SSEU, Local 371, 9 OCB2d 10 (BCB 2016)

(Arb.) (Docket No. BCB-4140-15) (A-14992-15)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that DHS violated the parties' collective bargaining agreement by refusing to provide the Grievant with Fridays off as a religious accommodation, rejecting a request for an alternative work schedule, and violating provisions regarding shift assignments. The City argued that the Union failed to establish the requisite nexus between the subject of the grievance and the collective bargaining agreement. The Board found that, with the exception of the EEO policy claim, a nexus existed as to the Union's claims. Accordingly, the Board granted, in part, and denied, in part, the City's petition challenging arbitrability. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
on behalf of JESSE PENDER,

Respondent.

DECISION AND ORDER

On December 11, 2015, the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by Social Services Employees Union, Local 371 ("Union") on behalf of Jesse Pender[1] ("Grievant"). The Union alleges that the Department of Homeless Services ("DHS") violated Article IX, §§ 3 and 7 of the

[1] Subsequent to the filing of the petition, the Grievant legally changed his name to Abdul-Wahhab Ibrahim.

collective bargaining agreement ("Agreement"), Personnel Services Bulletin 440-4 ("PSB 440-4"), and DHS's EEO policy by refusing to provide the Grievant with Fridays off as a religious accommodation, rejecting a request for an alternative work schedule, and violating provisions regarding shift assignments. The City argues that the Union has failed to establish the requisite nexus between the subject of the grievance and the Agreement. The Board finds that, with the exception of the EEO policy claim, a nexus exists as to the Union's claims. Accordingly, the Board denies, in part, and grants, in part, the City's petition challenging arbitrability.

BACKGROUND

The Grievant is a Community Assistant ("CA") at Bellevue Men's Shelter, located at 400 East 30th Street. The Union is the duly certified collective bargaining representative for the CA title. The City and the Union are parties to the Agreement.

The Grievant commenced his employment at DHS on September 23, 2013 and was assigned to the Sunday to Thursday 8 am to 4 pm shift ("Grievant's Original Shift"). On or about January 2015[2], the Grievant resigned from DHS to accept a position at the New York City Housing Authority. At or about the end of February 2015[2], the Grievant returned to his former DHS position at the Bellevue Men's Shelter and was assigned to the 4 pm to 12 am shift on Mondays, Tuesdays, Fridays, Saturdays and Sundays. According to the Union, at the time of the Grievant's return to DHS in February 2015[2], Grievant's Original Shift was available and not posted, and instead, assigned to an employee with less seniority than the Grievant.

[2] The parties corrected their pleadings to reflect that Grievant's resignation date was in January 2015 and that his return date was in February 2015.

The Grievant is a practicing Muslim. On or about March 23, 2015, he submitted an application for a reasonable accommodation to DHS's EEO office, requesting off on Thursdays and Fridays or Fridays and Saturdays to participate in Friday Jumuaa services.[3] In response to the Grievant's accommodation request, on or about April 1, 2015, DHS offered, and the Grievant declined, a shift modification to a 6 pm Friday start time with the option of making up additional hours during the week. On April 3, 2015, the Grievant reiterated his request to be off on Thursdays and Fridays or Fridays and Saturdays to DHS's Executive Director of Diversity and Equal Opportunity ("EEO Director"). On April 14, 2015, the EEO Director advised Grievant that DHS was unable to grant his request for Fridays off and that he could appeal this decision within ten days.

On or about April 21, 2015, the Grievant filed a Step I grievance, alleging that DHS violated a rule and regulation or policy by denying him Fridays off for religious observance and on or about April 22, 2015, appealed the EEO Director's April 14, 2015 decision. DHS did not respond to the Step I grievance. Consequently, on May 4, 2015, the Grievant filed a Step II with DHS's Deputy Director of Labor Relations ("Deputy Director"), alleging a "violation, misinterpretation or misapplication of rules and regulations, policy, or orders applicable to DCAS Personnel Service Bulletins and EEO Policy II Specific Protections."[4] (Pet., Ex. 1, p. 5)

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[3] A Jumuaa is a congregational prayer that Muslims hold every Friday. In support of his application for a reasonable accommodation, the Grievant provided a letter from his Imam, indicating that his participation in Friday Jumuaa services is mandatory. *See* Pet. Ex. 3.

[4] The Union submitted a copy of PSB 440-4 with its Answer. Neither party submitted a copy of the DHS EEO policy.

PSB 440-4, titled "Time Off for Religious Observance," provides:

> **I Policy**
>
> Reasonable accommodations are to be made for the needs of employees requesting time off for religious observance.
>
> **II Procedure**
>
> Leave for religious observance is to be charged against annual leave and compensatory time balances. Employees with no accrued annual leave or compensatory time balances may be advanced annual leave to be charged against future annual leave accruals.
>
> Agencies must schedule adequate support staff to ensure that the operations of all agencies and services are not adversely affected.

(Ans. Ex. D)

On July 2, 2015, the Grievant appealed to Step III, alleging a "violation, misinterpretation, or misapplication of rules and regulations, policy, or orders." (Pet., Ex. 1, p. 6) On August 14, 2015, the Deputy Director of Labor Relations denied the Step II grievance, finding that DHS "did try to reasonable [sic] accommodate [the Grievant's] religious observance by offering an alternative that would not create an undue hardship." (Pet, Ex. 7, p. 2) Similarly, on August 25, 2015, DHS denied the grievance at Step III because the "allegations regarding violations of [an] EEO policy and the failure to provide a day off for religious observance do not meet the definition of a grievance in the Citywide Agreement or the Social Services and Related Titles Agreement." (Pet., Ex. 1, p. 7)

On October 22, 2015, the Union filed a request for arbitration, alleging:

> a violation, misapplication or misinterpretation of [the Agreement] including but not limited to Article 6, [§] 1b and [DHS] EEO Policy and Rules and Regulations, in that the grievant is a practicing Muslim and is requesting Friday (his Sabbath) off for his religious observance.

(Pet., Ex. 1, p. 2)

Article VI, §1 of the Agreement sets forth a grievance procedure, which, in relevant part, defines a grievance as:

> (a) A dispute concerning the application or interpretation of the terms of this Agreement; or
>
> (b) 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 terms and conditions of employment; provided disputes involving the Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the Health and Hospital Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration.

(Ans., Ex. B, p. 43)

In its February 4, 2016 Answer, the Union also specified violations of Article IX, §§ 3 and 7 of the Agreement titled "Hours and Schedules," which provides, in relevant part:

> **Section 3:**
> The Employer, when administratively possible, shall grant an alternative work schedule to an employee who requests such schedule for good and sufficient reason. The decision on such requests shall be made by the agency head or his/her designee. Rejection of such request shall be subject to the grievance procedure.
>
> **Section 7**
> Voluntary changes from one shift to another shall be made on the basis of greatest seniority in the work location from among per annum employees who are qualified.

> Involuntary changes shall generally be made on the basis of least seniority of those qualified within a work location; however, if changes are directed out of seniority, such changes shall not be arbitrary or capricious. In the event that HRA establishes new shifts, qualified incumbent per annum Employees at the affected work location whose shifts are most closely approximate the new shifts shall have, if practicable, priority according their seniority filling vacancies on the new shift. A complaint with respect to such changes shall constitute a grievance subject to the grievance procedure of this Agreement.

POSITIONS OF THE PARTIES

City's Position

The City argues that an EEO policy does not establish any substantive rights and that redress of its violation, misapplication, or misinterpretation is not available through arbitration. The City asserts that EEO policies consist of statements of goals or policy "couched in general and precatory language" that this Board has previously found not arbitrable under contract language identical to that found in the Agreement. *See DC 37, L. 2507*, 6 OCB2d 9, at 13-14 (BCB 2013); *Local 371, SSEU*, 61 OCB 7, at 6-7 (BCB 1998); *Local 371, SSEU*, 37 OCB 1, at 14 (BCB 1986). The City also argues that PSB 440-4 is substantively equivalent to an EEO policy, and that its claimed violations are not arbitrable for the same reasons. Further, the City argues that it complied with PSB 440-4 by offering the Grievant several religious accommodations and that PSB 440-4 does not require DHS to provide the Grievant with the accommodation of his choice.

With respect to the Article IX, § 3 claim, the City argues that it is not arbitrable because it was not cited in the request for arbitration; however, it acknowledges that the Article IX, § 3 claim "relies on the same facts presented in the RFA and in all of [the Grievant's] requests [. . .] for religious accommodation." (Rep. ¶ 21) Notwithstanding,

the City asserts that DHS complied with Article IX, § 3 because it did not reject Grievant's request for an alternate work schedule. Rather, the City argues that it offered Grievant several alternate work schedules, which he refused.

Finally, the City argues that DHS has a management right to determine shift allocation and the use and distribution of overtime to cover vacant positions and that it complied with Article IX, § 7 because the assignment of Grievant's Original Shift to a less senior employee occurred before the Grievant submitted his request for a religious accommodation.

Union's Position

The Union argues that DHS's denial of the Grievant's request to have Fridays off violates Article IX, §§ 3 and 7 of the Agreement and PSB 440-4, redress of which is available under Article VI, §§ 1(a) and 1(b) of the Agreement, and that these contractual violations establish the requisite nexus. The Union further argues that the City was put on notice of its Article IX, §§ 3 and 7 claims because the request for arbitration alleges "a violation, misapplication or misinterpretation of the Agreement, including but not limited to Article 6 Section 1b." *(*Ans. ¶ 39)

With respect to its Article IX, § 3 claim, the Union asserts that the Grievant's request for Fridays off for religious observance was administratively possible because DHS could assign the Grievant to shifts on other days that were regularly covered by others as overtime. Therefore, the Union argues, the Grievant was entitled to the requested alternative work schedule, and DHS's denial is explicitly subject to challenge via Article VI, § 1(a) of the Agreement's grievance procedure. With regard to its Article IX, § 7 claim, the Union contends that upon the Grievant's return to DHS in February

2015, he was denied an available Sunday to Thursday 8 am to 4 pm shift because DHS did not post the shift and instead, assigned it to another employee with less seniority. Similarly, the Union argues that the Grievant was entitled to his Original Shift, and DHS's denial is subject to challenge under Article VI, § 1(a) of the Agreement's grievance procedure.

DISCUSSION

The City challenges the arbitrability of a grievance alleging violations of Article IX, §§ 3 and 7 of the Agreement, PSB 440-4, and DHS's EEO policy for refusing to provide the Grievant with Fridays off as a religious accommodation. The Board finds that a nexus exists between the subject of the grievance and the Agreement as to Article IX, §§ 3 and 7, and PSB 440-4, but that no nexus exists for the EEO policy claim.

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." Section 12-302 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"); *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). As such, "the NYCCBL explicitly promotes and encourages the use of arbitration, and 'the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration.'" *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)); *see also DC 37*, 13 OCB 14, at 11 (BCB 1974).

Under NYCCBL § 12-309(a)(3), the Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." However, the Board "cannot create a duty to arbitrate if none exists, [nor can we] enlarge

a duty to arbitrate beyond the scope established by the parties" in their collective bargaining agreements. *DC 37, L. 768,* 4 OCB2d 45, at 12 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 12); *see also CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L.371*, 69 OCB 34, at 4 (BCB 2002). The Board applies a two-pronged test to determine whether a grievance is arbitrable. This test considers:

> (1) whether the parties are 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 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 9 (BCB 2011)) (citations and internal quotation marks omitted).

Here, it is undisputed that the parties agreed to resolve certain disputes through a grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute or the constitution. Therefore, the first prong of the test is satisfied.

With respect to the second prong, the burden is on the Union "to demonstrate a . . . [reasonable] 'relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *PBA*, 4 OCB2d 22, at 13 (quoting *PBA*, 3 OCB2d 1, at 11 (2010)); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). Such a showing "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact constitute 'an interpretation of the agreement that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16

(BCB 2008) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . [as] where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

Article IX, §§ 3 and 7 Claims

As a threshold matter, we address the City's contention that the Union's failure to cite Article IX, § 3 in the request for arbitration renders its grievance not arbitrable.[5] We have long held that we will "not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." *SSEU, L. 371, 3* OCB2d 53, at 6-7 (BCB 2010) (citations omitted); *see also DEA,* 43 OCB 73, at 6 (BCB 1989). Thus, "if the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." *SSEU, L. 371,* 3 OCB2d 53, at 7.

We find that Petitioners had sufficient notice of the nature of the Union's Article IX, § 3 claim, and that their ability to respond to the grievance was not impaired from its omission from the request for arbitration. In fact, the City acknowledges that the Article IX, § 3 claim "relies on the same set of facts presented in the RFA and in all [the Grievant's] requests [. . .] for religious accommodations." (Rep. ¶ 21) Consequently,

[5] The City did not advance this argument in connection with the Article IX, § 7 claim.

DHS was aware of the nature of this controversy since the Grievant's submission of the April 21, 2015 Step I grievance and had ample opportunities to settle the dispute at Steps I, II, and III of the grievance process. Accordingly, we find no basis to preclude the arbitration of the Article IX, § 3 claim on the basis of its exclusion from the request for arbitration.

We also find that a nexus exists between the alleged violations of Article IX, §§ 3 and 7 and DHS's refusal to provide the Grievant with Fridays off as a religious accommodation. Article IX, §3 pertains to employee requests for alternative work schedules, and the Union claims that the denial of the Grievant's requested schedule change constitutes the rejection of such a request. Article IX, §7 sets forth the requirements for voluntary and involuntary shift assignments, and the Union claims that DHS's failure to post Grievant's Original Shift and its assignment to a less senior employee violates those requirements. Thus, we find a nexus with Article IX, §§ 3 and 7.[6] Further, while the City presents several arguments as to its compliance with Article IX, §§ 3 and 7, these are defenses that may be raised when the merits of the grievance are considered. *PBA*, 4 OCB2d 22, at 13. ("Once an arguable relationship [exists], the Board will not consider the merits of the grievance.") Accordingly, we find the Article IX, §§ 3 and 7 arbitrable under Article VI, § 1(a) and deny the City's petition challenging arbitrability as to these claims.

[6] While not necessary for our finding of a nexus, we note that Article IX, §§ 3 and 7 expressly provide for the submission of disputes arising out of its provisions to the grievance process.

PSB 440-4 Claim

Similarly, we find that a nexus exists with regard to PSB 440-4. The substance of PSB 440-4 addresses granting time off as a reasonable accommodation for religious observance and describes procedures agencies should follow for making such accommodations. This Board has held that "[t]he arbitrability of PSB's, just like their predecessor PPPs cannot be determined in a categorical manner, but rather turns upon the nature of the PSB in question." *OSA*, 1 OCB2d 42, at 17. As a written employer policy, a PSB is arbitrable if it "generally consist[s] of a course of action, method or plan, procedure or guidelines [. . .] promulgated by the employer, unilaterally, to further the employer's purposes, comply with the requirements of the law or otherwise effectuate the mission of the agency" and where redress is available through the grievance procedure. *DC 37, L. 2507,* 6 OCB2d 9, at 13 (quoting *DC 37, L. 1549,* 61 OCB 50, at 9 (BCB 1998)); *DC 37, L. 1407,* 75 OCB 7, at 14 (BCB 2005); *L. 371, SSEU,* 61 OCB 7, at 6; *See OSA*, 1 OCB2d 42 (finding a PSB issued by DCAS arbitrable under the identical grievance language as in the Agreement); *DC 37*, 39 OCB 28 (BCB 1987) (finding arbitrable a Personnel Policy and Procedure ("PPP") that established evaluation requirements). On the other hand, written policies "couched in general and precatory language, [which] merely constitute statements of goals or objectives," are not arbitrable. *DC 37, L. 2507*, 6 OCB2d 9, at 14 (finding an agency memo suggesting a method for implementing the consolidation of two work units was not arbitrable); *L. 371, SSEU*, 61 OCB 7, at 6 (BCB 1998) (finding an agency procedure regarding the processing of EEO complaints that informed employees of their rights was not arbitrable); *L. 371, SSEU*, 37 OCB 1, at 14 (BCB 1986) (finding a PPP relating to the

goals and objectives of the probationary period was not arbitrable). PSB 440-4 is not merely an EEO policy containing general and precatory language, nor does it merely set forth goals and objectives. Rather, it sets forth a course of action, method or plan, procedure or guidelines promulgated by the City to comply with the requirements of the law and is directly related to DHS's denial of the Grievant's request for Fridays off for religious observance. Further, it is not disputed that PSB-440, which was issued by DCAS, applies to DHS. Accordingly, we find PSB 440-4 arbitrable under Article VI, §1(b) and deny the City's petition challenging arbitrability as to this claim. [7]

EEO Policy Claim

Finally, to the extent the Union seeks to submit an alleged EEO policy violation to arbitration, we find that that the Union has not met its burden of establishing a nexus between the subject of the grievance and the collective bargaining agreement. The Union cites an alleged violation of the DHS EEO policy in its request for arbitration, but does not provide a copy of the policy or offer any arguments or other information to support a finding of arbitrability. Without this information, the Board cannot assess whether the policy is arbitrable. *SSEU, L. 371*, 77 OCB 4, at 8 (BCB 2006) (petition challenging arbitrability was granted where the union failed to provide the content of a procedure whose violation it sought to arbitrate). Accordingly, we grant the City's petition challenging arbitrability as to the EEO policy claim.

[7] Our conclusion does not modify our finding in *L. 371, SSEU*, 77 OCB 4 (BCB 2006), that DCAS personnel rules that merely restate sources excluded from arbitration are not arbitrable. This issue was not raised here. Further, the City's arguments as to its compliance with PSB 440-4 pertain to the merits of the grievance and are for an arbitrator to consider. *See PBA*, 4 OCB2d 22, at 13; *OSA*, 1 OCB2d 42, at 16.

In conclusion, we find that the portion of the petition challenging arbitrability of the DHS EEO policy is granted, whereas the portions of the petition challenging the arbitrability of Article IX, §§ 3 and 7 and PSB-440 are 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 portion of the petition challenging arbitrability filed by the City of New York and the New York City Department of Homeless Services, docketed as BCB-4140-15, hereby is granted as to the DHS EEO policy, and denied as to Article IX, § 3 and 7 and PSB 440-4, and it is further

ORDERED, that the request for arbitration filed by Social Services Employees Union, Local 372, docketed as A-14992-15, hereby is granted as to Article IX, § 3 and 7 and PSB 440-4.

Dated: May 25, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER