SSEU, L. 371, 9 OCB2d 31 (BCB 2016)

(Arb.) (Docket No. BCB-4180-16) (A-15132-16)

Summary of Decision: HHC challenged the arbitrability of a grievance alleging a wrongful termination. HHC argued there was no nexus with the Agreement because its action was not disciplinary and its action was a proper exercise of its statutory management rights. The Board found that the Union established the requisite nexus. Accordingly, the petition challenging arbitrability was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH + HOSPITALS,
Petitioner,

-and-

SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371,
on behalf of NORMAN BLACKSHEAR,

Respondent.

DECISION AND ORDER

On July 11, 2016, Social Services Employees Union, Local 371 ("Union"), filed a request for arbitration on behalf of Norman Blackshear ("Grievant") alleging that New York City Health + Hospitals[1] violated Article VI of the Social Services & Related Titles collective bargaining agreement ("Agreement"), when it wrongfully disciplined Grievant by terminating him without affording him the due process rights provided in the Agreement. On August 30, 2016, HHC filed

[1] We refer to New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

a petition challenging the arbitrability of the grievance. HHC contends that Grievant's termination was not disciplinary, as the Union alleges, but was due to Grievant's failure to successfully maintain security clearance for Riker's Island as required for his employment and, as such, the Union's claim does not fall within the scope of the Agreement's provision to arbitrate alleged wrongful disciplinary actions. HHC further asserts that the termination was a proper exercise of its statutory management rights. Therefore, HHC argues that the Union has failed to establish the necessary nexus between the termination of Grievant, and the Agreement or HHC's rules, regulations, or written policies. The Board finds that the Union established the requisite nexus because it raised a question as to whether the termination was disciplinary. Accordingly, the petition challenging arbitrability is denied.

BACKGROUND[2]

Grievant was continuously employed by the City of New York ("City") at Correctional Health Services ("CHS") on Riker's Island for 18 years, from in or about 1997 until his termination in 2016.[3] At the time of his termination, Grievant was a permanent Caseworker represented by

[2] HHC did not file a reply. *See* Section 1-07(c)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("A]dditional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply.").

[3] When Grievant began working at CHS on Riker's Island he was employed by HHC. In or about 2003, the functions of CHS, including Grievant's functions, were transferred to the City Department of Health and Mental Hygiene ("DOHMH"). In 2015, HHC resumed responsibility for CHS, including Caseworkers employed on Riker's Island. As a result, in or about July 2015, Grievant was transferred from DOHMH to HHC.

the Union. The Union and HHC are parties to the Agreement.[4] Article VI, §§ 1(b), (e) and (g), of the Agreement define the term "Grievance" as:

> 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 Rules and Regulations of [HHC] 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;
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> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law or a permanent Employee covered by the Rules and Regulations of [HHC] upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status.
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> g. Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of [HHC] upon a permanent Employee covered by Section 75(1) of the Civil Service Law or a permanent Employee covered by the Rules and Regulations of [HHC] where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.

(Pet., Ex. 1) Article VI, § 5, of the Agreement, entitled "Disciplinary Procedure for Permanent Competitive Employees," sets out the multi-stage procedure that governs upon the service of written charges of incompetence or misconduct in any case involving a grievance under Article VI, § 1(e). (Pet., Ex. 1)

[4] Pages from the parties' 2005 to 2008 Agreement were attached to the petition challenging arbitrability. The parties have confirmed that the applicable contract language remains the same in the most recent Agreement.

In or about 1997, Grievant began working at CHS on Riker's Island in the civil service title of Public Health Educator. In or around 2005, Grievant was appointed to the civil service title of Caseworker while still working at CHS on Riker's Island. The Union asserts, and HHC does not dispute, that at the time Grievant was appointed to the title of Caseworker, he was not informed that access to Riker's Island was a qualification for the position nor was his appointment subject to that condition.

In or about August 2013, Grievant was interviewed by the City's Department of Investigation ("DOI") regarding its investigation of an allegation that Grievant engaged in inappropriate conduct toward an inmate on Riker's Island. Grievant was not provided the findings of said investigation by either DOI, HHC, or the City's Department of Correction ("DOC"). HHC never brought any disciplinary charges against Grievant regarding the DOI investigation.

According to HHC, on or about April 4, 2016, it received notification from the DOC that Grievant's security access to Riker's Island had been revoked. HHC has not provided any explanation for DOC's revocation of Grievant's security clearance. An undated letter from HHC's Assistant Director of Labor Relations, Central Office/Health & Home, to Grievant, states, in pertinent part:

> As a result of [HHC] assuming responsibilities of [CHS], you were transferred to work at Riker's Island, a correctional facility located in [the City]. On April[ ] 4, 2016, [HHC] received notification from [DOC] that your access to Riker's Island has been revoked indefinitely. Therefore, since working at Riker's Island was a term and condition of your employment, you are administratively terminated effective April 14, 2016.

(Ans., Ex. A) On or about April 14, 2016, Grievant was terminated. Grievant was not served with disciplinary charges in connection with his termination.

We take administrative notice that Caseworker is a City-wide title. According to the Union, and not disputed by HHC, HHC employs Caseworkers throughout its 11 hospitals and its 50 or more locations throughout the City. It is also undisputed that, in addition to its offices on Riker's Island, CHS has two barge-type facilities off of Riker's Island, where similar or related services are performed. The record does not reflect whether the barge-type facilities required the same security clearance as Riker's Island.

On or about April 22, 2016, the Union filed a grievance on Grievant's behalf at Step I(a) of the grievance procedure. The grievance alleged that HHC violated Article VI, §§ 1(b) and (g), of the Agreement when it terminated Grievant without issuing formal charges.[5] The grievance requested "the immediate return of [Grievant] to active duty, or to reinstate [Grievant] to active-payroll until such time he is returned to duty, and made whole for loss of wages & benefits." (Ans., Ex. B)

The grievance was denied at all levels of the step process stating, in pertinent part, that: Grievant "was hired as a Caseworker specifically for Riker's Island" and since DOC revoked his access to Riker's Island indefinitely, "he failed to meet the terms and conditions of his employment which resulted in an administrative termination" (Pet., Ex. 2); and that since "[a]n administrative separation from service for failing to meet the terms and conditions required for employment . . . is distinct from a disciplinary termination for misconduct or incompetence" the grievance lacks a nexus to the Agreement and Rules. (Pet., Ex. 3)

[5] The grievance also alleged that "the inquiry of misconduct and penalty imposed" violated §§ 7.5.1(a), 7.5.3(a) and (b), and 7.5.6 of the HHC Rules and Regulations ("HHC's Rules"). (Ans., Ex. B) For the reasons set forth in footnote 8, we need not address HHC's Rules herein.

On July 11, 2016, the Union filed the instant request for arbitration, which states the grievance to be arbitrated as: "Wrongful disciplinary action, e.g., discharge from employment as a Caseworker effective April 14, 2016." (Pet., Ex. 2) The remedy sought was: "Reinstatement with full backpay, benefits and seniority, and all other appropriate relief as determined by the arbitrator." (*Id*.)

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the Union has failed to establish a nexus between Grievant's termination and the disciplinary provisions of the Agreement because "administrative termination[s]" do not constitute discipline. (Pet. ¶ 29) HHC asserts that this "matter does not fall within the scope of the parties' [A]greement to arbitrate alleged wrongful disciplinary actions." (Pet. ¶ 29) According to HHC, Grievant was not disciplined; rather he was "administratively terminated" due to his failure to maintain his security clearance at the Riker's Island facility. (Pet. ¶ 29) Indeed, HHC "did not serve . . . Grievant with written charges of incompetency or misconduct, nor do any of the circumstances surrounding his administrative termination indicate [HHC's] action was disciplinary in nature." (Pet. ¶ 29) Thus, HHC asserts that Grievant's failure to maintain his security clearance, "a requirement for his employment as a Caseworker," made him ineligible for continued employment with HHC. (Pet. ¶ 36) HHC also asserts that the Union has not alleged anything to support its conclusory assertion of a disciplinary motive, nor did the Union submit any evidence that indicates a punitive intent.

HHC argues that this matter involves a proper exercise of its statutory management right to relieve employees from duty because of lack of work or for other legitimate reasons under §12-307(b) of the New York City Collective Bargaining Law (New York City Administrative Code,

Title 12, Chapter 3) ("NYCCBL").[6] It asserts that it had a legitimate reason to administratively terminate Grievant because he failed to maintain the security clearance required for his employment on Riker's Island. Further, HHC asserts that the Union has the burden to demonstrate a limit on management's right to remove employees for legitimate reasons and it did not do so here.

As a result, HHC asserts that the request for arbitration should be dismissed.

Union's Position

According to the Union, Grievant, a permanent employee covered by the Agreement, was wrongfully discharged without being served with disciplinary charges or being afforded any due process hearings, despite having been employed by the City for more than 18 years and having an unblemished disciplinary record. During the grievance procedure, the Union argued that HHC violated Article VI, §§ 1(b) and (g), of the Agreement, and §§ 7.5.1(a), 7.5.3(a) and (b), and 7.5.6, of HHC's Rules. In its answer to the petition challenging arbitrability, the Union argued that Grievant's discharge was based upon alleged misconduct, and therefore was a wrongful disciplinary action within the meaning of Article VI, § 1(e), of the Agreement. Further, it argued

[6] NYCCBL § 12-307(b) provides, in pertinent part, that:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city, or any other public employer on those matters are not within the scope of collective bargaining . . . .

that such discharge, along with HHC's failure to afford Grievant his due process rights under Article VI, § 5, of the Agreement, establish the requisite nexus between the claims in the grievance and the Agreement.

The Union avers that this is not an instance where an employee was discharged for failing to satisfy a stated qualification for a position, such as a driver's license required to perform a job, or failure to maintain City residency. Here, the Union argues, access to Riker's Island was not a qualification for Grievant's employment as a Caseworker. Indeed, when Grievant was appointed to the Caseworker position he was not informed verbally or in writing that access to Riker's Island was a qualification for his position, nor is there any evidence that his appointment was subject to that condition. Additionally, the Union asserts that there is nothing that limits HHC from assigning him to work at another location as a Caseworker. For example, CHS has two barge type facilities off of Riker's Island, which perform similar or related services to those performed on Riker's Island, and HHC employs Caseworkers throughout its 11 hospitals and its 50 or more locations throughout the City.

The Union asserts that Grievant was discharged based upon a disciplinary investigation which resulted in DOC's revocation of his access to Riker's Island. According to the Union, "[i]nstead of serving [Grievant] with disciplinary charges . . . [HHC] discharged [Grievant] upon the aforesaid [DOC] revocation of [Grievant's] authorization to be present on Riker's Island." (Ans. ¶ 40) Thus, Grievant was discharged without being afforded the contractual due process rights that he had earned after more than 18 years of unblemished service for the City. As a result, the Union requests that the Board deny the petition challenging arbitrability.

DISCUSSION

It is the well-established policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures); *OSA*, 77 OCB 19, at 10 (BCB 2006).[7] In recognition of this policy, the Board has long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *COBA*, 8 OCB2d 30, at 7 (BCB 2015) (citations and quotation marks omitted); *see also CWA, L. 1182*, 77 OCB 31, at 7 (BCB 2006). 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." The Board, however, "cannot create a duty to arbitrate where none exists." *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *UFA, L. 94*, 23 OCB 10, at 6 (BCB 1979)); *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

To determine whether a dispute is arbitrable, the Board applies the following two-pronged test:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so
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> (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

[7] NYCCBL § 12-302 provides that:

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

> subject matter of the dispute and the general subject matter of the Agreement.

COBA, 8 OCB2d 30, at 8; *see also UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011).

Establishing a "nexus between the collective bargaining agreement and the right that the grieving party asserts only requires that the party demonstrate a 'relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *CCA*, 4 OCB2d 49, at 9 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 13); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). This 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)); *see also* N.Y. Civ. Serv. Law § 205.5(d). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . 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 (internal citations and quotation marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

Here, the parties have agreed to submit certain disputes to arbitration. There is also no dispute that the parties have agreed that wrongful disciplinary actions and the failure to serve permanent employees with written charges are subjects that are grievable. Thus, the relevant inquiry is whether there is a reasonable relationship between the act complained of, the alleged wrongful termination, and the cited contractual provisions, Article VI §§ 1(e), 1(g) and 5.[8]

[8] We need not determine whether HHC's Rules cited in the Union's grievance provide a nexus, as we find the matter arbitrable on other grounds. *Local 1180, CWA*, 67 OCB 1, at 7 (BCB 2001) (Board did not reach the question of HHC's Rules where the necessary nexus was established on other grounds).

Where, as here, management claims to have acted pursuant to a statutory right, the Union must allege facts which, if proven, would establish that the act complained of was disciplinary in nature. *DC 37, L. 768*, 4 OCB2d 45, at 12 (BCB 2011); *see also DC 37, L. 375*, 51 OCB 12, at 12-13 (BCB 1993), *affd, NYC Dept. of Sanitation v. MacDonald*, 1993 NY Slip Op 402944[U] (Sup. Ct., New York County, December 20, 1993), *affd*, 215 A.D.2d 324 (1st Dept. 1995), *affd*, 87 N.Y.2d 650 (1996)). It is well established that, "where a grievant makes a sufficient showing that an action ostensibly within management's discretion is in fact undertaken as a form of discipline, such action may be arbitrable under the wrongful discipline provisions of the parties' grievance procedure." *DC 37, L. 768*, 4 OCB2d 41, at 13 (BCB 2011); *see also*, *DC 37, L. 375*, 51 OCB 12; *L. 237, CEU*, 61 OCB 44, at 6 (BCB 1998). "'Whether an act constitutes discipline depends on the circumstances surrounding the act' and, therefore, the Board examines whether specific facts have been alleged that show that the employer's motive was punitive."[9] *DC 37, L. 768*, 4 OCB2d 45, at 13 (quoting *DC 37, L. 375*, 51 OCB 12, at 13). Further, we have repeatedly held that, "[t]he absence of formal written charges will not bar the arbitration of a claim of wrongful discipline, even if the contractual provision upon which the grievance is based requires such written charges." *DC 37, L. 375*, 5 OCB2d 25, at 12 (BCB 2012); *see also Local DC 37, L. 375*, 51 OCB 12, at 13; *DC 37, L. 768*, 4 OCB2d 45, at 13 (BCB 2011); *Local 924, DC 37*, 1 OCB2d 3, at 13-14 (BCB 2008).

Here, we find that the Union's allegations raise a question as to whether Grievant's termination was disciplinary in nature and whether he was afforded his contractual due process rights. The Union alleged that in 2013 Grievant was interviewed by DOI regarding an allegation

[9] A Union's bare allegation that an action was taken for a disciplinary purpose will not suffice. *See DC 37, L. 375*, 51 OCB 12, at 12.

that Grievant engaged in inappropriate conduct toward an inmate on Riker's Island. We recognize that this investigation did not result in disciplinary action at the time, and occurred nearly three years prior to Grievant's 2016 termination. However, the only reason Grievant was given for his termination, "working at Riker's Island was a term and condition of your employment," is simply unsupported by the record. (Ans., Ex. A) Moreover, HHC has not pointed to any authority for its alleged right to "administratively terminate[]" a Caseworker, a title held by many employees throughout HHC, for losing access to Riker's Island.[10] (Pet. ¶ 29) On the contrary, HHC relies on cases that pertain to employee suspensions and/or terminations based on medical disability, actions which are authorized by New York State Civil Service Law. Further, there is no evidence that access to Riker's Island was a qualification of employment for Grievant or for any other Caseworker.[11] Nor has HHC represented that in the absence of access to Riker's Island, Grievant could not have been assigned to work elsewhere.

In light of the above, the record contains sufficient facts to demonstrate a reasonable relationship between Grievant's termination and the cited disciplinary provisions of the Agreement. It is for an arbitrator to decide whether Grievant's termination was a proper exercise of HHC's managerial authority, or a wrongful disciplinary action. *Local 924, DC 37*, 1 OCB2d 3, at 14 (BCB 2008) ("it is well established that the question of whether an employee has been

[10] HHC makes a passing reference to the revocation of Grievant's access to Riker's Island by a "third party." (Pet. ¶ 19) We do not find this to be significant since the revocation of Grievant's access to Riker's Island does not preclude his assignment to work elsewhere.

[11] In this regard, HHC's assertion that maintaining security clearance at Riker's Island was a qualification for Grievant's employment as a Caseworker was conclusory. HHC did not provide a job specification or any other support for said assertion. Moreover, HHC does not dispute the Union's assertion that at the time Grievant was appointed to the Caseworker position in 2005, he was not informed verbally or in writing that access to Riker's Island was a qualification for his position as a Caseworker.

disciplined within the meaning of a contractual term is one to be determined by an arbitrator.") (internal quotations and citations omitted).

Accordingly, the request for arbitration is granted and the petition challenging arbitrability is denied. This matter may properly proceed to 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 New York City Health + Hospitals, docketed as BCB-4180-16, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Social Services Employees Union, Local 371, on behalf of Norman Blackshear, docketed as A-15132-16, hereby is granted.

Dated: December 6, 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

GWYNNE A. WILCOX
MEMBER