1199 SEIU, 10 OCB2d 18 (BCB 2017)

(Arb.) (Docket No. BCB-4198-17) (A-15232-17)

Summary of Decision*:** HHC challenged the arbitrability of a grievance that alleges it violated the layoff provision of the Citywide Agreement by failing to recognize seniority when it reassigned Grievants. HHC argued that this dispute involves its Personnel Rules and is excluded from arbitration and, thus, the Union failed to establish a nexus between the subject matter of the grievance and the layoff provision. The Board found that the Union did not establish a nexus between the grievance and the layoff provision. Accordingly, the petition challenging arbitrability was granted, and the request for arbitration was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY
HEALTH + HOSPITALS CORPORATION,[1]

Petitioner,

-and-

1199 SEIU UNITED HEALTHCARE WORKERS EAST,
on behalf of its members in the laboratory at Coney Island Hospital,

Respondent.

DECISION AND ORDER

On March 9, 2017, the New York City Health + Hospitals Corporation filed a petition challenging the arbitrability of a grievance brought by 1199 SEIU United Healthcare Workers East ("Union") on behalf of its members who work as Clinical Laboratory Technologists

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

("Technologists") in the laboratory at HHC's Coney Island Hospital ("Grievants"). In its request for arbitration, the Union alleges that HHC violated the provision of the Citywide Agreement concerning layoffs by failing to recognize seniority when it reassigned Grievants. HHC argues that there have been no layoffs, only reassignments, which are governed by its Personnel Rules and Regulations ("HHC Personnel Rules"), and are not arbitrable. Therefore, HHC argues that the Union has failed to establish a nexus between the subject matter of the grievance and the layoff provision of the Citywide Agreement because no Grievant was laid off. This Board finds that the Union did not establish a nexus between the grievance and the layoff provision of the Citywide Agreement. Accordingly, the petition challenging arbitrability is granted, and the request for arbitration is denied.

BACKGROUND

The Union is the duly certified collective bargaining representative for the Technologists title. Grievants are Technologists who were assigned to the microbiology area of HHC's Coney Island Hospital, one of the laboratory's seven specialty areas. In 2014, HHC entered into a partnership with Northwell Health ("Northwell"). By late 2016, HHC had decided it would, by February 2017, transfer Coney Island Hospital's microbiology laboratory work to Northwell, resulting in the reassignment of Technologists.

The parties met four times between November 28 and December 19, 2016, to discuss the reassignment of Technologists. The Union acknowledges that HHC stated in these meetings that no Technologists positions were being eliminated, that no Technologists were being laid off, and that some of the Technologists in the microbiology area of Coney Island Hospital would be reassigned to other areas within the Hospital's laboratory department.

On or about December 27, 2016, HHC's Director of Labor Relations at Coney Island Hospital sent a letter to all Technologists assigned to the microbiology subspecialty area at the Hospital that reads, in pertinent part:

> Pursuant to [HHC Personnel Rule §] 7.2, and in the interest of managerial effectiveness, [Coney Island Hospital] will reassign you within Coney Island Hospital effective February 1, 2017. Please be informed that a meeting will be scheduled with Human Resources and the Department in order for you to volunteer for the positions that are available by seniority order. We will notify you of this meeting in the near future.

(Pet., Ex. E) The meeting referenced in the December 27, 2016 letter occurred on or about January 25, 2017. According to HHC, at the meeting, the Technologists who had worked in the microbiology area were notified of all the Technologist vacancies in Coney Island Hospital's laboratory and were able to choose from the available vacancies based on seniority. Thereafter, the Technologists were reassigned to other areas of the laboratory at Coney Island Hospital. According to the Union, employees with less seniority were permitted to remain in their existing laboratory positions, while more senior employees were moved from the microbiology area to other areas of the laboratory. The Union has not identified any Grievant laid off a result of HHC's actions.

The Grievance, Contract Provisions, and HHC Personnel Rules

HHC and the Union are parties to the Microbiologists Unit Collective Bargaining Agreement for the period 2009-2018 ("Microbiologists Agreement"). HHC and the Union are also subject to the 1995-2001 Citywide Agreement ("Citywide Agreement"), which remains in effect under the *status quo* provision of the New York City Collective Bargaining Law ("NYCCBL").

Both the Citywide and the Microbiologists Agreement provide for arbitration. Article XV, § 1, of the Citywide Agreement defines the term "grievance" as "a dispute concerning the application or interpretation of the terms of this Agreement." (Pet., Ex. B) Article VI, § 1, of the Microbiologists Agreement defines a grievance, in pertinent part, to be:

> a. A dispute concerning the application or interpretation of the terms of this Agreement;
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> 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 the New York City Personnel Director or the [HHC Personnel Rules] with respect to those matters set forth in the first paragraph of [§] 7390.l of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration[.][2]

On or about December 19, 2016, the Union filed a group grievance at Step III with the Mayor's Office of Labor Relations ("OLR") alleging, in pertinent part, that: "Management at Coney Island Hospital is in gross violation of the collective bargaining agreement by disregarding members[']rights by displacing them and not recognizing their seniority rights. Management is subcontracting out union work to an outside agency." (Pet., Ex. A)

The grievance references Article XVII and HHC Personnel Rule § 7.6.5.[3] Article XVII of the Citywide Agreement, entitled "Job Security" ("Layoff Provision"), addresses layoffs and transfers to another agency in lieu of layoffs and provides, in pertinent part, that:

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[2] The Board takes administrative notice of § 7390.l of the Unconsolidated Laws, which is part of the HHC Enabling Act. Section 7390.1 reads, in pertinent part, that "[HHC] shall … promulgate rules and regulations consistent with civil service law with respect to policies, practices, procedures relating to … transfers, … procedures relating to abolition or reduction in positions, for personnel employed by the corporation …."

[3] It appears from the context that Article XVII refers to the Citywide Agreement.

> **Section 1: General Layoff Provisions**
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> Where layoffs are scheduled affecting full-time employees in competitive class, non-competitive class, and labor classes the following procedures shall be used:
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> * * *
>
> (c) After meeting and conferring with the designated representatives of the appropriate union, the Employer shall have the right, when necessary, to transfer any employee, in lieu of layoff, from one agency to another provided such transfer is within title (and the employee meets all the legal requirements of the new position) and is being made without loss in pay, benefits, or seniority to the affected employee. The following procedures shall govern:
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> i. Volunteers in order of title seniority.
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> ii. Non-volunteers in order of title seniority among those who would otherwise have to be laid off in the agency from which the transfer is being made.

(Pet., Ex. B) (emphasis in original)

HHC Personnel Rule § 7.6, entitled "Abolition of Position, Reduction in Staff, Demotion and Preferred Lists," provides that layoffs, in general, are to be made in the "inverse order to date of original appointment." (Pet., Ex. C) Section 7.6.5, entitled "Displacement of Employees," provides that more senior employees who have been laid off or demoted have the right to displace (or "bump") employees in the same title with less seniority. *Id.*

HHC Personnel Rule § 7.2, entitled "Reassignments," provides that a "change of assignment to another position in the same title which has the same salary rate and substantially the same educational and/or training requirements and which is under the jurisdiction of the same Appointing Officer shall be regarded as a reassignment." (Pet., Ex. C) Section 7.2.2 further provides that "[a] reassignment may be made at the discretion of the Appointing Officer in the interest of managerial effectiveness." *Id*

HHC Personnel Rule § 2.2.5 sets forth the powers of HHC's Personnel Review Board as: "the power and duties prescribed in [§ 7390(8)(b)] of the [HHC] Act and those specifically enumerated in these Rules." (Pet., Ex. D) Section 7390(8)(b) of the HHC Enabling Act provides, in pertinent part, that:

> Except for matters which are subject to collective bargaining agreement, the personnel review board shall have the right to review, at the [insistence] of any aggrieved employee of [HHC] or any certified employee organization representing such employee, any bylaw, rule or regulation promulgated pursuant to [this section] or any action of [HHC] related thereto and upon such review to direct [HHC] to take or refrain from such action as the personnel review board shall deem proper except, however, nothing contained in [this section] shall abridge the right of [HHC] to exercise any managerial prerogatives which were reserved ….

(Pet., Ex. D)

On January 20, 2017, OLR issued a Step III Reply denying the grievance because "this matter fails to meet the definition of a grievance, precluding review and the finding of a violation; review may only be made through the Personnel Review Board." (Pet., Ex. A)

On January 27, 2017, the Union filed a request for arbitration, stating the grievance as follows: "Due to subcontracting bargaining unit work, members are being laid off, displaced, and management fails to recognize seniority." (Pet., Ex. A)

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the crux of this disagreement stems from how HHC reassigned the Technologists. It contends that those reassignments were made pursuant to HHC Personnel Rule 7.2, and that Article VI, §1(b), of the Microbiologists Agreement explicitly provides that disputes involving the Rules are not subject to arbitration. Thus, according to HHC, to the extent the Union

disagrees with the reassignments, the proper forum is before the Personnel Review Board. Further, Rule 7.2 does not provide that reassignments should be made based on seniority but explicitly provides that "reassignments may be made at the discretion of the Appointing Officer in the interest of managerial effectiveness." (Rep. ¶ 3)

HHC argues that sections of the Citywide Agreement regarding layoffs are not applicable to the instant matter because there were no layoffs. Thus, according to HHC, there is no nexus between the grievance and the sections of the Citywide Agreement cited in the request for arbitration.

Union's Position

The Union argues that the instant matter is arbitrable under the broad definition of grievance found in the Citywide Agreement, which encompasses any "a dispute concerning the application or interpretation of the terms of [the] Agreement." (Ans. ¶ 40) (quoting Pet., Ex. B) According to the Union, the Layoff Provision provides that HHC may transfer any employee within title, provided that volunteers in order of title seniority are given first priority for transfers, and if there are no volunteers, non-volunteers in order of seniority will be transferred. The Union asserts that members with greater seniority were transferred, either to other areas of the laboratory at Coney Island Hospital or to different shifts, while those with less seniority were allowed to remain in their existing slots. Accordingly, the Union argues, this dispute implicates the Layoff Provision and is a proper subject of arbitration.

DISCUSSION

HHC challenges the arbitrability of a grievance concerning Technologists formally assigned to the microbiology area of Coney Island Hospital's laboratory. The Board finds that the Union has not established a nexus to the Layoff Provision of the Citywide Agreement.

It is the policy of NYCCBL "to favor and encourage ... final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). Accordingly, "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." The Board, however, "cannot create a duty to arbitrate where none exists." *PBA*, 4 OCB2d 22, at 12; *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

The Board employs a two-pronged test to determine the substantive arbitrability of a grievance:

> (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
>
> (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.

UFOA, 4 OCB2d 5, at 9 (BCB 2011); *see also NYSNA*, 69 OCB 21, at 7 (BCB 2002).

Regarding the first prong, both the Citywide and Microbiologists Agreements have arbitration clauses, and HHC has not argued in the instant case that there are any court-enunciated public policy, statutory, or constitutional restrictions barring the arbitration of the grievance.[4]

[4] While HHC references its enabling act and the powers of its Personnel Review Board enumerated therein, it has not argued that there is any statutory bar to arbitration in this case. Further, we note that

Regarding the second prong, to establish a nexus between the collective bargaining agreement and the subject of the grievance "a party need only demonstrate a ... '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). By definition, 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* CSL § 205.5(d). "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' interpretations 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).

In the instant matter, the Union alleges a nexus with the Layoff Provision of the Citywide Agreement. That section of the Citywide Agreement is explicitly entitled "General Layoff Provisions," and states that it applies "[w]here layoffs are scheduled." (Pet., Ex. B) The Union did not allege that layoffs were either contemplated, announced, or discussed by HHC, nor has it identified any member who was scheduled to be, or has been, laid off.[5] To the contrary, the Union acknowledged that HHC informed it that no Technologists were being laid off. Moreover, the specific sub-section of the Layoff Provision relied upon by the Union, Article XVII, § 1(c),

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the HHC Enabling Act excludes from the Personnel Review Board "matters which are subject to collective bargaining agreement." (Pet., Ex. D)

[5] The Union's request for arbitration states that "members are being laid off." (Pet., Ex. A) However, the undisputed facts set forth in the parties' pleadings belie that assertion.

provides procedures for the "transfer any employee, in lieu of layoff, **from one agency to another**." (Pet., Ex. B) (emphasis added) The Union has not alleged that any Grievant was transferred to another agency. Indeed, Grievants were moved to other areas of Coney Island Hospital's laboratory. Thus, we find that there is no nexus between the grievance and Article XVII, § 1(c). *See SSEU, L. 371*, 6 OCB2d 16, at 7-8 (BCB 2013) (Board found grievance alleging employee was harassed by co-worker was not reasonably related to contract provision providing that "the relationship between Employer and Employee shall be dignified and professional at all times ..." because that provision could not reasonable be read as applying to conduct between employees). Accordingly, the petition challenging arbitrability is granted, and the request for arbitration is denied.

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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 New York City Health + Hospitals Corporation, docketed as BCB-4198-17, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by 1199 SEIU United Healthcare Workers East, docketed as A-15232-17, hereby is denied.

Dated: September 7, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER