HA v. CSBA, L237 IBT, 75 OCB 5 (BCB 2005) [Decision No. B-5-05 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

NEW YORK CITY HOUSING AUTHORITY,

Petitioners,

Decision No. B-5-2005
Docket No. BCB-2401-04
(A-10519-04)

-and-

CIVIL SERVICE BAR ASSOCIATION,
affiliated with LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Respondents.
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DECISION AND ORDER

On May 5, 2004, the New York City Housing Authority ("NYCHA" or "Authority") filed a petition challenging the arbitrability of a grievance brought by the Civil Service Bar Association ("CSBA" or "Union") on behalf of Duane Williamson ("Grievant"). The request for arbitration alleges that Grievant was terminated in violation of the Authority's Personnel Manual: Personnel Rules and Regulations ("Manual"), which sets forth grievance procedures for employees. The Authority argues that the Manual affords rights for certain non-disciplinary grievances, but not for disciplinary actions. The Union responds that the definition of a grievance in the Manual does include disciplinary actions and that the matter should thus be sent to an arbitrator for determination. This Board finds, first, that the Manual provides grievance rights and, second, that the Manual is broad enough in scope to provide a nexus with the dispute in this case. Therefore, we deny the petition challenging arbitrability and send the grievance to

arbitration.

BACKGROUND

Grievant began working for New York City in March 1999 as an Agency Attorney, Level I, at the Department of Housing Preservation and Development. On January 16, 2001, he was hired as Agency Attorney, Level II, at NYCHA and worked in the Tenant Administrative Hearing Division.

In 1996, the Board of Certification of the Office of Collective Bargaining certified CSBA, an affiliate of Local 237, International Brotherhood of Teamsters, to represent employees in the non-competitive title, Agency Attorney, Levels I-IV. *Civil Service Bar Ass'n, Local 237, IBT*, Decision No. 1-96. NYCHA and CSBA did not enter into a collective bargaining agreement until December 3, 2003. That agreement provides for a grievance procedure for disciplinary actions after one year of service.

On November 12, 2003, about three weeks prior to the execution of the contract, NYCHA informed Grievant by letter that his employment was terminated as of that day. NYCHA offered no reasons for the dismissal.

CSBA filed a Step 1 grievance on November 14, 2003, pursuant to Chapter I, § VII, of the Manual. That section reads, in pertinent part:

> A. Policy
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> The processing of grievances of all employees of the Authority is patterned upon the provisions of Section 8(a) of Executive Order No. 52 of the City of New York, dated September 29, 1967, except as may otherwise be provided in a collective bargaining agreement.

> Any employee may present his/her own grievance through the first three steps set forth in Section C below either personally or through an appropriate representative of an organization of which he/she is a member. . . .
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> B. Definition of Grievance
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> The term "grievance" shall mean:
> 1. A dispute concerning the application and interpretation of the terms of:
> a. Written collective bargaining agreements and written rules or regulations. (Emphasis in original.)
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> 2. A claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority affecting the terms and conditions of employment.
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> C. Procedure
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> 1. Step 1 – An employee on any level below Project Manager/Division Chief may present his/her grievance orally or in writing to the Project Manager/Division Chief . . . not later than 120 days after the grievance arose. . . .
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> * * *
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> 4. Step 4 – An employee organization certified for the title which the grievant holds shall have the right to bring grievances unresolved at Step 3 to impartial arbitration by an arbitrator on the register of the Office of Collective Bargaining, under procedures established by such Office. . . .

In the grievance, the Union claimed that the termination violated the Manual's rules and regulations on Probationary Periods, Chapter III, § I, which provides, in pertinent part:

> The probationary period for new appointees and for promotees is one year. The minimum period of probation for new appointees is two months and, for promotees, four months. . . .

The Union asserted that Grievant had been employed for well over one year and, therefore, could not be summarily terminated.

The Union also invoked Chapter VIII, § I, of the Manual, which states: "Incompetence

and misconduct are the only causes for disciplinary action." Chapter VIII, § I, of the Manual also includes definitions and a description of the differences between relatively minor disciplinary cases, or "local" cases, and serious, or "general," cases. Other sections include discussions of the personnel authorized to prefer disciplinary charges, the need for counseling and written charges, local and general hearings, post-trial processing, and the duties of trial officers for local and general hearings. (Petition Ex. 10.) Nothing in this Chapter excludes coverage of non-competitive employees. The grievance alleged that since the Director of Human Resources had articulated no grounds for the Grievant's termination, the Authority violated the Manual.

On November 17, 2003, the Authority denied the grievance at Step 1 because Chapter I, § VII, does not grant a right to grieve an alleged wrongful disciplinary action. The Authority stated that the completion of a probationary period does not grant non-competitive employees with less than five years of service an entitlement to disciplinary procedures under the Civil Service Law ("CSL"), the Rules and Regulations of the Department of Citywide Administrative Services ("DCAS"), or NYCHA Rules and Regulations.

After a Step 2 conference, the Authority, on January 22, 2004, again found no violation of NYCHA's rules and regulations. A March 30, 2004, Step 3 decision following a hearing confirmed the Authority's position. On April 21, 2004, the Union filed a Request for Arbitration alleging that NYCHA took wrongful disciplinary action against Grievant in violation of the same provisions of the Manual as the Union had previously cited.

POSITIONS OF THE PARTIES

NYCHA's Position

According to NYCHA, the grievance procedure under Chapter I, § VII, of the Manual "sets out the who, where and how for an employee not covered by a contractual grievance procedure to bring a grievance, but it does not bestow upon them the right to bring a grievance." (Reply ¶ 7.) The Authority processed the instant grievance through Step 3 because the Manual does not include provisions for not processing a grievance.

NYCHA argues that the Manual is for information and guidance, and its overriding purpose is to explain external laws. Chapter I, § I, of the Manual states: "National, state, or local laws, as well as rules or regulations that apply to Authority employees, shall take precedence over any and all of these rules." When read together, Chapters III and VIII are meant only to inform employees of rights available under CSL § 75 and do not serve as an independent source of right. Therefore, the Authority says, parties must look to the CSL and DCAS rules to determine whether Grievant has disciplinary due process rights. The Union's assumption that all employees who complete probation at NYCHA are entitled to due process under Chapter VIII is unsupported by the statute, the DCAS rules, and the Manual itself. Thus, the Union has not demonstrated a source of right.

NYCHA also asserts that no nexus exists between Grievant's dismissal and the provisions of the Manual. Chapter III, § I, of the Manual only conveys the maximum and minimum probationary period and does not grant employees substantive or procedural due process rights following the probationary period. Looking to external law, the Authority points out that under CSL § 75, non-competitive employees gain disciplinary rights after five years of service in title. In addition, Personnel Services Bulletin No. 200-6R, based on DCAS Rule 5.2, addresses probation for non-competitive employees and states that completion of the

probationary period "does not grant the non-competitive employee permanent tenure" but that some collective bargaining agreements do provide disciplinary rights after completion of the probationary period. Because the CSL and DCAS rules do not grant Grievant disciplinary rights, because the parties had no contract at the time Grievant was terminated, and because Chapter III of the Manual provides no rights, the Union has not shown a relationship between act complained of and the rights invoked.

Moreover, the Authority claims, the provisions in Chapter VIII – that incompetence and misconduct are the only causes for disciplinary action – apply solely to employees who are entitled to due process under CSL § 75. At the same time, NYCHA asserts that nothing in this Chapter indicates when employees or which employees are entitled to due process. Thus, NYCHA contends, the Union has failed to show that Chapter VIII extends the coverage of disciplinary due process to non-competitive employees who have not served five years in title.

Union's Position

The Union argues that NYCHA failed to comply with the procedures for disciplinary due process, to which Grievant is entitled under the Manual. The Manual confers both substantive and procedural rights.

Chapter I, § VII, defines "grievance" as a "claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority affecting terms and conditions of employment." The Manual itself establishes the grievance procedure. Chapter I, § VII, additionally provides that "any" employee may present a grievance personally or by a representative through the first three steps of the grievance procedure. The member's certified organization has the "right" to submit unresolved grievances at Step 3 to impartial arbitration.

According to the Union, these rights would be meaningless if the remainder of the Manual were deemed not to confer substantive and procedural rights. Indeed, the Authority processed the instant grievance through the first three steps.

The Union also notes that neither party disputes that Grievant completed his probationary period as defined in Chapter III, § I, of the Manual. Moreover, Chapter VIII confers rights on the employee by limiting to incompetence and misconduct the grounds on which NYCHA may impose disciplinary action. Yet NYCHA summarily terminated Grievant. The Union claims that in failing to observe the requirements of finding either incompetence or misconduct prior to dismissal, the Authority violated its own rules and regulations. Because a nexus exists between Grievant's termination and the Manual, the case should proceed to arbitration.

DISCUSSION

The question before the Board is whether the rules and regulations embodied in NYCHA's Manual encompass a non-competitive employee's grievance concerning disciplinary action. Because the Manual gives employees arbitration rights and because the Union has shown a reasonable relationship between Grievant's termination and the Manual, we refer this case to an arbitrator.

Pursuant to § 12-302 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the policy of the City is to favor and encourage arbitration to resolve grievances. *Plumbers Local Union No. 1 of Brooklyn and Queens*, Decision No. B-27-92 at 21, *aff'd sub nom. City of New York v. Plumbers Local Union No. 1*, No. 43764/92 (Sup. Ct. N.Y. Co. Aug. 13, 1993), *aff'd*, 204 A.D.2d 183 (1st Dep't 1994).

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, *see also District Council 37, AFSCME*, Decision No. B-47-99, 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 8.

Here, the parties had no contract at the time of the disputed action. Rather, we must determine whether the Authority's written grievance policy confers arbitration rights on NYCHA employees and, if so, whether a reasonable relationship exists between Grievant's termination and the provisions promulgated in the Manual. *See Plumbers Local Union No. 1*, Decision No. B-27-92.

In *Local Union No. 3, IBEW*, Decision No. B-13-77, *aff'd upon rehearing*, Decision No. B-1-78, *aff'd sub nom. City of New York v. Anderson*, No. 40532/78 (Sup. Ct. N.Y. Co. July 17, 1978), the parties did not have a collective bargaining agreement, and the union sought instead to use the grievance mechanism in Executive Order ("EO") No. 83, July 26, 1973, as the source of right for a grievance. The claim was that the agency violated another EO concerning implementation of promotions. Section 5(a)(1)(B) of EO 83 indicates that the step procedure ending in arbitration applies to all mayoral agency employees who are eligible for collective bargaining but whose bargaining unit has not executed a collective bargaining agreement with a grievance mechanism. In *Local Union No. 3*, the relevant definition of a grievance under EO 83 was "a claimed violation, misinterpretation or misapplication of the written rules or regulations

of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment." This Board found EO 83 an independent source of right and its procedures binding on the parties. In addition, the Board found that the definition of grievance was broad enough to cover an alleged violation of an EO dealing with promotions and held the dispute arbitrable.

Similarly, in *Plumber's Local Union No. 1*, Decision No. B-27-92, we determined that a Department of Sanitation ("DOS") employee covered by a Labor Law § 220 determination, but not a collective bargaining agreement, could grieve, based on the procedures in EO 83, certain claims alleging violations of rules and regulations of the Department of Personnel ("DOP"). We noted that no provision excluded DOP rules and regulations from the grievance process of a DOS employee. *Id.* at 24 n.10. *See also Local Union No. 3, IBEW*, Decision No. B-18-83 (parties not signatories to a contract are governed solely by grievance/arbitration procedures of EO 83); *but cf. Whaley*, Decision No. B-41-97 (Board found no breach of the union's duty of fair representation because petitioner failed to identify any provision in the collective bargaining agreement, NYCHA's Personnel Rules and Regulations, or an informational booklet that established the employee's right initially to bring a wrongful disciplinary claim; further, Board made no reference to Personnel Rules and Regulations, Chapter VIII, § I, which narrows the bases on which discipline can be imposed).

In this case, when NYCHA, a non-mayoral agency, promulgated the Manual, NYCHA established rights for its employees. The policy enunciated in Chapter I, § VII(A), of the Manual states explicitly that the processing of grievances of "all employees" of the Authority is patterned

on EO 52.[1] Furthermore, an employee's certified organization has the "right" to submit unresolved grievances to arbitration. The Authority has not pointed to a provision that excludes non-competitive employees from exercising these grievance rights. Just as EO 52 established a grievance process for those eligible employees who did not have a collective bargaining agreement, so this Manual created a grievance mechanism for eligible employees, such as members of CSBA, who did not have a collective bargaining agreement with NYCHA.

Having determined that the parties are obligated to arbitrate certain disputes, we now analyze whether the obligation is broad enough in scope to include the instant controversy. Initially, we address NYCHA's argument that the Manual serves only informational purposes to clarify external law – the CSL and DCAS rules – for managers and employees.

An agency manual may constitute a "written policy" affecting employees' terms and conditions of employment and not simply explain rights granted under other sources. *See Local 1180, Communications Workers of America*, Decision No. B-1-2001 at 7; *Local 30, International Union of Operating Engineers*, Decision No. B-2-92 at 14; *Social Service Employees Union, Local 371*, Decision No. B-28-83 at 11. In *Communications Workers of America*, Decision No. B-27-93 at 18, we found that a job description communicated to employees in the agency's manual was promulgated unilaterally to further the employer's purpose; thus, the manual was considered the employer's written policy and the grievance was arbitrable.

Distinguished from these cases are those dealing with agency documents written only to clarify issues. In *District Council 37, Local 1549*, Decision No. B-50-98, cited by NYCHA, the grievance alleged that the New York City Police Department violated an Equal Employment

[1] EO 52 is the predecessor of EO 83.

Opportunity Policy Statement ("EEOP") and the Citywide contract. While we found the grievance arbitrable under the contract, we stated that the EEOP informed employees of their statutory rights but did not grant substantive rights, for the EEOP was not promulgated unilaterally "to further the employer's purposes, to comply with the requirements of law, or otherwise effectuate the mission of the agency." *Id*. at 9; *see Social Service Employees Union, Local 371*, Decision No. 7-98; *see also In the Matter of Roberts*, 3 Misc. 3d 549 (Sup. Ct. N.Y. Co. Jan. 29, 2003) (layoff manual is not regulation but internal document for managers so that they do not have to research law).

Here we find that NYCHA promulgated the Manual unilaterally to further the Authority's purpose and communicated the purpose to employees represented by a union. The Manual is not limited simply to explaining the external laws to the Authority's managers and represented employees. Indeed, Chapter I, § I, stating that the external laws take precedence over "these rules," acknowledges that the Manual's provisions are rules of NYCHA. Thus, the Manual is NYCHA's written policy.

We have found arbitrable certain alleged violations of agency written rules, regulations, or policies when these are incorporated within the definition of a grievance. *See Social Services Employees Union, Local 371*, Decision No. 3-83 at 8.[2] Moreover, when there is a broad

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[2] Manuals: *see Social Service Employees Union, Local 371*, Decision No. B-38-85 (procedures in manual to notify employees of standards are arbitrable); *Social Service Employees Union, Local 371*, Decision No. B-31-82 (job performance manual is not directive but has force and effect of written policy of agency). Guides: *see District Council 37, AFSCME*, Decision No. B-28-87 (though contract excludes DCAS rules and regulations from grievance procedures, agency guides impose specific standards and requirements and thus constitute written policies subject to arbitration); *Patrolmens Benevolent Ass'n*, Decision No. B- 8-78 (even if conflict exists between agency's Patrol Guide and Public Officers Law, misapplication of Patrol Guide is arbitrable under contractual definition of grievance). Procedures: *see District Council 37,*

definition of the term "grievance," this Board has authorized arbitration even if the arbitration clause "makes no specific mention of the particular type or class of dispute presented in a given case." *Local Union No. 3, IBEW*, Decision No. B-1-78 at 13-14 (EO on promotions is a rule or regulation of a mayoral agency affecting terms and conditions of employment, and a violation of an EO is contemplated by the broad definition of "grievance" under EO 83); *see Correction Officers Benevolent Ass'n*, Decision No. B-41-90 at 10 (EO addressing investigations of alleged corruption of corrections officers is regulation, the misapplication of which falls under collective bargaining agreement's broad definition of "grievance"). In both these decisions, the definition of grievance at issue was: "a claimed violation, misinterpretation, or misapplication of the rules and regulations" of the agency, and the subject in question was not specifically enumerated.

Here, the Manual's definition of "grievance" in Chapter I, § VII, as a "claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority" is worded exactly as other definitions that this Board has deemed broad enough to encompass policies just like those set forth in the Manual. Although the definition makes no mention of the "particular type or class of dispute presented," *Local Union No. 3, IBEW,* Decision No. B-1-78 at 13-14, such silence is not fatal to finding a nexus between the subject complained of and the provision specified. *See Correction Officers Benevolent Ass'n*, Decision No. B-41-90 at 10.

The basis of the Union's grievance in the instant case is the Authority's failure to afford a

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AFSCME, Decision No. B-34-80 (operating procedure that is internal memorandum from the Vice President for Personnel and Labor Relations to Executive Directors of the agency is "written policy or order" within scope of parties' agreement to arbitrate). Handbooks: *see Local 246, Service Employees International Union*, Decision No. B- 32-99 (handbook and substance abuse testing policy are employer's written procedures and guidelines); *District Council 37, Local 1549*, Decision No. B-67-89 (Employees Handbook imposes specific standards and requirements and is thus written policy).

mechanism to determine whether Grievant was terminated for incompetence or misconduct after he completed probation. The Manual includes rules and regulations that indicate that probationary periods are one year (Chapter III, § I), and that the Authority can take disciplinary action only for incompetence and misconduct (Chapter VIII, § I). Chapter VIII also contains a full description of procedures for local and general disciplinary cases, including hearings and post-trial processing.

We find that the Union has established a reasonable relationship between the Grievant's termination and the provisions of the Manual. Even though the Manual states that CSL and DCAS rules take precedence over the Manual's rules, Chapter VIII does not conflict with the external laws but in this instance may grant rights greater than those the CSL provides. NYCHA, in fact, concedes that Chapter VIII does not indicate when employees or which employees are entitled to due process. The Authority neither points to a provision limiting non-competitive employees' rights to those enunciated in the CSL and DCAS rules nor points to a provision specifically excluding non-competitive employees from the rights set forth in Chapter VIII. The wording in Chapter VIII, giving employees the right to a finding of incompetence or misconduct before they are dismissed, is general: "Incompetence and misconduct are the only causes for disciplinary action." Had NYCHA intended to circumscribe disciplinary rights and distinguish these from non-disciplinary rights or had NYCHA intended to exclude non-competitive employees from having rights under Chapter VIII, it could have so stated in the Manual. Thus, we are not persuaded here that Chapters III, § I, and VIII, § I, of the Manual expressly apply only to employees entitled to due process under CSL § 75. We leave to an arbitrator the remaining questions concerning the grievant's termination as presented in the request for arbitration.

Because the Manual enunciates rules and regulations that establish grievance and arbitration rights for NYCHA employees and because the obligation to arbitrate is broad enough in scope to include the dispute over Grievant's termination, we deny NYCHA's petition and grant the request for arbitration.

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 New York City Housing Authority's petition challenging arbitrability, docketed as BCB No. 2401-04, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Civil Service Bar Association, affiliated with Local 237, International Brotherhood of Teamsters, on behalf of Duane Williamson, and docketed as A-10519-04, hereby is granted.

Dated: March 11, 2005
New York, New York

MARLENE GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

I dissent. ERNEST F. HART
MEMBER