City & NYPD v. L. 1549, DC 37, 61 OCB 50 (BCB 1998) [Decision No. B-50-98 (Arb)]

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 POLICE DEPARTMENT,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO,

Respondents.

Decision No. B-50-98
Docket No. BCB-1943-97
(A-6866-97)

DECISION AND ORDER

On October 23, 1997, the City of New York (hereinafter referred to as "City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by District Council 37, Local 1549, AFSCME, AFL-CIO ("DC 37" or "Union"). After several requests for extensions of time were granted, the Union filed its answer on December 22, 1997. After several requests for extensions of time were granted, the City filed its reply on September 8, 1998.

BACKGROUND

On September 29, 1994, Local 1549 filed a Step III group grievance on behalf of a number of New York City Police Department ("NYPD") employees. The grievance alleged that the NYPD

violated the Equal Employment Opportunity Policy Statement ("EEOP")[1] and Article IX, § 9 of the City-Wide Contract[2] when the Police Department refused to reinstate employees on mental disorder sick leave who are "returned" to work by their physician. The remedy requested was that the listed grievants be paid in full, with interest, for lost wages and benefits for the period they were without disability payments. A Step III hearing was conducted on October 25, 1995. A decision on the merits of the grievance was never rendered. On July 24, 1997, the Union filed a request for arbitration, restating violations of Article IX, § 9 of the Citywide contract and the EEOP, and adding violations of Article VI, § 1(b) of the Clerical Administrative Agreement and Executive Order No.

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[1] The Equal Employment Opportunity Policy Statement states the areas in which employment discrimination is prohibited (*i.e.*, Age, Alienage, Color Creed, etc.), that the law requires reasonable accommodations be made for employees with disabilities and religious observances and that all employees are directed to comply with both the letter and the spirit of the law. It also states. . .

> If any employee feels that he or she has been discriminated against by a manager, supervisor, or another employee, the employee should contact the Equal Opportunity Officer or an Equal Employment Opportunity Counselor . . . The Equal Employment Opportunity Officer has the authority to recommend to the Police Commissioner that disciplinary action be taken against any employee who has committed an unlawful discriminatory act.
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> All complaints will be handled in confidence. No employee may retaliate against or harass any person for filing a complaint or cooperating in the investigation of a complaint. Such retaliation or harassment is unlawful and will be cause for disciplinary action.

[2] Article IX, § 9 reads:

Any employee who is required to take a medical examination to determine if the employee is physically capable of performing the employee's full duties, and who is found not to be so capable, shall, as far as practicable, be assigned to in-title and related duties in the same title during the employee's disability. If a suitable position is not available, the Employer shall offer the employee any available opportunity to transfer to another title for which the employee may qualify by the change of title procedure followed by the New York City Department of Personnel pursuant to Rule 6.1.1 of the City Personnel Director's Rules or by noncompetitive examination offered pursuant to Rule 6.1.9 of the City Personnel Director's Rules.

If such an employee has ten (10) years or more of retirement system membership service and is considered permanently unable to perform all the duties of the employee's title and no suitable in-title position is available, the employee shall be referred to the New York City Employee's Retirement System and recommended for ordinary disability retirement.

118 ("EO 118").[3] The grievance to be arbitrated was:

> (1) Whether the employer, NYPD, failed to follow its own rules, regulations, policies or procedures in failing to process and/or approve the applications of employees who seek to return to work from leave of absences for mental or emotional disorder? (2) Whether the employer has failed to process or approve the applications of employees who seek to return to work from leave of absences due to emotional disorder in violation of the collective bargaining agreement.

The remedy requested was "[p]ayment of salaries and benefits to affected employees from date they sought to return to duty until they were actually returned to duty. Cessation of the practice of the NYPD in delaying approval to such employees return to work, and any other remedy necessary and proper to make the grievants and Union whole."

POSITIONS OF THE PARTIES

City's Position

The City argues that the instant grievance must be dismissed because it fails to allege any nexus between the act complained of and the provision of the Citywide contract cited by the Union

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[3] Executive Order No. 118 reads, in pertinent part:

WHEREAS, it has long been recognized that alcoholism and alcohol abuse and mental and emotional problems have a serious impact on the health, welfare, and social life of the individual, the individual's family, co-workers, and the community; and

WHEREAS, when the problems of employees result in job-impairment they become an immediate concern to the City as an employer . . .

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Section 1. Policy

(a) The City government, as an employer, is concerned and will take appropriate action when an employee experiences a job-impairing problem.

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(c) It is City policy that the employing agency initiate non-disciplinary procedures under which the employee is offered rehabilitative assistance when experiencing job-impairing problems.

(d) this policy is not to be construed as waiving management's responsibility to maintain discipline or its mandate to invoke disciplinary proceedings in the event of work-related misconduct or substandard job performance which may result from, or be associated with, the use or abuse of alcohol or untreated mental or emotional problems.

in its request for arbitration. It contends that Article IX, § 9 of the Citywide contract speaks specifically to an employee's physical capability of performing their full duties. The issue stated by the Union is not the grievant's physical capability of performing their duties, the City argues, but rather their mental or emotional capability and Article XI, § 9 does not address the issue of an employee's mental or emotional capability of performing their duties. As such, it contends, the Union has failed to demonstrate the requisite nexus.

The City also contends that the Union has failed to demonstrate the requisite nexus between the alleged refusal to return grievants to work and the EEOP cited in its request for arbitration, citing prior Board holdings that a personnel statement framed in general and precatory language was a statement of goals and objectives rather than an arguable source of a right to arbitrate.[4] The City argues that, in the instant matter, the EEOP merely provides a thumbnail sketch of Federal and State law relating to employment discrimination, to which the Department is bound. It argues that it is not a source of substantive rights, nor is it a means of proceeding to arbitration.

Third, the City argues that the Union has failed to identify the relationship between the act complained of and EO 118. It contends that EO 118 provides only that the City will initiate assistance to employees who have mental or emotional job-impairing problems, and there is no provision of EO 118 concerning the return to work following a medical leave of absence. It further states that the policy does not impose an absolute duty on the City or its agencies to return to work those individuals who take part in an Employee Assistance Program ("EAP") at the command of those individuals. The City also contends that the Union has not alleged that any of the named

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[4] The City cites BCB Decision Nos. B-14-96; B-5-96 and B-6-86.

grievants were in an EAP, that the Union merely alleges that grievants were not returned to work after a leave of absence. As the grievant must identify the relationship between the act complained of and the source of the alleged right, the Union has failed to demonstrate how the denial of a request to return to work violates EO 118.

The City states that the grievance should be dismissed since the decision to return an employee to work after a leave of absence for mental or emotional disorders falls within the scope of management's statutory rights. The City states that the Board has long held that the right to determine standard of selection for employment is reserved to management, and the Board has long held that in the absence of a limitation in the contract or otherwise, managerial rights are not arbitrable. Here, the City argues that there is no provision in the collective bargaining agreement or elsewhere that governs an employee's return to work following a leave of absence for mental or emotional disorders and decisions as to whether or not an employee is fit to return to duty after such a leave is within management's statutory rights. In the absence of such a provision, the City argues, management's decision is not grievable and the request for arbitration should be dismissed.

In its reply, the City responds to the Union's answer by contending that the Union raised two new claims that should be disregarded by the Board since they were raised for the first time in the answer to the petition challenging arbitrability. The City argues that the Union raised 1) a new claim that pursuant to the provisions of EO 118, the grievants should be returned to work and allowed to participate in employee assistance programs while on payroll and 2) a new claim that the grievants were physically incapable of performing their job duties. It notes that the Board has traditionally held that an attempt to amend a grievance at the penultimate moment, *i.e.*, the arbitration step [or

thereafter], is improper.[5]

Union's Position

The Union refutes the City's contention that the EEOP statement merely constitutes a thumbnail sketch of rights by stating that the EEOP "directs" the Department and its officials to comply with not merely the letter, but the spirit of EEO laws. It points out that managers and supervisors are not directed merely to comply with federal and state minimal legal requirements, but with the NYPD's own EEO Policy.

In response to the City's arguments regarding EO 118, the Union argues that the City recognizes EO 118 as a policy, yet contends that EO 118 cannot be the source of right for the instant grievance. In doing so, it argues, the City disregards the Union's allegations that emotional or mental disorders had job-impairing impact upon the employees as recognized in EO 118. The Union maintains that the employees should be returned to work and be allowed to participate in the employee assistance program while on payroll. Thus, they argue the nexus has been met.

In response to the City's management rights defense, in which it argues that there exists no contract provision that requires the employer to return employees to work, the Union contends that the Union's collective bargaining agreement ("CBA") expressly provides that written policies or orders of the employer are grievable. It argues that the City's argument runs counter to policies set forth in the NYPD's EEOP and EO 118 and incorporated into the CBA.

Finally, the Union responds to the City's Article IX, § 9 argument that advanced the notion that the Article only deals with employees' physical disabilities and not their mental disabilities by

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[5] The City cites Decision No. B-55-89; *see also* Decision Nos. B-30-94 and B-12-94.

stating that the Union has maintained that the employees have been forced to take leaves of absence due to emotional disorders brought on by stress. It argues that their illnesses have rendered them physically incapable of performing their duties, thereby requiring the City to medically examine them to determine their ability to fully perform those duties. The Union argues that if, upon examination, the City deems them incapable of performing their duties, it is obligated to assign them to in-title and related duties during the period of their disabilities.

DISCUSSION

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[6] When challenged to do so, a union requesting arbitration has the burden of showing that the contractual provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[7]

As a preliminary issue, we hold that the Union raised new claims regarding EO 118 in its request for arbitration. The first time EO 118 appears in the record is in the request for arbitration, and the arguments pertaining to EO 118 appear for the first time in the Union's answer. EO 118 is not mentioned at all in the Step III grievance form. The City is correct when it states that the Board has long held that an attempt to amend a grievance at the penultimate moment, i.e., the arbitration step [or thereafter], is improper, since this would deny the parties an opportunity to fully consider

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6 Decision Nos. B-47-92 and B-15-90.

7 Decision Nos. B-50-92; B-47-92; B-29-91 and B-9-89.

and attempt to resolve the issue at the lower steps of the grievance procedure.[8] Accordingly, we will not consider the Union's claims pursuant to EO 118. However, we find that the City was put on notice regarding the claims that the grievants were physically incapable of performing their job duties because the Union included Article IX, §9 in their Step III grievance as one of the contract provisions allegedly violated.

We find that the Union has demonstrated the requisite nexus between the act complained of and Article IX, § 9. The Union argues that the employees' illnesses have forced them to take leaves of absence due to emotional and mental disorders brought on by stress, and as such, have rendered them physically incapable of performing their duties. The City counters that physical capability, for purposes of Article IX, § 9, does not include mental or emotional capability. We find that the City's argument concerns the merits of the Union's claim and that it turns on an interpretation of the contractual language, a matter which must be left to an arbitrator to determine. Inasmuch as the contractual language, on its face, does not preclude the possibility that a mental or emotional disorder may render an employee physically incapable of performing his or her job duties, we cannot say that there is no arguable nexus to Article IX, § 9. Accordingly, it is for an arbitrator to determine whether the term "physically capable" should be given the more restrictive meaning urged by the City.

The Board has recently dealt with the questions presented to us regarding the EEOP. The EEOP does not provide a substantive contractual right, redress of which is available through arbitration. In Decision Nos. B-7-98 and B-26-98, we recited past holdings, stating that a written

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[8] The Board first discussed this issue in *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-20-74.

pronouncement by the employer will not be considered granting substantive rights unless it "[g]enerally consists in a course of action, method or plan, procedure or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with the requirements of law, or otherwise to effectuate the mission of an agency." In each of the prior decisions, in which the language was found to be general and precatory, the language was similar to the language in the instant matter. Here, as in the prior cases, the purpose of the wording of the EEOP is to inform employees of their statutory rights, and to urge them to follow the methods of redress provided therein; it does not serve to maintain compliance with the law, create independent contractual rights, or establish a departmental course of action. We do not find the factual differences between the cases to be substantial enough to warrant a different finding.

As to the City's arguments based on its management rights, we note that the only claim found arbitrable herein, that based on Article IX, § 9 of the Citywide agreement, does not interfere with the right of the City to determine whether the grievants are fit to return to duty. However, Article IX, § 9, on its face, appears to grant certain rights in the circumstance that an employee is found (by the City) not to be fit or "physically capable" of performing full duty. It is clear that management can limit the exercise of its rights by contract. Whether and to what extent it did so in Article IX, § 9, and whether that section applies to the situation of each of the grievants in this case are questions to be resolved by the arbitrator.

Accordingly, we find that the Union has met its burden to demonstrate a nexus regarding the Article IX, § 9 claims, but has failed to meet its burden regarding the EEOP and EO 118.

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, be and the same hereby is, granted as to the claim based on the EEOP and EO 118 and denied as to the claim based on Article IX, § 9 of the City-Wide agreement; and it is further

ORDERED, that the request for arbitration filed by Local 1549, District Council 37, AFSCME, AFL-CIO be, and the same hereby is granted only to the extent of the decision herein.

Dated: New York, New York
November 24, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER