OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
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-between-	:	
	:	
NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,	:	
	:	Decision No. B-1-2001
Petitioners,	:	Docket No. BCB-2016-98
	:	(A-7419-98)
-and-	:	
	:	
LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On September 30, 1998, the Health and Hospitals Corporation ("HHC"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 1180, Communications Workers of America ("Union"). The Union filed an answer on January 25, 1999. HHC submitted a reply on February 28, 2000.

BACKGROUND

The grievant in this case, Cora Palaez, was promoted from the title of Clerical Associate to the permanent title of PAA I in November 1996. Upon promotion, she was required to serve a probationary period of one year. HHC submitted a copy of a job description for Palaez, dated December 11, 1996, and addressed to Palaez, but the Union contends she never received a job description. Palaez was presented with an employee performance evaluation on July 31, 1997, which covered the time period between May 5 and July 14, 1997. Palaez refused to sign the evaluation,

which gave her an overall rating of "Below Standard." Palaez was demoted to her previous permanent title on August 30, 1997, which was within the term of her probationary period.

On September 4, 1997, Palaez filed a Step I grievance, stating that her rights had been violated because HHC failed to adhere to the job evaluation procedure. She also stated that she was advised on August 30, 1997 that she was demoted because of her performance evaluation. The remedy she sought was the restoration of her rights and credibility. On September 17, 1997, she filed a Step IA grievance which named the "Job Evaluation Procedure" as the section of the contract allegedly violated and stated the remedy as "to make me whole again."

On September 18, 1997, her grievance was denied. The denial letter stated:

> As you are aware, an employee's probationary period can be failed provided that it occurs 2 months after an appointment from an open competitive civil service list or four months if said appointment is from a promotional list. Our records reflect that Ms. Palaez was selected from an open-competitive list on 11/25/96. She received a "Below Standard" evaluation on 7/30/97. As a result of the above, her probationary period was failed and she was demoted to her previous permanent title.

On September 29, 1997, the Union requested a Step II hearing. The Union claimed that under section 5.2.2, of the Rules and Regulations of the HHC,[1] the demotion of the grievant was in violation of the current procedure. The Union also cited several alleged violations of the evaluation procedure.[2] It sought to reinstate the grievant to her Civil Service title of PAA I as of her demotion

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[1] Section 5.2.2 of the HHC Rules and Regulations, covers the effect of certain prior service and Military Law on the probationary period.

[2] The evaluation procedure is covered by HHC's Operating Procedure 20-40, "Group 12 Employee Performance Evaluation." The purpose of the procedure is stated as "to establish, consistent with the Corporation's Personnel Rules and Regulations, a uniform method of evaluating the performance of the Corporation's Group 12 employees." The Operating Procedure covers issues of the evaluation's timing, frequency and preparation. For example, one of the requirements is that "Probationary employees shall receive at least one written interim evaluation during their probationary

(continued...)

date and to make her whole in the PAA title. On December 12, 1997, a Step II conference was held. On December 31, 1997, the Review Officer denied the grievance, stating that "the preponderance of credible evidence indicates that Ms. Palaez's rights have not been violated."

On January 22, 1998, the Union requested a Step III hearing. On August 7, 1998, a Step III conference was held. On August 20, 1998, the grievance was again denied, for the reason that the grievance involves alleged violations of the Rules and Regulations of the HHC, and that under Article VI, § 1(b) of the parties' agreement, those Rules and Regulations are not grievable. On September 3, 1998, the Union filed a Request for Arbitration. The grievance to be arbitrated was stated to be "Job Evaluation," the provision, rule or regulation claimed to have been violated and the section under which the demand was made was Article VI, § 2 of the Principal Administrative Associate Contract 1995-2000.[3] The remedy sought was to make the grievant whole in the PAA title.

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the Request for Arbitration must be denied because the Respondent has failed to cite a contractual provision which, if violated, would present a grievable issue. HHC notes that the Request cites a violation of Article VI, § 2, as its basis for arbitration and that the Board has repeatedly held that merely citing the contractual provision which grants the right to proceed through

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[2](...continued)
period, to be completed no later than midway through the probationary period. A final evaluation shall be completed before the end of the probationary period."

[3] Article VI, § 2 of the PAA contract defines the grievance procedure.

a grievance procedure is insufficient to invoke arbitration absent an alleged violation of the contract or written policies.[4] HHC also argues that the burden is upon the proponent of arbitration to demonstrate a nexus between the acts complained of and the contract provision allegedly violated.

HHC contends that even assuming, *arguendo*, that the grievant seeks to grieve the HHC's failure to comply with its Rules and Regulations, the Request for Arbitration must be denied because Article VI, § 1(b) specifically excludes alleged violations of the Rules and Regulations of the HHC. It states that Article VI, § 1 of the contract defines the term grievance, and § 1(b) states:

> 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 affecting terms and conditions of employment; provided, disputes involving title 59, Appendix A of the Rules of the City of New York (City Personnel Director Rules) 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.

Thus, HHC argues that the instant grievance is one which specifically excluded from arbitration by Article VI, § 1(b), and must be dismissed.

Union's Position

The Union argues that it has shown a nexus between the grievance alleging that the petitioner did not properly evaluate the grievant and a violation of the "rules or regulations, written policy or orders" of the petitioner. It states that a nexus is clearly demonstrated between HHC's failure to provide the grievant with the required evaluations and with the tasks and standards for the position to which she was promoted and HHC's Personnel Rules and Regulations and operating procedure for employee performance evaluations. The Union states that § 6:1:2 of the HHC Rules and Regulations

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[4] HHC cites Decision Nos. B-22-80; B-7-81; B-22A-85.

and #3C of HHC's Operating Procedure 20-40 require that probationary employees be given at least one written evaluation no later than midway through their probationary period. It also states that Number 4B of Operating Procedure 20-40 requires that employees be made aware of the "major tasks and related factors" of their positions before, or at the latest, at the beginning of, the evaluation period.

Th Union contends that they mistakenly cited Article VI, § 2, the provision setting forth the steps of the grievance procedure, as the violated contract provision. The Union contends that HHC has had notice of the provision allegedly violated since the beginning of the grievance procedure. It states that in the Step I and II grievance forms, among other things, both cite violations of the HHC's job evaluation procedures. The Union states that the HHC's own responses to the grievance acknowledge that its probationary procedures and evaluation procedures were the subject of the grievance.

The Union contends that HHC appears to argue that the Union is precluded from arbitrating this grievance because Article VI, § 1(b) specifically excludes the alleged violations of HHC's Rules and Regulations. The Union argues that the claim is clearly belied by the language of the contract. The Union states that it is clear from the plain language of Article VI, § 1(b) that not all disputes concerning HHC's Rules and Regulations are excluded from the grievance procedure, but only those disputes concerning HHC's Rules and Regulations involving the subjects set out in § 7390.1 of the Unconsolidated Laws. The Union states that the section provides:

> The corporation shall . . . promulgate rules and regulations . . . with respect to policies, practices, procedures relating to position classifications, title structure, class specifications, examinations, appointments, promotions, voluntary demotions, transfers, re-instatements, procedures relating to abolition or reduction in positions, for personnel employed by the corporation.

The Union states that not one of the areas excluded from arbitration by the plain language of Article

VI, § 1(b), in conjunction with § 7390.1, relates to those issues. The union contends that where, as here, the express language of the document does not preclude its applicability to the grievance at issue, the question of the applicability of the language is to be resolved by the arbitrator.[5]

Finally, the Union contends that even assuming the contract clearly excluded from arbitration all of HHC's Personnel Rules and Regulations, petitioner's argument would still fail, as this grievance also challenges HHC's failure to comply with its operating procedure for employee performance evaluations as well as the Rules and Regulations. It argues that because HHC's written "procedures" arguably fall within the contract definition of a "grievance" as a "claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer" this question must also be resolved by an arbitrator.[6]

DISCUSSION

When the employer challenges the arbitrability of a grievance, we must first determine whether the parties are contractually obligated to arbitrate disputes and, if they are, whether the acts alleged in the grievance are covered by that contractual obligation.[7] Here, the contract provides a grievance and arbitration procedure, but the parties disagree as to whether the instant matter is arbitrable within the meaning of the contract. The burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached.[8] If the Union cannot show such

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5 The Union cites Decision No. B-30-92.

6 The Union cites Decision Nos. B-30-92; B24-91; B-6-88 and B-29-85.

7 *See, e.g.,* Decision Nos. B-4-96; B-52-91; B-19-89 and B-65-88.

8 Decision Nos. B-4-96; B-28-92; B-55-91; B-58-90 and B-1-89.

a nexus, the grievance will not proceed to arbitration.[9]

The Union argues that evaluation procedures of HHC's Rules and Regulations are not included in the areas excluded from arbitration by the plain language of Article VI, § 1(b) in conjunction with § 7390.0 of the Unconsolidated Laws. Although it has been argued that those provisions are not excluded from arbitration, we do not have to reach that question because the Union has also pled that HHC also violated various provisions of HHC's Operating Procedure 20-40.

Beyond the exclusion of the HHC Rules and Regulations, Article VI, § 1(b) of the parties' contract defines the term grievance, in part, as a claimed violation, misinterpretation, or misapplication of the "written policy or orders of the Employer." This Board held that a "written policy generally consists in a course of action, a 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 the agency."[10] The language of the policy must not be couched in general or precatory terms.[11] Operating Procedure 20-40 is a concise directive, promulgated by the employer, that outlines the evaluation procedures with great specificity.

Clearly, HHC was on notice that Article VI, § 1(b) was a basis for the Union's grievance because the Union has claimed a violation of the evaluation procedure since Step I. Inasmuch as the act the Union complains of is the failure by HHC to adhere to Operating Procedure 20-40, a written policy of the employer, and Article VI § 1(b) defines the term grievance in part as a claimed violation

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[9] Decision No. B-10-92.

[10] *Health and Hospitals Corporation v. Local 30, International Union of Operating Engineers, AFL-CIO*, Decision No. B-2-92.

[11] *City of New York v. Social Service Employees Union, Local 371*, Decision No. B-6-86.

of written policy or orders of the employer, the Union has supplied the necessary nexus and may proceed to arbitration. Therefore, the HHC's petition is denied.

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 HHC be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Communications Workers of America, Local 1180, AFL-CIO be, and the same hereby is granted.

Dated: January 9, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER

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MEMBER