Correction Captains Ass'n, 79 OCB 10 (BCB 2007)

[Decision No B-10-2007] (Arb.) (Docket No. BCB-2575-06) (A-11995-06).
(Docket No. BCB-2576-06) (A-11996-06).

Summary of Decision: The City filed petitions challenging the arbitrability of two grievances filed by the Union alleging that an employee was improperly denied her request for a reasonable accommodation to account for her disability, and was improperly placed on sick leave and/or light duty due to her disability. The City argued that these grievances should not be arbitrable because the Union has failed to demonstrate a nexus between the subject of the grievances and the provisions invoked therein. The Board found that one grievance was not arbitrable because it involved a determination that is specifically exempted from arbitration, while the other grievance was arbitrable because a nexus existed between the denial of the employee's request for a reasonable accommodation and the department's reasonable accommodation regulation. Accordingly, the City's petitions were granted, in part, and dismissed, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF CORRECTIONS,

Petitioners,

-and-

CORRECTION CAPTAINS ASSOCIATION,

Respondent.

DECISION AND ORDER

On October 6, 2006, the City of New York and the Department of Corrections ("City" or "DOC") filed two petitions challenging the arbitrability of two distinct grievances brought by Correction Captains Association ("Union" or "CCA") on behalf of Donnezzetta Brown ("Grievant").

The first grievance, filed on May 19, 2006, asserts that DOC violated DOC Directive 2232R, which sets forth the requirement that employees who are disabled be afforded reasonable accommodations, when DOC denied Grievant's request for such an accommodation for injuries she previously had suffered while on duty. The second grievance, filed on May 26, 2006, asserts that DOC violated Mayoral Directive No. 78-14, DOC Operations Orders 08/87 and 56/88, and DOC Directive 2262R by placing Grievant, first, on involuntary sick leave, and then, on Medically Monitored Returned status, instead of returning her to full duty. The City contends that these grievances are not subject to arbitration because CCA has failed to establish the necessary nexus between the subject matters of the respective grievances and the sources of the alleged rights. In addition, the City further contends that both of these grievances are not arbitrable because they are moot, as no remedy is available to Grievant, and because these grievances address subjects that fall within DOC's managerial prerogative.

The Board, upon request by the Union, consolidated these two matters. The grievance involving the alleged misplacement of Grievant on sick leave and/or Medically Monitored Returned status is not arbitrable because the language of the procedure invoked precludes such determination being brought before an arbitrator. The grievance involving the denial of Grievant's request for reasonable accommodation is arbitrable because the language of the regulation invoked is not unambiguous on its face to preclude all DOC employees on Medically Monitored Returned status from receiving a reasonable accommodation. Accordingly, the petition is granted in part and dismissed, in part.

BACKGROUND

On June 11, 2002, while working at the Eric M. Taylor Center ("EMTC"), Grievant, a Corrections Captain, slipped and fell, injuring her neck, lower back, right shoulder, and right hand. On April 1, 2004, Grievant was involved in another workplace accident, where she was allegedly assaulted by a fellow DOC employee, aggravating the injuries she had suffered in 2002. As a result of these two incidents, Grievant underwent two shoulder surgeries and received epidural injections and oral steroids.

DOC Directive 2232R

DOC Directive 2232R, entitled "Reasonable Accommodation" ("2232R"), sets forth the policies and procedures governing reasonable accommodations to DOC applicants and employees who are disabled as defined by this provision, which incorporates by reference the Americans with Disabilities Act of 1990.[1] This regulation states that DOC will "provide reasonable accommodations to qualified employees with disabilities in order to enable them to reasonably perform the essential functions of their job." (Emphasis added) (Petition in BCB-2575-06 ("First Petition"), Exhibit C.)

According to 2232R, a "qualified employee" is defined as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of a position and who, with a reasonable accommodation . . . can perform the essential functions of that position." (Id.) This regulation further defines "essential functions" as "duties that are fundamental to a position including, but not limited to, those for which the position exists, those that only a

[1] Since a part of the instant matter deals solely with an employee's request for a reasonable accommodation and in no way deals with the rights of an applicant for employment with DOC under this or any other DOC regulation, mention of applicants will be omitted even though they are recognized under 2232R.

limited number of employees are available to perform, or those that cannot be delegated." (Id.) Examples of reasonable accommodations include, but are not limited to "making facilities physically accessible to, and usable by people with disabilities . . .; modifying work schedules to accommodate the employee's medical needs . . .; and providing or modifying equipment, devices or materials." (Id.)

According to 2232R, when a disabled employee cannot either "perform the essential functions of the job, or where providing an accommodation would impose an undue hardship on the agency, or pose a direct threat to the health or safety of other employees," DOC retains the right to refuse to accommodate that employee. (Id.) Examples of accommodations that are deemed unreasonable include "no inmate contact; requiring two individuals to perform the essential functions of a job; [and] eliminating/reassigning the essential functions of a job." (Id.) In addition, 2232R, Article III, labeled "Applicability," states that this regulation is "not intended to supercede Operations Order 08/87, which applies to members in temporary limited duty (Medically Monitored Returned [MMR]) status, due to a disability that is not expected to be permanent." (Id.)

In order for an employee to request a reasonable accommodation, 2232R requires an employee to complete and submit a Reasonable Accommodation Request Form and documentation detailing the employee's disability to the Disability Rights Coordinator ("DRC"). Upon receipt of this form, the DRC reviews the request and determines, *inter alia*, whether the employee has a disability, whether a reasonable accommodation can be made, whether the accommodation requested by the employee is reasonable, and whether the documents provided are sufficient to permit these

determinations to be made.[2] In evaluating these requests, the DRC, who may consult with DOC's Health and Management Division ("HMD"), must determine essential functions of the job performed by the requesting employee, so that a reasonable accommodation, if any, can be devised.

The DRC's determinations involving these requests are to be made within ten business days of their submission. When such determinations take longer than ten business days, "the steps taken to order, secure or carry out the accommodation shall be documented and discussed with the employee, [and] in all instances, however, the DRC . . . shall act as expeditiously as possible." (Id.) If an employee's request is denied, then the DRC shall notify the employee on the Reasonable Accommodation Request Form submitted by the employee. If an employee disagrees with any portion of the DRC's determination, he or she may appeal it to the Appeals Committee.[3]

Medically Monitored Returned Status

Mayoral Directive No. 78-14, entitled "Limited Duty Procedure," ("78-14") is addressed to all agencies and defines a limited duty assignment as "an assignment to duties which a temporarily disabled employee is capable of performing . . . [since that] employee is unable to perform the full duties of his or her position."[4] (Emphasis added.) When an employee is placed on MMR status, HMD completes a "Case Disposition" form, which lists, *inter alia*, the date of the employee's visit

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[2] A footnote at the end of this criterion states that "the DRC or Personnel Division shall confer with the HMD medical staff and/or the Office of the General Counsel to determine whether or not a disability exists.

[3] No time limit is specified in which the employee must appeal a determination, but the Appeals Committee must render a written determination within fifteen days of receipt of the employee's appeal.

[4] The City contends, and the Union does not deny, that "Limited Duty" is the same as light duty and Medically Monitored Returned ("MMR") status. As such, Limited Duty assignments, posts or duties will be hereinafter referred to as MMR assignments, posts or duties.

to HMD, whether the employee was assigned to MMR, continued on MMR, reassigned to MMR, or returned to full duty, and the date that the employee is either scheduled to return to HMD for another examination or to return to full duty. (First Petition, Exhibits H, Q, U and W.)

Assignment of employees in MMR status is governed by DOC Operations Order 08/87, which is entitled "Assignment of Medically Monitored Personnel" ("08/87"). This provision states that "the assignment of all Medically Monitored Personnel shall be administered by the Health Management Division." (Petition in BCB-2576-06 ("Second Petition"), Exhibit E.)[5] DOC Operations Order 56/88, entitled "Utilization of Medically Monitored Personnel" ("56/88"), sets forth the three categories of MMR status and their appropriate duty restrictions. MMR1 status is defined as "no physical limitations" and only restricts the employee's assignment of overtime and certain tours. (Petition, Exhibit G.) MMR2 status is defined as "some physical limitations." This category allows the employee to work a normal tour as long as the job allows for ample opportunity for sitting, but prohibits the employee from performing strenuous physical activity. (Id.) MMR3 status is defined as "serious physical limitations" and restricts the employee to assignments involving more physical limitations than the ones listed in MMR2 status. Further, 56/88 reiterates that "uniformed staff will be designated as MMR and placed in an MMR category only by the Health Management Division [HMD] medical staff." (Id.)

DOC Directive 2262R, entitled "Sick Leave Regulations for Members of the Uniformed Force," primarily deals with the procedures by which uniformed members of DOC are to report absences due to illness and usage of sick leave ("2262R"), but also states that the HMD "is

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[5] The First Petition and Second Petition, which challenge the arbitrability of respective grievances filed by Grievant are almost identical. Accordingly, hereinafter First Petition and Second Petition shall be collectively referred to as "Petition," unless otherwise specified.

empowered to enforce the rules and regulations concerning sick leave; take appropriate disciplinary action against employees who violate these rules . . . and authorize and dispatch a physician . . . to evaluate a medical and/or psychiatric condition that affects the member's ability to perform their assigned duties." (Petition, Exhibit F.) Furthermore, the HMD's "decisions concerning the medical and/or psychiatric conditions and/or limitations of all employees are final, unless amended by recommendation of the Commissioner." (Id.) This provision reiterates that "all MMR assignments must be made by HMD." (Emphasis in the Original) (Id.)

Grievant's Medical History

On March 8, 2005, Grievant, who had been on sick leave dating back to April 1, 2004, the date her second work place injury occurred, visited HMD for an examination. At this visit, Grievant was reassigned to MMR3 status, required to return for re-evaluation on March 29, 2005, and instructed to provide additional medical information to HMD. Thus, in accordance with 78-14 and 08/87, Grievant could return to work at a MMR3 post as of March 9, 2005.

On June 20, 2005, Grievant visited her treating physician and obtained a "Treating Physician's Summary Report," which indicated that, as of September 15, 2005, Grievant would be capable of returning to full duty on a trial basis and that a re-evaluation will be required sometime thereafter.

On July 22, 2005, Grievant was reevaluated by HMD, at which time, Grievant submitted the June 20, 2005 medical report. HMD continued Grievant on MMR3 status.

On August 11, 2005, Grievant visited a physician who was not treating her, in order to obtain an Independent Medical Examination ("IME"). During the examination, the doctor observed that Grievant suffered from tendon and joint damage in her right shoulder, atrophied muscles in her right

upper arm, consistent with a limited range of motion in that joint, and "a very hesitant gait." (Petition, Exhibit J.) This doctor noted that "since Grievant may be suffering from "impending frozen shoulder," he recommended an additional surgery. (Id.) Finally, the doctor indicated that Grievant suffered from a "moderate partial disability [and] she should avoid excessive bending, lifting and overhead reaching."[6] (Id.)

On August 23, 2005, Grievant was reexamined by HMD again, which continued to leave her on MMR3 status, but decided that she would be able to return to full duty on September 15, 2005, in accordance with the recommendation proffered by Grievant's treating physician.

On September 14, 2005, Grievant filed with the DRC a Reasonable Accommodation Request Form and attached the Treating Physician's Summary Report, dated June 20, 2005, and the IME Report, dated August 11, 2005. In this request form, Grievant stated that an accommodation was necessary in order "to prevent any further aggravation" of her injuries. (Petition, Exhibit J.) In response, on September 15, 2005, the DRC sent Grievant a memorandum stating that Grievant needed to clarify her requested accommodation before further processing could be completed.

According to the Union, that same day, Grievant called the DRC to ask that he clarify and explain his response to her reasonable accommodation request. In response, the DRC stated that "most people ask for no inmate contact, or a steady tour, etc." (Request for Arbitration in A-11995-06 ("First RFA"), Exhibit 1.) According to the Union, Grievant replied insisting that she was not requesting such accommodations, rather one that "was based on medical documentation." (Id.) On September 18, 2005, Grievant, memorializing her conversation with the DRC, sent a memorandum

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[6] The IME Report, dated August 11, 2005, does not propose a specific date for Grievant to return to full duty work.

stating that the accommodation she sought was a post that "would not put her at risk of any further injuries." (Petition, Exhibit L.) On September 26, 2005, the DRC forwarded Grievant's accommodation clarification to HMD for review.

On October 12, 2005, Grievant called the DRC to inquiry about the status of her request for a reasonable accommodation. (First RFA, Exhibit 1.) On October 14, 2005, DOC responded to Grievant's inquiry via memorandum stating that her reasonable accommodation request was still being processed and that her current work status was full duty. (Petition, Exhibit M.) On October 16, 2005, Grievant approached Assistant Deputy Warden ("ADW") Lozada and informed him that "she was disabled and unable to take her post." (Petition, ¶ 39.) On October 17, 2005, ADW Lozada checked the work status of Grievant and found that she was still listed as full duty.[7] That same day, Grievant again approached ADW Lozada and informed him that she was disabled and could not take her post. At that time, ADW Lozada informed Warden Frank Squillante of Grievant's disability and requested that she be sent to HMD for a medical evaluation, which Warden Squillante did.

That same day, HMD evaluated Grievant. Based upon Grievant's complaints and the IME Report, dated August 11, 2005, the examining HMD physician determined that Grievant's condition prevented her from "working any post at this time." (Petition, Exhibit P.) Warden Goodman, the head of HMD, communicated HMD's findings to Grievant, who was placed immediately on sick leave and instructed her to return for a re-examination on November 7, 2005. Warden Goodman also

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[7] According to the City, from September 15, 2005, the date Grievant was reinstated to fully duty, to October 17, 2005, the date Grievant was placed on sick leave, Grievant worked "approximately five days - the rest of the time, [she was out on] vacation or emergency leave." (Petition, ¶ 37.)

informed the DRC, via a memorandum, dated October 17, 2005, of Grievant's prognosis.

According to the City, on January 11, 2006, the DRC informed Grievant in writing that her request for reasonable accommodation was denied because her condition prevented her from working at her post, with or without a reasonable accommodation; however, she was invited to resubmit her reasonable accommodation request when she returned to full duty status. According to the Union, Grievant never received this memorandum. On March 1, 2006, Grievant again inquired about her request for reasonable accommodation.

On March 13, 2006, the DRC reiterated that Grievant's request for reasonable accommodation, dated September 14, 2005, had been rejected because her condition prevented Grievant "from working any post at [that] time, with or without a reasonable accommodation." (Petition, Exhibit T.) Further, the DRC stated that "since [Grievant] serve[d] as a Correction Captain, even with a reasonable accommodation, [Grievant] must [be] able to perform the essential functions of the job - care, custody and control of inmates." (Id.) Grievant never filed an appeal to either the January 2006 or the March 2006 denials of her reasonable accommodation request.

On March 31, 2006, during a HMD reexamination, Grievant submitted additional medical documentation from her treating physician and her physical therapist, which had been previously requested by HMD. According to the Union, Grievant hoped that the submission of this additional documentation would cause HMD to remove her from sick leave and reinstate her to full duty with an accommodation. However, it is undisputed that Grievant was not removed from sick leave at that time.

On May 8, 2006, Grievant reported to HMD for a reexamination concerning her injuries, since she had been assigned to be on sick leave by HMD on October 17, 2005. As result of this

reexamination, Grievant was placed on MMR3 status, returned to work as of May 10, 2006, and assigned to "JATC (a closed Riker's Island facility)." (Petition, ¶ 53.)

On May 19, 2006, Grievant filed the first grievance alleging that DOC violated 2232R by rejecting her request for a reasonable accommodation. This grievance further alleged that, instead of granting Grievant's request and accommodating her injuries, DOC, through HMD and the DRC, placed her on "involuntary sick leave." (First RFA, Exhibit 1.) She also alleged that she never requested "no inmate contact," rather that was wrongly inferred by the DRC. Finally, Grievant alleged that she never received the January 11, 2006 memorandum from the DRC rejecting her reasonable accommodation request, and only received the DRC's March 13, 2006 memorandum reiterating the rejection; all of which was well outside the ten day time frame set forth in 2232R. (Id.)

On May 26, 2006, Grievant filed the second grievance alleging that DOC violated 78-14, 08/87, 56/88, and 2262R, when DOC, through HMD, placed Grievant first on involuntary sick leave and then on MMR status. Grievant claimed that, despite her compliance with HMD's continued requests for documents from her treating physician and her therapists, as well as her continued requests to be reinstated, HMD kept her on sick leave and/or MMR status for almost a year. Grievant further alleged that HMD's actions were designed to avoid granting her a reasonable accommodation and to eventually "medically separate" her from her job. (Request for Arbitration in A-10996-06 ("Second RFA"), Exhibit 1.)

On June 9, 2006, Grievant appealed the rejection of the first grievance to Step III.[8] On June

[8] Neither the City nor CCA presented any evidence concerning a hearing and/or a determination resulting from an earlier step in the grievance process.

29, 2006, Grievant appealed the rejection of the second grievance to Step III.

On July 25, 2006, the City rejected both of Grievant's appeals. Regarding the first grievance, the City found that "disputes concerning the Department's actions or failures to act with regard to accommodations are governed by the Appeals Procedure contained in the Department's Directive 2232R . . . [and] does not constitute a grievable issue, nor does it represent a contractual violation." (First RFA, Exhibit 2.) Concerning the second grievance, the City utilized the exact same language in order to deny Grievant's appeal on issues concerning her placement on involuntary sick leave and/or MMR status.

On August 8, 2006, the Union filed both the First RFA and the Second RFA. In the First RFA, citing to the parties' collective bargaining agreement ("Agreement"), Article XX and 2232R, the Union alleged that DOC "violated, misinterpreted and misapplied the rules, regulations and procedures of the agency in that it failed to provide [Grievant] a reasonable accommodation for a physical condition." (First RFA.) As remedy, the Union requested that DOC provide Grievant with a reasonable accommodation. In the Second RFA, again citing to Article XX of the Agreement, the Union alleged that DOC "violated, misinterpreted and misapplied the rules, regulations and procedures of the agency in that it improperly placed [Grievant] on involuntary sick leave/Medically Monitored Returned 3 Status." (Second RFA.) The Union sought, as a remedy, that DOC adhere to the rules and regulations governing these issues, and that Grievant "be made whole" for DOC's violations.

On September 27, 2006, Grievant revisited HMD for a further evaluation of her injuries. At

that time, she was placed back on full duty as of September 29, 2006 and was reassigned to EMTC.[9]

POSITIONS OF THE PARTIES

City's Position

The First RFA

The City argues that the First RFA must be dismissed because it is moot. Shortly after requesting a reasonable accommodation, Grievant was placed back on sick leave and then on MMR3 status, thereby disqualifying her from the scope of 2232R under the terms of this regulation. The First RFA additionally is moot because HMD's subsequent determination finding Grievant to be unable to work any post disqualifies her, again, from obtaining an accommodation. Since 2232R applies only to employees who are able to perform the essential functions of their posts, and she has been deemed unable to perform such functions, Grievant cannot avail herself of the protection of 2232R.

The City further contends that the First RFA should be dismissed because the Union cannot establish a nexus between the denial of her reasonable accommodation request and Article XX of the Agreement.[10] The City argues that since the First RFA, in claiming a violation of 2232R, does

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[9] At the time of Grievant's removal from MMR3 status, there is no evidence in the record that she ever received the additional shoulder surgery suggested in the IME Report, dated August 11, 2005, or that her therapy for the injuries she sustained in 2002 and aggravated in 2004 ever changed from the same course of therapy she received prior to October 2005.

[10] Agreement, Article XX, § 1, in pertinent part, states:
For the purposes of this Agreement the term "grievance" shall mean:
a. a claimed violation, misinterpretation, or inequitable application of the provision of this Agreement;
b. a claimed violation, misinterpretation, or misapplication of the rules, regulations, or
(continued...)

not involve a provision of the Agreement, of the Guidelines for Interrogation of Members, of an improper holding of an examination, or of out-of-title work, the Union failed to establish a nexus between the subject of the grievance and the provisions invoked therein. Furthermore, no nexus exists between the denial of Grievant's reasonable accommodation request and the provision invoked because 2232R, Article III explicitly excludes employees on MMR status from receiving a reasonable accommodation.

Finally, the City argues that DOC acted within its managerial prerogative in denying Grievant's request for reasonable accommodation, and, therefore, the issue raised in the First RFA is not arbitrable. The DRC, in concert with HMD, are charged with the implementation of 2232R. HMD is empowered to assign DOC employees on MMR status to their posts, and their determinations can only be amended by the Commissioner. Accordingly, review of DOC's decision concerning an employee on MMR status is not arbitrable.

The Second RFA

The City contends that the Second RFA must be dismissed because it is also moot. Grievant is no longer on sick leave or MMR status and, therefore has no remedy available to her.

The City next contends that the Second RFA should be dismissed because the Union cannot

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[10](...continued)

procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a the term "grievance" shall not include disciplinary matters;

c. a claimed violation, misinterpretation, or misapplication of the Guidelines for Interrogation of Members of the Department referred to in Article XVIII of this Agreement;

d. a claimed improper holding of an open-competitive rather than a promotional examination;

e. a claimed assignment of the grievant to duties substantially different from those stated in the employee's job title specification.

establish a nexus between the denial of her request for a reasonable accommodation and Article XX of the Agreement. Since the Second RFA, in claiming violations of 78-14, 08/87, 56/88, and 2262R, does not involve a provision of the Agreement, of the Guidelines for Interrogation of Members, of an improper holding of an examination, or of out-of-title work, the Union failed to establish a nexus between the subject of the grievance and the provisions invoked therein. Furthermore, no nexus exists between the placement of Grievant on sick leave and/or MMR status and these above-cited provisions because none of these regulations limit the authority vested in HMD. Therefore, since HMD's decisions concerning medical conditions or limitations of employees is final and only subject to review by the Commissioner, the Union has failed to allege a rule or regulation that is reasonably related to Grievant alleged improper placement on sick leave and/or MMR status.

Along the same lines, the City also argues that DOC acted within its managerial prerogative in placing Grievant on sick leave and/or MMR status, and, therefore, the issue raised in the Second RFA is not arbitrable. As stated above, HMD has been charged with the placement of employees on MMR status, their determinations concerning these issues are final, and therefore are not arbitrable.

Union's Position

The First RFA

The Union contends that a nexus does exist between the act complained of, the denial of Grievant's request for a reasonable accommodation, and the provisions cited therein, Article XX of the Agreement and 2232R. Article XX, § 1(b) specifically provides that a grievance is a claimed violation, misinterpretation, or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, and 2232R is a regulation. Since the First RFA

addresses reasonable accommodations pursuant to 2232R, a nexus exists.

In response to the City's argument that 2232R is inapplicable to Grievant because she was on MMR3 status, the Union contends that DOC improperly placed Grievant on MMR3 status in order to avoid granting her reasonable accommodation request. Moreover, 08/87, which according to the City excludes the First RFA from arbitration, is also a regulation, thereby rendering 08/87 arbitrable.

The Union also argues that the City's invocation of its managerial prerogative is inapplicable in the instant matter and does not render the subject of the First RFA non-arbitrable. Even though the City contends that HMD's determinations are final and not subject to arbitration, disputes regarding medical opinions involving DOC employees are routinely heard by arbitrators. The City's failure to cite to any precedents that precludes arbitrators from hearing medical determinations highlights the inherent fault in the City's argument.

The Union further contends that the City's mootness argument is inapplicable because Grievant would have been able to work if she had been given a reasonable accommodation. However, DOC decided to find that Grievant was unable to work any post, and therefore was not entitled to a reasonable accommodation. Thus, the issue raised in the First RFA, whether DOC violated 2232R by rejecting her reasonable accommodation request, is still ripe for a determination by an arbitrator.

The Second RFA

The Union contends that there is a clear nexus between the subject of the Second RFA, the placement of Grievant on sick leave and MMR3 status, and the provisions invoked therein, 78-14, 08/87, 56/88, and 2262R. The Agreement defines a grievance as, *inter alia*, a violation of a DOC

regulation, which these above-stated provisions clearly are. The placement of Grievant on sick leave and/or MMR status is an alleged violation of DOC regulations, is reasonably related to provisions invoked in the Second RFA, and thus, gives rise to arbitration rights. Therefore, the City's challenge to the arbitrability should be dismissed.

With regards to the City's mootness argument, the Union contends that Grievant's placement on sick leave and/or MMR3 status has prejudiced her and may, in the future, continue to prejudice her. Grievant's personnel file still documents her placement on sick leave and MMR3 status and may lead to her being labeled as chronically absent, thereby subjecting her to in-house confinement if she were to be injured again. In addition, the issue raised in the Second RFA is still ripe for an arbitrator's determination because, due to the placement of Grievant on sick leave and MMR3 status, she still has not received a reasonable accommodation from DOC.

The Union, in response to the City's managerial rights argument, contends that, assuming *arguendo* that DOC's ability to place employees on sick leave and/or MMR status is a managerial prerogative, DOC's issuance of these regulations rendered these topics grievable and arbitrable, to the extent so covered in the regulations. Thus, by promulgating 78-14, 08/87, 56/88, and 2262R, DOC removed disputes concerning these issues from the protection of managerial prerogative, and are now rendered arbitrable.

DISCUSSION

These cases present two questions: first, whether the sick leave policy's description of HMD's determination as "final" renders such determinations not arbitrable; and second, whether employees on MMR status are precluded from receiving a reasonable accommodation. We conclude

that the language contained in 2262R regarding the finality of HMD's determination of sick leave and/or MMR status renders these decisions outside the scope of the contemplated arbitration provision. However, we further conclude that the express language of 2232R is not unambiguous on its face as it relates to the eligibility of DOC employees on MMR status to seek a reasonable accommodation, and thus a sufficient nexus exists between this regulation and the act complained by Grievant. Therefore, we grant the City's petition challenging the arbitrability of the Second RFA, but dismiss the City's petition challenging the arbitrability of the First RFA.

In general, this Board's statutory directive is to promote and encourage impartial arbitration as the selected means for the resolution of grievances, NYCCBL § 12-302. *See New York State Nurses Ass'n*, Decision No. B-21-2002, *citing Matter of Board of Education [Watertown Education Ass'n]*, 93 N.Y. 2d. 132 (1999). However, we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *United Marine Division, Local 333, ILA*, Decision No. B-12-2005 at 8; *Soc. Serv. 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.

We find that both grievances satisfy the first prong of this Board's arbitrability standard

because the Union and DOC are obligated to arbitrate their controversies through the grievance procedure set forth in the Agreement, and we find that no statutory, contractual or court-enunciated public policy restrictions are applicable. We now turn to the second prong of the arbitrability standard.

In examining the second prong of this standard as it relates to the Second RFA, we are presented with the issue of whether HMD's placement of Grievant on sick leave and/or MMR3 status violated the referenced provisions of 74-18, 08/87, 56/88, and 2262R. We find that DOC's placement of Grievant on sick leave and/or MMR3 status is not arbitrable because HMD's determination is final and, therefore, not grievable.

This Board held in *Uniformed Firefighters Ass'n, Local 94*, Decision No. B-10-79, that when a contract provides that certain actions or decisions of the employer are "final," such actions or decisions are not subject to arbitration. *See Id.* at 7-8 (stating that an employer's decisions regarding involuntary transfers were "final," and, thus, the "natural language" of the regulation mandated that such decisions were not arbitrable); *see also Communication Workers of America*, Decision No. B-19-81 at 14-16; *Correction Officers Benevolent Ass'n*, Decision No. B-24-86 at 5.

This same principle has been consistently applied to executive memorandum and agency rules, regulations, and written policies. *See United Probation Officers Ass'n*, Decision No. B-47-88 at 5 and 16 (holding that the language of an executive memorandum involving involuntary transfers, which specifically stated that "all transfer decisions . . . shall be final," removed the substantive result of the managerial decision from arbitration); *see also Detective Endowment Ass'n*, Decision No. B-10-99 at 7 (express language of procedure stating the Health Services Division determinations are "final," precludes arbitration of decisions on line-of-duty injury designations); *Communications*

Workers of America, Local 1180, Decision No. 20-2000 at 5.

In the instant matter, we find that the Second RFA seeking to arbitrate HMD's determination of placing Grievant on sick leave and/or MMR3 status, is precluded by the language of 2262R, which expressly provides that HMD's determinations regarding the physical health of DOC employees are final. Therefore, such decisions are not grievable and not arbitrable. Additionally, 56/88 provides that only HMD can place uniformed employees on MMR status, 08/87 states that HMD is responsible for the assignment of MMR status employees, and 2262R sets forth that HMD's determination regarding the medical conditions and/or limitations of DOC employees, including assignment of MMR status are final. Therefore, the language of 2262R leaves no room for doubt that HMD's determination is not subject to be submitted to the grievance and arbitration procedure. Based upon this Board's precedents, we find the Second RFA not arbitrable because the express language of 2262R precludes the submission of this grievance to arbitration, and thus, no nexus exists between the act complained of and the provisions invoked.

Regarding the City's challenge to the arbitrability of the First RFA, the question presented is whether employees assigned to MMR status are eligible to receive reasonable accommodations under 2232R, or whether employees on MMR status are precluded by the express terms of this regulation. If, in fact, MMR employees are eligible for reasonable accommodations under 2232R, then the next question posed must be whether Grievant's request for a reasonable accommodation was improperly denied by DOC. We find that the language of 2232R, on its face, does not unambiguously preclude all DOC employees assigned to MMR status from receiving a reasonable accommodation. As for the second question posed, we decline to answer it, as it relates to the underlying merits of the case and is more properly before an arbitrator.

We have long held that "where contract language or a provision of a departmental order or policy is clear and unambiguous on its face . . ., we will look no further into the intent of the parties or to other provisions of the policy at issue." *Patrolmen's Benevolent Ass'n*, Decision No. B-68-89 at 6, *citing Communication Workers of America, Local 1182*, Decision No. B-19-75 at 18. In *Communication Workers of America, Local 1182*, a union which was not a signatory to the applicable Citywide Agreement attempted to grieve a violation of the Citywide Agreement as it related to members in its bargaining unit. Decision No. B-19-75 at 15. The Board held that there was no doubt, on the face of the contract, that the wording precluded any other union from seeking the benefit afforded by this provision. *Id.* at 18. Therefore, the union could not take this grievance to arbitration.

In *Doctors Council*, Decision No. B-4-84, the union sought to arbitrate a claimed violation of a contract provision when several employees were either laid off or had their hours reduced. The union cited a provision in the parties collective bargaining agreement, entitled "Job Security"which stated that, with respect to "abolition of positions, reductions in staff, demotion and preferred lists," employees of the New York City Health and Hospitals Corporation ("HHC") would be governed by personnel rules and regulations. *Id*. at 2. HHC argued that this dispute was not arbitrable because the language of this provision set forth that the actions being grieved were governed by the personnel rules and regulations. This Board held that the language of this contract provision was not clear and unambiguous, and that "the matters presently being grieved (i.e. layoffs and reductions in hours) are arguably encompassed by the aforementioned categories." *Id.* at 10.

In the instant matter, we find that the language of 2232R, which allegedly precludes DOC employees on MMR status from obtaining a reasonable accommodation and availing themselves of

the rights contained in this regulation, is not clear and unambiguous. The City argued that the following language excluded DOC employees on MMR status from receiving a reasonable accommodation, if requested: "The provisions of this Directive [2232R] are not intended to supercede Operations Order 08/87, which applies to members in temporary limited duty (Medically Monitored Returned [MMR]) status, due to a disability that is not expected to be permanent." (Petition, Exhibit C.) Upon examining 08/87, we find that this regulation addresses the manner in which employees on MMR status receive their assignments and from whom they receive these assignments. This regulation never references reasonable accommodations, and does not explicitly exclude employees on MMR status from receiving these accommodations. Therefore, we find that this grievance raises a question of the interpretation of 2232R and the applicability of this regulation to DOC employees on MMR status. Accordingly, 2232R does not preclude the First RFA from proceeding to arbitration.

We further find that the Union established a reasonable relationship between the denial of Grievant's request for a reasonable accommodation, and 2232R. Under the Agreement, a "grievance" is defined as "a claimed violation, misinterpretation, or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." (Agreement, Article XX, § 1(b)). Further, 2232R is a DOC rule, regulation, and/or procedure that affects terms and conditions of employment, and, since the First RFA alleges that DOC violated 2232R when it denied Grievant's request for a reasonable accommodation, we find that a nexus exists. Therefore, we dismiss the City petition and grant the Union's 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 petition challenging arbitrability filed by the City of New York and the Department of Corrections, docketed as BCB-2575-06, and the same hereby is, dismissed; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York and the Department of Corrections, docketed as BCB-2576-06, and the same hereby is granted; and it is further

ORDERED, that the request for arbitration filed by Correction Captains Association, on behalf of Captain Donnezzetta Brown, docketed as A-11995-06, and the same hereby is granted; and it is further

ORDERED, that the request for arbitration filed by Correction Captains Association, on behalf of Captain Donnezzetta Brown, docketed as A-11996-06, and the same hereby is denied.

Dated: March 29, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER