United Marine Division, Local 333, 75 OCB 34 (BCB 2005)

[Decision No.B-34-2005(Arb.)] (Docket No. BCB-2477-05) (A-11001-05).

Summary of Decision: The City filed a petition challenging the arbitrability of a grievance asserting that the change in the drug and alcohol testing policy mandating that employees be terminated after a first time verified positive result constitutes a violation of the NYCCBL because the change violated the existing drug and alcohol policy. The City contended that the Union failed to establish a reasonable relationship between the subject of the grievance and the source of the alleged right. The Board found that the Union cannot cite to a provision in either the parties' collective bargaining agreement or the existing policy, that prevents the City from revising, modifying or revoking an existing rule or written policy. Thus, no reasonable relationship existed between the replacement of the existing drug testing policy and the agreed upon grievance procedures set forth in the parties' agreement. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

UNITED MARINE DIVISION, LOCAL 333,
INTERNATIONAL LONGSHOREMAN'S ASSOCIATION,

Respondent.

DECISION AND ORDER

On August 2, 2005, the City of New York and the Department of Transportation ("City" or "DOT") filed a petition challenging the arbitrability of an amended request for arbitration, filed by United Marine Division, Local 333 of the International Longshoreman's Association ("Union" or

"UMD"). The Union's amended request for arbitration, amended June 17, 2005 ("Amended RFA") asserts that DOT's replacement of its existing written drug and alcohol testing policy with a revised testing policy violated DOT Directives 89-7, 89-7 (Ch.1) and 89-7 (Ch.2) (collectively "Directives"), and thus was a unilateral change in violation of written policies incorporated into the parties' 2000-2002 collective bargaining agreement ("Agreement").[1] The City contends that the Union has failed to demonstrate a reasonable relationship between DOT's actions regarding its drug and alcohol testing policy and the rights invoked in the Directives. We find that the replacement of an existing written policy with a new written policy does not constitute a violation of the former policy, absent language in either the contract or the existing policy limiting the City from revising, modifying or revoking an existing rule, regulation or policy. Therefore, no reasonable relationship exists between the replacement of the existing drug and alcohol testing policy and the grievance procedure set forth in the Agreement. Accordingly, the petition is dismissed.

BACKGROUND

DOT is responsible for all the functions and operations of the transportation systems throughout the City of New York including the Staten Island Ferry. UMD represents DOT employees who are members in the marine consolidated job titles. Many work at the Staten Island Ferry.

On December 15, 1989, DOT promulgated Directive 89-7, entitled "Ferry Operations

[1] On May 19, 2005, the City filed a petition challenging the arbitrability of a grievance filed by the Union. The grievance, dated February 25, 2005, asserted that DOT's replacement of its existing written drug and alcohol testing policy with a revised testing policy violated a "long established practice." In response to the City's initial challenge to arbitrability, the Union filed the Amended RFA.

Division Drug Testing Program," which was directed to "all Ferry operations Division Marine Employees." This policy, required by the United States Department of Transportation and the United States Coast Guard, stated that all employees are subjected to pre-employment, random, post-accident, and reasonable cause drug testing. This policy also set forth the manner in which employees are selected to be tested, how testing procedures are conducted, and what substances are banned. Further, this directive mandated that any employee who refused to be tested or who tested positive would be referred "for appropriate action."

On September 22, 1991, and again on June 13, 1992, DOT revised its drug testing policy through Directive 89-7 (Ch. 1) and Directive 89-7 (Ch. 2), respectively. Aside from a few minor distinctions, these policies were identical. In or around 1991, employees who worked on the Staten Island Ferry and were subjected to these testing procedures benefitted from a policy of rehabilitation and reinstatement.[2] The Union furthers contends, and the City does not deny, that DOT's policy of rehabilitation and reinstatement was endorsed by the United States Coast Guard, which, along with the United States Department of Transportation, requires drug and alcohol testing.

On October 15, 2003, 11 people died in an accident involving the Staten Island Ferry. In response to this incident, DOT implemented several initiatives to improve passenger safety and reassure public confidence in the ferry system. On April 8, 2004, DOT issued a memorandum, entitled "Zero Tolerance Policy for Positive Drug and Alcohol Test Results," regarding the use of drugs and alcohol by employees working in the ferry system. This policy states that "DOT shall seek

[2] According to the Union, any employee covered by these testing procedures who tested positive for a banned substance or who refused to take such a test was subjected to a program of rehabilitation. If this employee successfully completed this program and was sufficiently reformed, then DOT typically would reinstate the employee to his or her previous position.

the termination of any employee in the following safety-sensitive job titles who perform work related to the Staten Island Ferry and receive a first time verified positive result for a drug or alcohol test." The enumerated job titles in this policy that are represented by the Union include deckhand, ferry terminal supervisor and marine oiler.

By letter dated May 27, 2004, the Union informed the City that DOT's decision to abandon its policy of rehabilitation and reinstatement was "a unilateral change, a prohibited practice and a change in the status quo." The Union viewed this change in policy to be prohibited since: "Ferry employees are now the only DOT employees who are not entitled to rehabilitation and reinstatement." The Union continued: "If the city wishes to raise this issue it should do so at the bargaining table."

On September 23, 2004, DOT issued a new formal policy, entitled "New York City Department of Transportation's Controlled Substance and Alcohol Abuse Policy for Employees Assigned to Work in Connection with the Staten Island Ferry" ("Revised Testing Policy"), regarding drug and alcohol testing of employees. On the first page of this policy in bold print and all in capital letters, it states "**THIS POLICY SUPERSEDES ALL PREVIOUS DRUG AND ALCOHOL TESTING POLICIES.**" Furthermore, Part VII(2) of the Revised Testing Policy states: "zero tolerance policy - DOT shall seek the termination of covered employees as defined under Part II of this policy statement who receive a verified positive drug or alcohol test result," words that mirrored the language used in the April 8, 2004, memorandum.

Pursuant to Article VI of the Agreement, the Union filed the Amended RFA claiming that DOT violated the Agreement by unilaterally changing the drug and alcohol testing policies that affect

a number of DOT employees represented by UMD.[3] As a remedy, the Union seeks the "reinstatement of the status quo, and bargaining over the proposed change."

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union's grievance is not arbitrable because the Union cannot establish a nexus between DOT's abandonment of the practice of rehabilitation and reinstatement, through its revision of the existing employee testing policy, and the Directives that are no longer applicable. It would be incongruous to allow the term "grievance" to encompass policies that have been replaced or revised because inapplicable or defunct policies can no longer affect the terms and conditions of employment since replaced or revised policies are inapplicable and defunct.

The City states that a claimed violation, misinterpretation, or misapplication of the Revised Testing Policy would be arbitrable, but, UMD has not made such a claim. At best, the Union's instant claim constitutes a subject for an improper practice petition, but the Union failed to file such a charge within the four month statute of limitations.

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[3] Article VI, § 1(b), in pertinent part, defines the term grievance as:
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 the terms and conditions of employment.

Union's Position

The Union argues that DOT's institution of the Revised Testing Policy is arbitrable because the grievance provision in the Agreement covers written policies that affect the terms and conditions of employment. The Revised Testing Policy calls for the termination upon the failing of a test, and terminations affect the terms and conditions of employment; therefore the implementation of this type of policy soundly rests within the confines of arbitrability.

The Union also contends that a nexus has been established between the act complained of and the source of the alleged right because the cancellation of the Directives, and their subsequent replacement by the Revised Testing Policy, present a question whether DOT had the right initially to change the existing policy. This issue, the Union contends, requires interpretation of the Agreement and thus must be presented to an arbitrator.

Finally, the Union contends that it has established a reasonable relationship between the subject matter of the grievance, the revision of the drug policies, and the grievance procedures set forth in Article VI, § 1(b), of the Agreement. The Union argues that this provision "does not specifically apply only to policies that are current." Thus, the language that set forth which grievances are arbitrable is sufficiently broad enough to cover all rules, regulations and policies.

DISCUSSION

This Board's statutory directive is to promote and encourage impartial arbitration as the selected means for the resolution of grievances. New York City Collective Bargaining Law (New York City Administrative Code, Tile 12, Chapter 3 ("NYCCBL"); *New York State Nurses Ass'n*, Decision No. B-21-2002. However, we cannot create a duty to arbitrate if none exists or enlarge a

duty to arbitrate beyond the scope established by the parties. *Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 4.

To determine arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employment Union*, Decision No. B-2-69 at 2; *see District Council 37, AFSCME*, Decision No. B-47-99 at 8-9, or, in other words, whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement. *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7.

Here, the first prong of the arbitrability test has been met. The parties are obligated to arbitrate their controversies through the grievance procedure as set forth in Article VI of the Agreement. Since we find that no statutory, contractual or court-enunciated public policy restrictions apply to the instant matter, we turn to whether a reasonable relationship exists between the act complained of in the grievance, DOT's abandonment of its practice of rehabilitation and reinstatement for employees who test positively for drugs or alcohol, through the issuance of the Revised Testing Policy, and the rights invoked under the Directives. In other words, the issue is whether DOT violated the terms of the previous drug and alcohol testing policy, memorialized in the Directives, by issuing the Revised Testing Policy.

In *Patrolmen's Benevolent Ass'n*, Decision No. B-9-79, an existing regulation required that all police officers who had to make court appearances would be assigned to a specific tour of duty. Later, a new policy mandated that all police officers who had to appear in court on a scheduled day off would be assigned to either a tour that began at 9:00 a.m. and ended at 5:00 p.m. or a tour that

was "otherwise appropriate for attendance at court." The union contended that the issuance of the new policy violated the terms of the existing policy. The Board found that, in the absence of any provision contained in the parties' collective bargaining agreement that limited the employer's right to promulgate amendments to existing regulations, or a provision in the existing policy that imposed a duty to retain the regulation unchanged, the Union had no basis to arbitrate its claim that amending or revoking the existing policy constituted a violation of that policy. *Id.*, at 8; *see also Patrolmen's Benevolent Ass'n*, Decision No. B-60-89 at 9 (holding, *inter alia*, that, without contractual or regulatory language limiting the employer's ability to amend or revoke existing written policies, claims alleging a violation of an existing policy due to the issuance of a revised policy are not arbitrable).

In *Patrolmen's Benevolent Ass'n*, Decision No. B-22A-85, the union attempted to arbitrate a grievance alleging that the employer's imposition of a new regulation was inconsistent with an existing regulation, thereby rendering the conflict between the two regulations an arbitrable matter. Though the City argued that the more recent regulation revoked the previous one, the Board held that the new regulation arguably incorporated portions of the existing regulation, and thus did not unambiguously revoke all the terms of the previous regulation. Thus, the issue whether the new regulations incorporated the substance of the previous regulation, thereby leading to its potential violation, or revoked the previous regulation entirely, is appropriate for determination by an arbitrator. *Id.* at 8-9.

In the instant matter, as a result of an accident, DOT issued the Revised Testing Policy in 2004, under which the penalty for a positive test result was increased. Here, as in *Patrolmen's Benevolent Ass'n*, Decision No. B-9-79, the policy upon which the Union relies has been expressly

superceded by a new policy, and the Union has not identified any provision in the Agreement that limits DOT's ability to revise, modify or revoke existing policies. The Union further has not identified any language in the Directives that imposes a duty on DOT to retain this policy unchanged. Since the former drug and alcohol testing policy is no longer in effect, there can be no reasonable relationship between the subject of this grievance and a violation, misinterpretation, or misapplication of a written policy pursuant to Article VI.

Moreover, here, the first page of the Revised Testing Policy states, in bold print and capital letters, that "**THIS POLICY SUPERSEDES ALL PREVIOUS DRUG AND ALCOHOL TESTING POLICIES**." Unlike *Patrolmen's Benevolent Ass'n*, Decision No. B-22A-85, in which we found a nexus because the new regulation did not unmistakably and unambiguously revoke the existing regulation. Here, no such ambiguity exists.

To the extent that the Union's claims in the Amended RFA contend that DOT acted unilaterally in changing a mandatory subject of bargaining that affects the terms and conditions of employment of the Union's members through the issuance of the Revised Testing Policy, these claims could have been brought as an improper practice charging violations of the NYCCBL § 12-306(a). Since they have not filed an improper practice petition, we do not reach this question.

Therefore, the City's petition to dismiss the Amended RFA is granted and the Union's request for arbitration 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 docketed as BCB-2477-05, filed by the City of New York be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration docketed as A-11001-05, filed by the United Marine Division, Local 333 of the International Longshoreman's Association be, and the same hereby by is, denied.

Dated: New York, New York
December 5, 2005

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GAY SEMEL
MEMBER