OLR & Comptroller v. DC 37, 63 OCB 47 (BCB 1999) [Decision No. B-47-99 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
Between	:	
	:	
New York City Office of Labor Relations and the New York City Office of the Comptroller,	:	
	:	
Petitioners,	:	Decision No. B-47-1999
	:	Docket No. BCB-2033-98
And	:	(A-7503-98)
	:	
District Council 37, AFSCME, AFL-CIO,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On January 8, 1999, the City of New York ("City"), by its Office of Labor Relations, and the New York City Office of the Comptroller ("Agency") filed a petition challenging arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO ("Union") on behalf of two members of Local 1549. The grievance alleges that the Agency wrongfully disciplined Jackie Palmer-Moses and Renae Frazier-Lee without just cause.

After requesting several extensions of time, the Union filed an answer on March 19, 1999. After requesting several extensions of time, the City filed an answer on June 8, 1999.

BACKGROUND

The City and the Union are parties to a current collective bargaining agreement. Article VI of the contract provides a grievance and arbitration procedure culminating in binding

arbitration.

The grievants, Jackie Palmer-Moses and Renae Frazier-Lee, are competitive class employees of the Agency. Moses is a Unit Secretary and Lee is an Associate Word Processor. Both are members of a Quality of Work Life Communications Committee that publishes a newsletter for Agency employees. The Committee was intended to be a joint effort of labor and management to encourage communication and cooperation among employees. Twelve members of the Committee were Union members and three were management employees. Moses was Co-Chair of the Committee and Bob Schmidt, an employee of the Union, was its Facilitator.

The parties dispute whether Committee members are on work time while at Committee meetings. The City asserts that Committee meetings are part of its members' official duties, while the Union claims that participants are released from official duties during attendance at the meetings.

At a Committee meeting in April, 1997, a member suggested including an article about the Jewish holiday of Purim in the upcoming edition. According to the findings of the Agency's EEO investigators, Moses and Lee made what some Committee members perceived to be anti-Semitic and racist remarks directed at the Jewish members of the Committee, and Moses physically threatened a Committee member who is Jewish.

After an investigation, in which all members who had been present were interviewed, the Agency's EEO officers issued a report setting forth the facts and relevant law. The report concluded that Moses and Lee had engaged in disruptive, discriminatory speech that was not constitutionally protected, and that their behavior was intimidating and threatening and violated

the Agency's and City's EEO policies.

The EEO investigators recommended that Moses and Lee be disciplined and suggested, among other possible actions, that Letters of Official Warning be placed in their files for one year and that they attend seminars for sensitivity training in the multi-cultural workplace. Warning letters were issued to the grievants on January 28, 1998. Each stated that the letter would remain in the grievant's personnel file for one year, that she would be required to attend sensitivity training sessions, and that if she engaged in similar conduct in the future she would be charged with misconduct.

The Union filed a grievance at Step I on May 26, 1998. It alleged:

> The comptroller wrongfully utilized its EEO to investigate the grievants and disciplined the grievants on January 28, 1998, by issuing letters of Official Warning to them for constitutionally and union-protected statements and conduct made by them in a Quality of Work Life meeting on April 8, 1997. Without just cause: these warnings constitute a violation of the QWL provisions of the Employee Manual and misapplication of the EEO Office Procedures, conform to Article VI, Section 1(b) of the current clerical agreement.

As a remedy, it asked that the Agency be ordered to rescind the warning letters and expunge them from the grievants' personnel files.

The grievance was denied at Step I on June 3, 1998, and at Step II on July 20, 1998. One of its reasons for denying the grievance, the Agency stated, was that the grievants "conceded that their reliance on purported references to Quality of Life committee policies and procedures contained in the Comptroller's Employee manual, in support of their contention that it was improper to conduct an Equal Employment Opportunity investigation based upon a complaint of one of the committee's members, was mistaken. The last official manual issued to all agency

employees in 1989 contained no references to QWL." It continued that the grievants, "conceded that there is no legal support for their contention that 'the comptroller wrongfully utilized its EEO to investigate the grievants.'"

A Step III determination was issued on September 10, 1998. It denied the grievance on the grounds that the Union did not provide documents containing the allegedly violated sections of the Employee Manual and EEO Procedures, as the City had requested by letter dated July 30, 1998.

On October 26, 1998, the Union filed the instant request for arbitration. The question presented is:

> [w]hether the Comptroller wrongfully disciplined the grievants Jackie Palmer-Moses and Renae Frazier-Lee on January 28, 1998 without just cause by issuing letters of official warning for statements they made in a Quality of Work Life meeting on April 8, 1997 or violated, misapplied, or misinterpreted its EEO policy when it concluded after an investigation that the grievants had engaged in racist or religious harassment in violation of the EEO Policy in the April 8, 1997 meeting and, if so, what shall the remedy be?

As the contract provision, rule or regulation it claims was violated, the Union lists Article VI, § 1(b) and (f) of the contract.[1] It cites Article VI as the section of the contract under which the

---

[1]Article VI of the collective bargaining agreement ("Grievance Procedure") provides, in relevant part:

Section 1. - Definition:

The term "Grievance" shall mean:

***

b. A claimed violation, misinterpretation 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;....

***

(continued...)

demand for arbitration is made.[2]

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union seeks, in arbitration, to affect the conclusion reached by the Agency's EEO investigators, but that the contract provision relied upon in the request for

---

[1](...continued)

f. Failure to serve written charges as required by Section 75 of the Civil Service Law ... upon a permanent employee covered by Section 75(1) of the Civil Service Law ... where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed....

Section 75 of the Civil Service Law ("Removal and other disciplinary action") provides that a person holding a position by permanent appointment in the competitive class of the classified civil service shall not be removed or subject to discipline except for incompetency or misconduct shown after a hearing upon stated charges as set forth in that section. The section sets forth due process procedures for hearing, suspensions pending determination of charges, and penalties. In particular, Section 75(3) provides:

Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer of employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

[2]Article VI generally sets forth the grievance and arbitration procedure.

arbitration does not grant the right to grieve these conclusions. It maintains that the Board has found that EEO policies containing the same or similar language and provisions as the policy here contain general and precatory language and do not give rise to grievable contractual rights.[3] It claims that the EEO policy did not serve to maintain compliance with the law, create new contractual rights or establish a course of action for the Agency; it merely informs employees of their statutory rights and urges them to follow the remedial measures provided.[4]

In the instant case, the City says, the Agency could have taken disciplinary action against the grievants, but chose instead to give them formal warnings. According to the City, the grievants filed a grievance in response to the warning letters rather than availing themselves of the formal methods of redress provided by the EEO policy itself. Had they done so, it states, their formal responses, to which they were entitled, would have been included in their personnel files. Instead, it maintains, they are attempting to have the determination of the EEO investigators reviewed. Therefore, the City argues, the Union failed to show a nexus between the conclusions reached by the EEO investigators and the claimed source of the alleged right to arbitrate.

Further, the City maintains, the Union has not shown that issuing the warning letters was a disciplinary action, as alleged in the grievance, and thus has not shown a nexus between that action and Article VI, § 1(f) of the contract. It argues that the warning letters serve merely to provide feedback to the grievants, and put them on notice that their conduct is not acceptable,

---

[3]The City cites Decision Nos. B-50-98, B-14-96; B-5-96, B-6-86.

[4]The City cites Decision Nos. B-5-96.

rather than as written disciplinary charges.

Citing Decision No. B-18-94, the City maintains that issuing the warning letters was an action within the scope of management's rights. In fact, it contends, the Agency chose not to discipline the grievants; rather, it warned them that appropriate disciplinary action would be taken if similar misconduct occurred in the future. Not only has the Union failed to show that issuing the warning letters was a disciplinary act, the City claims, but it has also failed to show that the Agency intended to discipline the grievants.

Union's Position

The Union denies that the grievants' comments and conduct were discriminatory or violated Agency or City EEO policies or Committee guidelines. It maintains, further, that their overall conduct was not disruptive, intimidating or threatening.

The Union claims that there is a cause and effect relationship between the warning letters and the alleged violation of Article VI, § 1 of the contract, and that Article VI, § 1(f) allows the Union to challenge the Agency's application of its written policies. It contends that the original grievance and the Request for Arbitration state two distinct and arbitrable claims. The first, it says, challenges the propriety of the decision that the grievants' statements violated the Agency's EEO Policies and Procedures. The second claim, it says, is that the Agency's decision to reprimand the grievants for their statements and send them to sensitivity training was a disciplinary action taken without just cause.

According to the Union, its grievance challenges the substantive and procedural bases for

the Agency's determination that the grievants engaged in racial and religious harassment. It relies on Decision No. B-50-98 to claim that the Agency's decision to use its EEO policy and investigation to determine that the grievants' behavior violated the EEO policy is the kind of course of action, method or plan unilaterally promulgated by the employer to further its purposes. Thus, it claims, there is a clear nexus between the grievance and the contract provision alleged to have been violated.

The Union argues that the letters of warning meet the criteria of a reprimand penalty within the meaning of CSL § 75(3)[5] and may not be assessed without service of written charges.[6] The Union also contends that the warning letters are formal reprimands according to criteria set forth by the New York State Court of Appeals.[7]

DISCUSSION

The New York City Collective Bargaining Law ("NYCCBL") invests this Board with the power to determine the arbitrability of disputes arising from collective bargaining agreements under its jurisdiction. Our duty is to inquire whether the parties are obligated to arbitrate their controversies. If they are, we must then determine whether a claim, on its face, demonstrates an arguable relationship between the act complained of and the source of the right alleged to have

---

[5] *Supra*, n. 1.

[6] The Union cites *Civil Service Employees Ass'n., Inc. v. Southold Union Free School Dist.,* 611 N.Y.S.2d 895 (2d Dep't 1994); *Becker v. Churchville-Chile Central School Dist.,* 602 N.Y.S.2d 497 (Sup.Ct. Monroe Cty. 1993).

[7] The Union cites *Holt v. Bd of Education of Webutuck Central School Dist.,* 439 N.Y.S.2d 839 (Ct.App. 1981).

been violated.[8] If an arguable relationship is shown, the Board will not consider the merits of a case; it is for an arbitrator to decide whether the cited provision applies.[9] It is the Board's long-held position that, in conformity with the statutory policy of the NYCCBL favoring and encouraging the arbitration of grievances,[10] doubtful issues of arbitrability are to be resolved in favor of arbitration.[11]

In the instant case, the parties have agreed to a grievance and arbitration procedure culminating in binding arbitration. The dispute is whether the actions taken by management were arguably related to a contract provision.

In Decision No. B-50-98, we said that an EEO policy did not provide substantive rights to employees unless it generally consisted of a course of action, method or plan, procedure or guidelines which were promulgated by the employer, unilaterally, to further the employer's purposes, comply with the requirements of law or otherwise effectuate the mission of an agency. Although the Union claims that the substantive rights that have been violated here are provided by the contract, not the agency's EEO policy, we have found otherwise in previous decisions,

---

[8] *See. e.g.*, *City of New York and Correction Officers Benevolent* Ass'n, Decision No. B-12-94; *City of New York and Communications Workers of America*, Decision No. B-27-93. *See also, Howard v. Daley*, 317 N.Y.S.2d 326 (1970); *Board of Education of Lakeland Central School District of Shrub Oak v. Barni,* 49 N.Y.2d 311, 425 N.Y.S.2d 554 (1980).

[9] *See,* Decision No. B-12-94 and the decisions cited therein.

[10] NYCCBL § 12-302.

[11] *See, e.g.*, Decision No. B-12-94.

.

under identical EEO policies.[12] Therefore, we find that the instant dispute is not arbitrable as a claimed violation of the Agency's policy.

The Union raises a second question: whether, by its actions, the Agency disciplined the grievants without just cause and in contravention of the contract. The question of whether an employee has been disciplined within the meaning of a contractual term is to be decided by an arbitrator.[13] Furthermore, a determination of whether this Letter of Warning is a reprimand within the meaning of the contract goes to the merits of the case, which we will not consider.[14] All we must decide is whether the grievance is arguably related to a contract provision, and we find that it is. Whether the Agency's action was disciplinary within the meaning of the contract or merely a conclusion by its EEO investigators is an issue that is arguably related to provisions of the collective bargaining agreement and raises questions of contract interpretation, which an arbitrator must decide.

Accordingly, the instant petition challenging arbitrability is dismissed in part and granted in part.

---

[12] *Human Resources Administration v. Social Service Employees Union, Local 371*, Decision No. B-7-98 (no nexus between the EEO policy and a contract provision); *Department of Correction v. Correction Officers Benevolent Ass'n*, Decision No. B-26-98 (same).

[13] *See, e.g., City of New York v. D.C. 37, L. 375,* Decision No. B-12-93.

[14] *See, e.g.,*Decision No. B-12-94.

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 docketed as BCB-2033-99 be, and the same hereby is, granted as to the claimed violation of Agency policy and dismissed as to the claimed violative disciplinary action; and it is further,

ORDERED, that the request for arbitration docketed as A-7503-98 be, and the same hereby is, granted as to the claimed violative disciplinary action and dismissed as to the claimed violation of Agency policy.

Dated: New York, New York
November 23, 1999

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER