining agreement when the Grievant

was subjected to undignified and unprofessional conduct by a co-worker, who is an employee of the New York City Department of Corrections ("DOC"), and DOHMH did not take corrective action after she complained. The City argued that the dispute was not arbitrable because DOHMH's action or inaction did not violate the collective bargaining agreement as the actions of a DOC employee cannot violate the parties' collective bargaining agreement. The Union argues that it has presented an arbitrable claim, and that an arbitrator should decide whether the DOC employee's actions violate the contract. The Board finds the grievance is not arbitrable. Accordingly, the petition challenging arbitrability is granted and the request for arbitration denied.

BACKGROUND

The Grievant is employed as a caseworker by DOHMH; she is represented by the Union. The City, DOHMH, and the Union are parties to a collective bargaining agreement covering the period from March 3, 2008, through March 2, 2010 ("Agreement"), which remains in full force and effect pursuant to NYCCBL § 12-311(d). Article VI, § 1 of the Agreement defines a "grievance as including "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employees the grievant affecting terms and conditions of employment." (City Ex. A). Article VIII "Personnel Practices," § 11 of the Agreement states that:

> The parties agree that the relationship between Employer and Employee shall be dignified and professional at all times. This means that the Employer and Employees shall not use indecent, abusive, profane language and/or behavior. Claimed violations of this provision are limited to such language and/or behavior.

(City Ex. A).

The Grievant works at the Anna M. Kross Center ("AMKC"), which is a DOC facility that houses a Mental Health Center and Methadone Detoxification Unit. The Grievant's work included providing discharge planning services for mentally ill individuals.

The Union alleges that while working at AMKC, the Grievant interacted with a Correction Officer employed by the DOC who "directed indecent, abusive, and profane language and behavior toward" her. (City Ex. B). The Union asserts that the Correction Officer yelled at the Grievant, kicked and threw a garbage can at her, and physically intimidated her.

The Union filed grievances at Steps I through III, which stated in pertinent part that:

> [Grievant], a Caseworker employed in [DOHMH] is being and has been . . . subjected to undignified and unprofessional conduct by her co-worker . . . a Correction Officer in [DOC], who has used and directed indecent, abusive, and profane language and behavior toward the Grievant. Numerous complaints regarding such conduct have been made by the Grievant to both agencies but no corrective action has been taken. As a remedy, the Grievant seeks a cease and desist order of such conduct, together with all remedies found to be appropriate.

(City Ex. B).[1]

The Union filed its request for arbitration on September 11, 2012.

POSITIONS OF THE PARTIES

City's Position

The City argues that there is no nexus between the subject of the grievance and the Agreement. Therefore, the request for arbitration should be dismissed. The Union's grievance

[1] The City asserts that after receiving the Step I grievance, DOHMH contacted DOC regarding the allegations. The City asserts, and the Union denies, that DOC's Director of Labor Relations investigated the Grievant's allegations and determined that the Grievant made no recent complaints, and that all her complaints dated back to 2009 or 2011. The City also alleges that the Grievant told a DOC corrections captain that she would send an email containing her allegations, but did not do so.

does not contain detail or specificity regarding its charge; it does not contain facts concerning the language or behavior used, nor the time, date and place of the alleged incidents.

DOHMH is clearly the "Employer" as contemplated in Article VIII, § 11 of the Agreement; thus, the behavior of a DOC employee is not arbitrable under this section. The Union does not even assert that the Correction Officer is a DOHMH employee. In fact, the Union makes clear that it understands that the Correction Officer is a DOC employee. Thus, the Correction Officer and the vague allegations concerning her cannot fall within Article VIII, § 11 of the Agreement, as the Union claims. To allow otherwise, would permit the behavior of any City employee in any agency to be arbitrable as a violation of Article VIII, § 11, and there is no right to grieve the behavior of individuals who are not employed by the Agency anywhere in the Agreement.

To the extent that the Union claims that the City is the "Employer," this claim must also fail because the Correction Officer cannot be construed to be an agent of the City. The Correction Officer is not a manager; thus, she is not an agent or representative of any employer, be it DOHMH, DOC, or the City. The language of Article VIII, § 11 is clear that the parties agreed only to arbitrate disputes involving an employee and a manager, not between fellow employees, and the Board ruled accordingly in *Local 371*, 55 OCB 5 (BCB 1995). As such, the Board should grant the grant the petition challenging arbitrability.

Union's Position

The Union asserts that if it is able to prove the alleged conduct of the Correction Officer at the arbitration, the allegations would constitute a violation of Article VIII, § 11. Thus, a clear nexus exists between the alleged conduct and the Agreement; the City and DOHMH are responsible for the violation.

The fact that the Correction Officer is an employee of DOC and not DOHMH does not relieve the City or DOHMH of liability. Both DOHMH and DOC are mayoral agencies; DOC and DOHMH employees perform closely related functions, which require that they to work closely together. As the City has placed employees of DOHMH and DOC in a position such that they must work together in the same physical space, the City may not disown the conduct of the Correction Officer toward the Grievant. The City is responsible for the conduct of its employees in both major agencies that work together at AMKC.

Moreover, both the City and DOHMH have a duty to ensure that the Correction Officer does not violate the Agreement to which the City and DOHMH are parties with the Union. Further, DOHMH has a legal obligation to ensure DOC employees do not act in such a way that violates the rights of DOHMH employees under the Agreement. DOHMH took no action in response to the Grievant's complaints.

DISCUSSION

NYCCBL § 12-302 sets forth the statutory policy of the City to favor the use of impartial arbitration to resolve disputes.[2] To realize this policy, the "Board is charged with the task of making threshold determinations of substantive arbitrability."[3] *DC 37, L. 1505*, 5 OCB2d 32, at 8-9 (BCB 2012) (quoting *ADW/DWA*, 4 OCB2d 21, at 10 (BCB 2011)). The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *PBA*, 5 OCB2d 11, at 9-10 (BCB 2012) (quoting *UFOA*, 15 OCB 2, at 7 (BCB 1975)); *see also ADW/DWA,* 4 OCB2d 21, at 10; *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995).

---

[2] 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."

[3] 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.

DC 37, L. 420, 5 OCB2d 4, at 12 (BCB 2012); (quoting *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).

The New York Court of Appeals has held that these "rules are applicable as long as a contractual interpretation is at least colorable, but it is not true that any claim, no matter how insubstantial, may be arbitrated." *Matter of NYS Office of Children & Family Svcs. v. Lanterman*, 14 N.Y.3d 275, 283 (2010) ("*Lanterman*"). Rather, "the reasonable relationship test is not met . . . [if] despite the breadth of the arbitration clause in the [Agreement], it cannot be construed to extend to arbitration of grievances which, as a matter of law, do not effectively allege any breach of the collective bargaining agreement." *Id*. (quoting *Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL–CIO v. City of Cohoes*, 94 N.Y.2d 686, 694-695 (2000)) (editing and quotation marks omitted); *see also Board of Educ. of Rondout Valley Cent. School Dist. (Rondout Valley Federation of Teachers*), 101 A.D.3d 1446 (3d Dept. 2012) (in determining arbitrability, trier of fact and law "may decide whether the provisions of a collective bargaining agreement are applicable to a grievant asserting a claim thereunder").

There is no dispute that the parties have agreed to arbitrate disputes that fall within the contractually-defined term "grievance." Further, no public policy or other restriction has been alleged that would prohibit arbitration of this dispute. Thus, the remaining question before the

Board is therefore whether the dispute falls within the scope of the parties' Agreement. We find that it does not.

Although we presume that "disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration," we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See DC 37, L. 1505*, 5 OCB2d 32, at 9 (BCB 2012); *CEA*, 3 OCB2d 3, at 12 (BCB 2010).

Where, as here, 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." *DC 37, L. 1505*, 5 OCB2d 32, at 10 (BCB 2012) (quoting *Local 371, SSEU,* 65 OCB 39, at 8 (BCB 2000)) (citations omitted); *see also DC 37,* 61 OCB 50, at 7 (BCB 1998). We find that the Union has not met this burden, and, thus, we grant the City's petition challenging arbitrability. The clause at issue states:

> The parties agree that the relationship between Employer and Employee shall be dignified and professional at all times. This means that the Employer and Employees shall not use indecent, abusive, profane language and/or behavior. Claimed violations of this provision are limited to such language and/or behavior.

The Union alleges that the Correction Officer treated the Grievant in an offensive manner. On its face, Article VIII, § 11 governs the relationship between the "Employer" and the "Employee." Moreover, in defining the requirement that the relationship between the Employer and the Employee be "dignified and professional," the Agreement defines these terms by stating "[t]his means that the Employer and Employees shall not use indecent, abusive, profane language and/or behavior." It further limits violations of the provision to "such language and/or behavior." The Agreement makes clear that the parties crafted this language to dictate a "dignified and professional" relationship between management and employees, not between its

employees and other individuals. *See Local 371*, 55 OCB 5 (BCB 1995) (interpreting Article VIII, § 11 of the Agreement).[4]

We fail to see how the fact that the Grievant encountered the Correction Officer during the course of her DOHMH employment is in any way related to the contract language at issue. The contract language addresses the relationship between the employer and employees and clearly seeks to circumscribe actions taken by either the employer or an employee towards each other. Nothing in the allegations asserted by the Union, however, can be reasonably read to attribute any complained of actions to the employer. In effect, the Union argues that the clause makes arbitrable inaction by an employer. Although the Union argues that this Article VIII, § 11, should require DOHMH to be responsible for the Correction Officer's behavior, the Agreement explicitly limits violations of the provision to "such language and/or behavior" occurring between Employer and Employee. We find, therefore, that there is no reasonable relationship between grievance and the clause at issue, and we cannot find such an argument "colorable." *Lanterman*, 14 N.Y.3d at 283.

Therefore, we find that this claim fails to meet the "the reasonable relationship test" as articulated in *Lanterman*. *Id*. Accordingly, we grant the City's petition challenging arbitrability, and deny the Union's request for arbitration.

[4] *Local 371*, 55 OCB 5 (BCB 1995) relied upon by the City, involved Article VIII, Section 11, the same provision as this case. In that case, we found that a grievance in which it was alleged that an altercation between two co-workers that occurred in the presence of a supervisor was not arbitrable under this provision because the employee whose conduct was at issue could not be deemed an agent of management. Here, the individual who is alleged to have committed the offending behavior is not alleged to be a supervisor. Even more, unlike in *Local 371*, there is no claim that the conduct took place in the presence of management, making this claim even more attenuated that the prior case, which we already found not arbitrable.

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 Health and Mental Hygiene, docketed as BCB-3063-13, is hereby granted; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371 docketed as A-14282-12, is hereby denied.

Dated: May 29, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER