HRA & City v. L. 371, SSEU, 61 OCB 7 (BCB 1998) [Decision No. B-7-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
between	:	
	:	
THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION and THE CITY OF NEW YORK,	:	
Petitioners,	:	
	:	Decision No . B-7-98
and	:	Docket No. BCB-1903-97 (A-6547-97)
	:	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,	:	
Respondents.	:	

DECISION AND ORDER

On April 23, 1997, the New York City Human Resources Administration ("HRA") and the City of New York (hereinafter collectively referred to as "City"), appearing by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Social Service Employees Union, Local 371 ("Union"). The Union filed an answer on July 29, 1997. The City did not file a reply.

Background

Katherina Syrkett ("Grievant") is employed by the HRA in the title Fraud Investigator at the Office of Revenue Investigation/Eligibility Verification Review. On June 24, 1996, she filed a complaint with the New York State Division of Human Rights ("NYSDHR"), alleging age discrimination on the part of the City. On October 31, 1996, the HRA filed disciplinary charges against the Grievant, alleging time and leave violations, insubordination and failure to perform

work.[1] On November 14, 1996, the Grievant filed a Step I grievance alleging a violation of HRA and Equal Employment Opportunity ("EEO") procedures, claiming that the aforementioned disciplinary charges were filed against her in retaliation for her initial filing with the NYSDHR.

The Petitioner received no response to her Step I grievance and appealed to Step II on November 20, 1996, specifically alleging violations of Article VI, §1 of the parties' collective bargaining agreement[2] and HRA Procedure No. 95-15.[3] The grievance was denied on December 16, 1996, for the stated reason that "Allegations of retaliation are not subject to the grievance procedure and should be referred to the State Division of Human Rights." On December 26, 1996, the grievance was appealed to Step III, and on January 21, 1997, it was dismissed, with further recommendations that the Grievant pursue this matter with the HRA - EEO office. On January 31,

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[1] On November 25, 1996, a conference was held regarding these disciplinary charges. The Grievant elected to appeal the agency's recommended penalty of a three day pay fine in accordance with the grievance procedure. That grievance was denied at Step II, in a decision dated, July 31, 1997, and is currently awaiting a decision at Step III.

[2] Article VI, §1 of the collective bargaining agreement provides for the definitions of the term "Grievance."

[3] HRA procedure No. 95-15 was replaced by HRA procedure 96-10, and is referred to by the parties throughout the pleadings as the relevant HRA Procedure. It states in pertinent part:

> **RETALIATION**
>
> It is unlawful to retaliate against or harass any person for filing an EEO complaint, seeking a reasonable accommodation for a disability or a religious observance, or for cooperating in the investigation of an EEO complaint. HRA will not tolerate any such retaliation. Any person who believes that he she is or has been retaliated against for having made a complaint, or for cooperating in an investigation, is urged to file a complaint of retaliation with the EEO Office. Any employee who engages in such retaliation or harassment shall be subject to disciplinary action.

1997, the Grievant filed a request for arbitration, re-alleging a violation of HRA Procedure No. 96-10 ("Procedure") as well as a violation of Article VI, §1(e),[4] arising from the HRA's alleged retaliation against the Grievant for filing her complaint with the NYSDHR.

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City claims that the Union has failed to establish a nexus between the alleged retaliation against the Grievant and the Procedure, or Article VI, §1 of the collective bargaining agreement. The City contends that the Procedure fails to provide any substantive rights which may be pursued in the contractual grievance process. Rather, it argues that that Procedure merely provides a general course of conduct with respect to the handling of discrimination and retaliation complaints, and as such, is nothing more than a goal oriented procedure which does not give rise to any rights under the contract.[5] Moreover, the City states that the Procedure provides for the procedure under which claims of retaliation should be made, an avenue the Grievant has not explored, and which is still open to her. Therefore, it is asserted that,

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[4] Article VI, §1(e) states,

Section 1. - Definition:
The term "Grievance" shall mean:

e. A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

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

since the Procedure fails to afford substantive rights to the Grievant, the Union has failed to allege a nexus between the alleged violation of that Procedure and the collective bargaining agreement.

With respect to the Union's claim of an alleged wrongful disciplinary action in violation of Article VI, §1(e) of the parties' collective bargaining agreement, the City maintains that the instant grievance has nothing to do with discipline. The City admits that the Grievant was brought up on disciplinary charges, but holds that those charges were a separate matter from the alleged retaliation perpetrated against the Grievant as a result of her filing an EEO complaint. As the retaliation claim does not involve wrongful discipline, the City maintains that the grievance has no nexus to the contractual provisions as stated in the grievances and request for arbitration, and should therefore be dismissed.

Union's Position

The Union states that the Procedure "Constitutes a specific statement of policy .... as distinguished from a personnel procedure couched in general and precatory language constituting a statement of goals and objections ..."[6] The Union claims that this Procedure is a policy of the HRA, violation of which is arbitrable as an alleged wrongful discipline action pursuant to Article VI, §1(e) of the parties' collective bargaining agreement. Moreover, it is asserted that the Board has found arbitrable alleged employer non-compliance with its own rule, regulation, order or written policy.[7]

Discussion

[6] The Union cites Decision Nos. B-6-86; B-5-96.

[7] The Union cites Decision Nos. B-2-92; B-3-83.

When a request for arbitration is challenged by the City, initially, this Board must determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related to the cited provision of the parties' agreement.[8] It is well established that it is the policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[9] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[10]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement, nor is it denied that alleged violations of departmental rules, regulations or procedures affecting terms and conditions of employment are within the scope of their agreement to arbitrate.[11] However, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the

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[8] Decision Nos. B-19-89; B-65-88; B-28-82.

[9] *See, e.g.,* Decision Nos. B-35-89; B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

[10] Decision Nos. B-41-82; B-15-82.

[11] Article VI, §1(b) of the parties' collective bargaining agreement defines a grievance as,

> A claimed violation, misrepresentation 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; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration.

parties' collective bargaining agreement.

This Board has held that a written pronouncement by the employer will not be considered a grievable written policy 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. The agreement of the union may be sought but it is not required. Nevertheless, a policy must be communicated to the union and/or to the employees who are to be governed thereby.[12]

In Decision No. B-1-86, we denied a request for arbitration because we found that Personnel Policy and Procedure ("PPP") 615-77, cited by the union as having been violated, did not constitute a written policy. PPP 615-77 dealt with the use of the probationary period of an employee, and stated, in part,

> Establishment of a program for effective, positive use of the probationary period is strongly urged. This program should include development of agency probationary policies and procedures aimed at improving employee performance and proper placement for each employee; development of a training program for supervisory staff to carry out agency policy; establishment of controls to ensure that a rational determination to retain or drop the probationer is made before the probationary period expires; establishment of a procedure to ensure action to terminate employment of an unsatisfactory probationer; and establishment of a procedure for informing unsatisfactory probationers that their services are to be terminated.

In denying the petition for arbitrability, our decision stated:

> Couched in general and precatory language, PPP 615-77 is a statement of goals and objectives relating to the effective use by City agencies of the probationary period. ... [H]owever, we cannot

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[12] Decision Nos. B-27-93; B-2-92; B-74-90; B-55-90.

> say that it is arguably the source of a right possessed either by the grievant, or by the Union ... to have such procedures applied in the present case. ... Additionally, we find that the purpose of PPP 615-77 - to encourage agencies to establish programs for effective, positive use of the probationary period - deals only indirectly with the rights of bargaining unit personnel.

In the matter before us, we find HRA Procedure No. 96-10 to be couched in equally "general and precatory" language, advising individuals of rights guaranteed under federal law, and affording explicit avenues of redress in the event of any alleged violation. The Procedure states, in its opening paragraph, that its purpose is,

> [T]o provide clear information regarding the filing and processing of complaints of alleged employment discrimination and sexual harassment, in accordance with the NYC Department of Citywide Administrative services, division of Citywide Equal Employment Opportunity (EEO) guidelines. ... HRA staff and job applicants are urged to follow this procedure immediately whenever they have a complaint or are aware of a problem with the agency possibly involving employment discrimination or sexual harassment. The effective use of this procedure should result in timely and equitable resolution of the complaint and prevent any discriminatory practice from harming other staff members and/or job applicants.

It is therefore evident that the purpose of this Procedure is to inform employees of their 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 substantive rights, or establish a departmental course of action. We therefore do not find an arguable relationship between any alleged violation of HRA Procedure 96-10 and the parties' collective bargaining agreement.

With respect to the Union's claimed violation of Article VI, §1(e), we dismiss that portion of the Union's request for arbitration on the ground that it is undisputed that the disciplinary action imposed as a consequence of the charges is being pursued in a separate wrongful discipline

grievance.[13] Dismissal of this aspect of the request for arbitration herein is without prejudice to the other matter now pending in the grievance procedure.

[13] *See,* Note 1, *supra*, at 2.

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 challenge to arbitrability raised herein by the petitioners be, and the same is hereby, granted; and

ORDERED, that the request for arbitration raised herein by the respondents be, and the same is hereby, denied.

Dated: March 24, 1998
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Richard A. Wilsker
MEMBER

Saul G. Kramer
MEMBER