OSA, 7 OCB2d 22 (BCB 2014)

(Arb.) (Docket Nos. BCB-4055-14 & BCB-4056-14) (A-14668-14 & A-14669-14)

Summary of Decision*:** HHC challenged the arbitrability of two grievances alleging that HHC arbitrarily and capriciously denied the Grievant the use of sick leave credits. HHC argued that the Union failed to establish the requisite nexus between the denials of sick leave and the cited provisions of the parties' collective bargaining agreement and leave regulations because both clearly state that the granting of sick leave is at the discretion of the employer. HHC further asserted that the Union's claims that it acted arbitrarily and capriciously in denying the requests were conclusory and not supported by probative facts. The Union contended that HHC did not consider the Grievant's medical documentation or her work history as mandated by the leave regulations. The Board found that the Union established the requisite nexus. Accordingly, HHC's petitions challenging arbitrability were denied, and the Union's requests for arbitration were granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS
on behalf of EVELYN WILLIAMS,

Respondent.

DECISION AND ORDER

On June 5, 2014, the Organization of Staff Analysts ("Union") filed two separate requests for arbitration on behalf of Evelyn Williams ("Grievant"), alleging that the New York City Health and Hospitals Corporation ("HHC") violated Article V, § 5(a)(1) of the Citywide Agreement ("Agreement") and § 3 of HHC's Leave Regulations For Employees Who Are Under

The Career And Salary Plan ("Leave Regulations"), when it arbitrarily and capriciously denied the Grievant the use of sick leave credits for the period of September 3 through September 6, 2013, as well as for September 20, 2013. On June 19, 2014, HHC filed two separate petitions challenging the arbitrability of the grievances. Due to the overlapping facts and issues presented, the Board determined, without objection, that the petitions should be consolidated for decision. HHC asserts that the Union failed to establish the requisite nexus between the denial of sick leave and the cited provisions of the Agreement and Leave Regulations because both clearly state that the granting of sick leave is at the discretion of the employer. Furthermore, HHC asserts that the Union's claims that it acted arbitrarily and capriciously in denying the requests are conclusory and not supported by probative facts. The Union argues that it established the requisite nexus because HHC improperly exercised its discretion in denying the Grievant's sick leave requests. The Union contends that the denials were arbitrary because HHC did not consider the Grievant's medical documentation or her work history as mandated by the Leave Regulations. This Board finds that the Union has established the requisite nexus. Accordingly, HHC's petitions challenging arbitrability are denied, and the Union's requests for arbitration are granted.

BACKGROUND

The Grievant has been employed by HHC as an Assistant Systems Analyst for approximately seven years, and the Union represents employees in this title. The Union and HHC are parties to the Agreement, which expired on June 30, 2001, and currently remains in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

On August 26, 2013, the Grievant requested annual leave from September 3, 2013, until

September 6, 2013. HHC denied this request, which pertained to the four days following Labor Day. According to the Union, on August 30, 2013, the Grievant became ill and left work. She then visited her primary care physician, Dr. James Peri, who advised her to rest and wrote a note, reading: "Please excuse from work due to medical reason. May return on September 9, 2013." (Pet. 2, Ex. B)[1] The Union alleges that Dr. Peri further instructed the Grievant to go to the Emergency Room ("ER") for testing, where she received abnormal test results and was instructed to rest. An ER physician provided the Grievant with a note that stated: "To whom it may concern: Pt. in ER today. Needs to rest. Able to return to work, Monday, 9/9/2013." (*Id.*)

On September 10, 2013, the Grievant returned to work and filed a request for sick leave for September 3 through September 6, 2013. The request specified the "Type of Leave/Absence" as "Sick Leave," however under the "Purpose" section of the form, the Grievant checked the box for "Vacation / Leave Used for Personal Reasons" rather than the box for "Illness/ Injury/ Incapacitation of Requesting Employee"[2] (*Id.*) HHC denied the request, and on September 19, 2013, the Union filed a Step I grievance on the Grievant's behalf, alleging that the denial violated Article V, § 5(a)(i) of the Agreement and § 3 of the Leave Regulations.[3] As a

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[1] Hereinafter, "Pet. 1" refers to the petition docketed as case number BCB-4055-14, and "Pet. 2" refers to the petition docketed as case number BCB-4056-14. "Pet." is used where the exhibit referred to is identical for both.

[2] While the form contained checks in boxes for both "Annual Leave" and "Sick Leave," the dates requested were contained only in the "Sick Leave" column.

[3] Article V, § 5(a)(i) of the Agreement, in pertinent part, states:

> [S]ick leave shall be used only for personal illness of the employee. Approval of sick leave in accordance with the Leave Regulations is discretionary with the agency and proof of disability must be provided by the employee, satisfactory to the agency within five (5) working days of the employee's return to work…

(Pet., Ex. A)

remedy, the Union sought to have the Grievant reimbursed for the time she was absent from work and denied sick leave.

On September 16, 2013, the Grievant filed a request for sick leave for September 20, 2013. Again, under the "Purpose" section, the Grievant checked the box that stated "Vacation/ Leave Used for Personal Reasons." This request was also denied, and the Union filed a Step I grievance regarding this denial on September 19, 2013.[4]

Both grievances proceeded through the various stages of the grievance procedure, as outlined in Article XV of the Agreement.[5] After being denied or receiving no response at Steps I, IA, and II, Step III conferences were held for both grievances on May 14, 2014. Regarding the first grievance, the Union presented the notes from Dr. Peri and the ER physician. The Union argued that HHC arbitrarily and capriciously denied sick leave to the Grievant without first performing an investigation to determine whether the Grievant was ill. It further argued that it was a coincidence that the Grievant was ill and needed to rest during the same time frame that

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Section 3 of the Leave Regulations is titled "Sick Leave Allowance" and it provides for the number of sick days employees are entitled to receive and the guidelines under which sick leave is to be granted and used. (Pet., Ex. C) Section 3.2 (a) states: "Sick leave may be granted in the discretion of the agency head and proof of disability must be provided by the employee satisfactory to the agency head." (*Id.*) In its answer to the petitions challenging arbitrability, the Union argued that Section 3.5 of the Leave Regulations "directs management to consider the individual's illness and employment history" in determining whether to grant a request for sick leave. (Ans. ¶ 5) That section provides for a discretionary grant of sick leave with pay for up to three months after an employee has ten years of service. It also states that in special circumstances sick leave may be further extended and that the "agency head shall be guided in this matter by the nature and extent of illness and the length and character of service." (Pet., Ex. C)

[4] This request also alleged violations of Article V, § 5(a)(i) of the Agreement and § 3 of the Leave Regulations and sought reimbursement for the day.

[5] The first grievance was denied by a written determination on September 25, 2013 and was advanced to Step IA. After receiving no response, the Union filed for a Step II review, which was held on February 19, 2014. The written determination denying this grievance was issued on March 4, 2014. The second grievance received no response at Steps I or IA. It was denied at Step II by a written determination issued on April 4, 2014.

the annual leave she requested had been denied. Additionally, the Union argued that the Grievant had prior work-related issues with her supervisor and that the supervisor's denial of sick leave was retaliatory. Regarding the second grievance, the Union again argued that the denial of sick leave was arbitrary and capricious. It stated that the Grievant requested sick leave in advance because of a previous medical condition and scheduled appointment. It further explained that the Grievant made a mistake when she indicated that the request was for vacation and personal reasons in the "Purpose" section of the request form.

On May 16, 2014, a review officer for the City's Office of Labor Relations issued written decisions denying both grievances, finding that HHC properly exercised its discretion in denying the Grievant's requests for sick leave. On June 3, 2014, the Union filed two separate requests for arbitration, asserting in both: "There has been a violation, misinterpretation of the Citywide Contract Article V, Section 5, a., i., and Section 3 of the leave regulations; in that HHC Woodhull Medical Center supervisory staff arbitrarily and capriciously denied Evelyn Williams the use of sick leave credits . . ." for the dates in question. (Pet., Ex. B)

POSITIONS OF THE PARTIES

HHC's Position

HHC contends that OSA has failed to establish a nexus between the acts complained of and any right to grieve under the Agreement. HHC maintains that Article XV of the Agreement does not contemplate arbitration over denials of sick leave where the granting of such a request is done in the discretion of the agency.[6] HHC points to Article V, § 5(a)(i) of the Agreement and §

[6] Article XV, "Adjustment of Disputes" states, in pertinent part, that "[t]he term 'grievance' shall mean a dispute concerning the application or interpretation of the terms of this Agreement." (Pet., Ex. A)

3.2(a) of the Leave Regulations, in support of this argument, which both state that the approval of sick leave is to be granted at the discretion of the agency.

HHC argues that OSA's claims that it acted in an arbitrary and capricious manner in denying the Grievant sick leave are conclusory and without a factual basis. HHC contends that the terms of the Agreement and Leave Regulations, and how they are to be applied, are clear on their face. By alleging that the denial of sick time was arbitrary and capricious, the Union seeks to circumvent this clear language. HHC asserts that it acted within its discretion when denying Ms. Williams accrued sick leave for the dates of September 3 to September 6 and September 20. Furthermore, HHC argues that § 3.5 of the Leave Regulations is not applicable in the instant matter, as the Grievant has only been employed by HHC for seven years and that section applies only to employees seeking three months of sick leave after ten years of service. Contrary to the Union's claims, nothing in the Leave Regulations mandates that HHC must consider an employee's employment history, disciplinary history, and illness prior to exercising the discretion to determine whether to grant a sick leave request. Therefore, OSA's claims do not arise out of any violation of the Agreement or Leave Regulations. HHC asks the Board to grant its petitions challenging arbitrability and deny OSA's requests for arbitration.[7]

OSA's Position

OSA argues that a nexus exists between Article V, § 5(a)(i) of the Agreement and the underlying grievance that warrants arbitration of the issue of whether HHC acted in its discretion

[7] HHC also argues that the Union has failed to identify a section in the Agreement that entitles it to expedited arbitration nor did HHC ever consent to it. However, to the extent this argument is a procedural objection to arbitrability, such claims are not subject to the Board's review under the NYCCBL § 12-309 (a)(3). *See CSBA & IBT*, 67 OCB 43, at 6 (BCB 2001) (matters of procedural arbitrability must be determined by an arbitrator). Further, the Board takes administrative notice of the 2008-2010 unit agreement between OSA, the City and HHC, which remains in *status quo* and sets forth an expedited arbitration procedure in Article VI, Section 15. Under that procedure, HHC has the option to object to expedited processing of a request for arbitration.

when denying the Grievant accrued sick leave on the dates of September 3 to September 6 and September 20, 2013. OSA asserts that while it is true that the granting of sick leave is discretionary under the Agreement and the Leave Regulations, HHC does not have the right to interpret these sections in an arbitrary or capricious manner, as all provisions contain a good faith element. OSA contends that HHC violated the cited provisions by acting in an arbitrary and capricious manner, and the issue is thus arbitrable.

OSA avers that in previous cases when the assertion of a discretionary management right is offered by a petitioner to justify a petition challenging arbitrability, the Board has looked to the respondent to establish facts that would show that this discretion has been improperly exercised. OSA maintains that § 3.5 of the Leave Regulations directs management to consider the individual's illness and employment history when considering whether to grant sick leave. The Grievant submitted medical documentation regarding her illness along with her sick leave request and at each lower step hearing. Further, she is a long-time employee with a good work record and no disciplinary history. These facts demonstrate that HHC failed to consider the factors it is directed to under the Leave Regulations and establish that HHC acted in an arbitrary manner when denying the Grievant's sick leave.

Furthermore, OSA points to previous cases where New York City public unions have prevailed at arbitration on the issue of sick leave denials being arbitrary and capricious in violation of Article V of the Agreement and argues that these demonstrate that the issue is arbitrable. OSA contends that it has met the burden of specifying facts which substantiate its allegations of arbitrariness. Whether the actions taken by HHC were arbitrary goes to the merits of the dispute and thus are for the arbitrator to determine. OSA asks that the Board deny both petitions challenging arbitrability and grant its requests for arbitration.

DISCUSSION

"The policy of [this Board], 'as is made explicit by § 12-302 of the NYCCBL . . . is to favor and encourage arbitration to resolve grievances.'" *OSA*, 1 OCB2d 42, at 15 (BCB 2008) (quoting *Local 1182, CWA*, 77 OCB 31, at 7 (BCB 2006)).[8] In recognition of this policy, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)) (internal quotation marks omitted).

The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test 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 (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). The Board lacks jurisdiction to enforce contractual rights and, therefore, it will generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citations omitted); *see also* N.Y. Civ. Serv. Law ("CSL") § 205(5)(d).

In the instant case, it is clear that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance procedure, which provides for final and binding

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[8] Section 12-302 of the NYCCBL provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

resolution of specific matters, including disputes concerning the application or interpretation of terms of the Agreement. Thus, prong one is established. However, regarding the second prong, HHC argues that there is no nexus between Article V, § 5(a)(i) of the Agreement and the Leave Regulations, and the Union's claims that HHC improperly denied the Grievant sick leave, because these provisions grant it the discretion to determine when an employee is entitled to such leave.

"When a public employer 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. 1549*, 6 OCB2d 7, at 12 (BCB 2013) (quoting *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000)) (internal quotation marks omitted). "If the Union's interpretation is plausible[,] the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Id.* (quoting *Local 3, IBEW*, 45 OCB 49, at 11 (BCB 1990)) (internal quotation marks omitted).

The Board has previously decided this issue in a case with similar facts. In *CWA*, 43 OCB 29 (BCB 1989), the union filed a request for arbitration over a grievance alleging that HHC violated Article V, § 5 of the Citywide Agreement in effect at that time when it denied the grievant the use of two sick days.[9] There, as here, HHC challenged the arbitrability of the grievance, arguing that there was no nexus because Article V, § 5 granted it the discretion to approve sick leave and it had not abused that discretion. The Board disagreed and found that the dispute was arbitrable. It pointed out that the Leave Regulations mandated that employees receive a specific amount of sick leave. It stated that, "[t]herefore, although Article V, § 5

[9] The pertinent language then in effect was nearly identical to the language of Article V, § 5 as it reads today. The only difference is that it stated that "approval of sick leave in accordance with 'Leave Regulations for Employees who are under the Career and Salary Plan' is discretionary…" *CWA*, 43 OCB 29, at 4 n. 6. These are the same Leave Regulations applicable to the instant case. (*See* Pet., Ex. C).

provides management with the authority to grant sick leave requests within its discretion, there are arguably guidelines to which it must adhere in exercising that discretion so that the specification of a sick leave allowance is not rendered merely illusory." *Id*. at 16. The Board went on to state that the issues of whether the grievant had provided sufficient medical documentation for her absence and whether HHC properly exercised its discretion within the meaning of the Article V, § 5 were issues of fact and of contractual interpretation which must be decided by an arbitrator. *Id*. at 17; *see also DC 37, L. 375*, 5 OCB2d 25, at 11 (BCB 2012) ("This Board has long held that [w]hen a case involves a factual dispute or a question of contract interpretation, [we] will submit the case for resolution by an arbitrator.") (citations and internal quotation marks omitted).

We find that the same principles apply to the instant matter. It is for an arbitrator to determine whether or not HHC properly exercised its discretion in denying the Grievant's requests for sick leave. Consequently, we find that the Union has established the requisite nexus between the denial of the Grievant's sick leave request and Article V, § 5(a)(i) of the Agreement, which incorporates § 3 of the Leave Regulations. We therefore deny HHC's petitions challenging arbitrability and grant the Union's requests for arbitrability.

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 petitions challenging arbitrability filed by the New York City Health and Hospitals Corporation, docketed as BCB-4055-14 and BCB-4056-14, hereby are denied; and it is further

ORDERED, that the requests for arbitration filed by the Organization of Staff Analysts on behalf of Evelyn Williams, docketed as A-14668-14 and A-14669-14, hereby are granted.

Dated: September 9, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER