CIR, 12 OCB2d 33 (BCB 2019)

(Arb.) (Docket No. BCB-4342-19) (A-15620-19)

Summary of Decision: HHC challenged the arbitrability of a grievance alleging that the Grievant was subjected to sexual harassment. It argued there was no nexus with the parties' collective bargaining agreement. The Board found that there is a nexus to the collective bargaining agreement. Accordingly, the petition challenging arbitrability was denied, and the request for arbitration was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NYC HEALTH + HOSPITALS,

Petitioner,

-and-

COMMITTEE OF INTERNS AND RESIDENTS, SEIU, LOCAL 1957,

***Respondent*.**

DECISION AND ORDER

On June 26, 2019, the Committee of Interns and Residents, SEIU Local 1957 ("CIR" or "Union"), filed a request for arbitration on behalf of Iliana Sanchez ("Grievant") alleging that she was subjected to sexual harassment in violation of the collective bargaining agreement between New York City Health + Hospitals ("HHC") [1] and the Union ("Agreement"). On July 18, 2019, HHC filed a petition challenging the arbitrability of the grievance. HHC contends that there is no

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

nexus between the grievance and HHC's Equal Employment Opportunity Program, Operating Procedure 20-32 ("EEO Policy"), or the cited provisions of the Agreement.[2] The Board finds that there is a nexus to the Agreement. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

Grievant works for HHC as a Resident-PGY, a title represented by the Union. On or about February 3, 2019, Grievant filed a sexual harassment complaint with HHC's EEO office pursuant to its EEO Policy.[3] HHC conducted an internal investigation and issued a written decision on March 26, 2019, finding "no reasonable cause to establish a violation of the EEO Policy" and advising Grievant that she had the right to pursue a formal complaint with an outside agency. (RFA ¶13) On April 1, 2019, the Union filed a grievance at Step I alleging that Grievant was being subjected to sexual harassment in violation of Article XVIII of the Agreement. On April 17, 2019, HHC issued a Step I response dismissing the grievance because that it "[did] not raise a grievable issue under the [Agreement]." (Ans., Ex. F) The Union appealed the Step I response by letter dated April 30, 2019, which was denied by HHC in a Step II(a) decision dated May 31, 2019. The basis of the denial in the Step II(a) decision was that the "dispute [did] not meet the definition of a Grievance" under the Agreement. (Ans., Ex. H) Pursuant to Step III of the grievance

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[2] HHC also asserts that the EEO Policy is not arbitrable or subject to the grievance procedure. The Union, however, disclaimed that it is seeking to arbitrate under the EEO Policy and limits the request for arbitration to a violation of Article XVIII of the Agreement. Accordingly, we need not address whether a violation of the EEO Policy is arbitrable.

[3] The EEO complaint also listed discrimination based on alienage, citizenship, and race. However, these subjects were not raised in the request for arbitration.

procedure, on June 26, 2019, the Union filed a request for arbitration. On July 18, 2019, HHC filed the instant petition challenging arbitrability.

Article XVIII of the Agreement, entitled "Prohibition Against Discrimination," provides:

> No [HHC] institution shall discriminate against an HSO [House Staff Officer] on account of race, color, creed, national origin, place of medical education, sex, sexual orientation, affectional preference, or age in any matter of hiring or employment, housing, credit, contracting, provision of service, or any other matter whatsoever. Further, in relation to equal employment opportunity in city employment and training for physically handicapped individuals, [HHC] shall follow the procedures set forth in the Mayor's Executive Order No. 14, dated May 21, 1974. Standards and policies affecting HSOs for provision of facilities shall be justly applied to all HSOs.

(Pet., Ex. B)

Article XVI(a) of the Agreement defines the term "grievance" as:

> a. A dispute concerning the application and interpretation of the terms of this collective bargaining agreement.

(Pet., Ex. B) Article XVI of the Agreement also sets out the multi-step grievance procedure culminating in final and binding arbitration.

POSITIONS OF THE PARTIES

HHC's Position

According to HHC, the request for arbitration must be dismissed because the Union has not established a nexus between the grievance and Article XVIII of the Agreement. HHC asserts that it investigated Grievant's complaint pursuant to its EEO policy and an arbitrator does not have the power to determine if [HHC's] response to the Grievant's complaint was appropriate and/or meaningful." (Pet. ¶ 30, 36) In addition, HHC asserts that the EEO Policy is not arbitrable; rather, it only empowers HHC to determine "whether there was a reasonable cause to find that the policy

was violated," and it would be "outside the jurisdiction of the Arbitrator." (Pet. ¶ 36) In support of its position, HHC cites three Board decisions that found certain EEO policies were not arbitrable. HHC argues that the grievance is no more than an expression of disagreement with the outcome of the EEO investigation and that Grievant's only available remedy would be to file a complaint with "an outside civil rights enforcement agency." (Pet. ¶¶ 31-32) Lastly, HHC argues that the respondent in Grievant's complaint was not an HHC employee, thus "[a]ny remedial action would have to be imposed by his employer, and not [HHC]. As such, there is no redress available at arbitration for the Union and the Grievant." (Pet. ¶¶ 37-38)

In sum, HHC argues that there is no nexus between the grievance and the Agreement because EEO policies are not arbitrable, an arbitrator is without jurisdiction to fashion a remedy, and the only recourse available to challenge the outcome of an EEO investigation is through a complaint with an outside agency. Accordingly, HHC claims that the request for arbitration should be dismissed.

Union's Position

According to the Union, a nexus exists between the subject matter of the grievance, sexual harassment, and the Agreement. Article XVI of the Agreement defines a grievance and sets forth the procedure for resolving grievances, which culminates with arbitration. Included within this definition are disputes "concerning the application and interpretation of the terms of this collective bargaining agreement," and the Agreement contains a specific section prohibiting discrimination based on "sex," among other categories. (Pet., Ex. B at 18-19) Here, the Union asserts that Grievant was subjected to discrimination based on sex in the form of sexual harassment due to a hostile work environment, and that HHC did not "adequately address it." (Union Br. at 5) In light of this, the Union asserts that the "nexus between a discrimination grievance and an anti-discrimination

contract provision could not be more obvious." (*Id.*) Thus, the Union requests that the Board dismiss the petition challenging arbitrability.

DISCUSSION

The Union has alleged a source of right – Article XVIII of the Agreement – for its claim that HHC has failed to address Grievant's claim of sexual harassment. The Board finds that there is a reasonable relationship between the subject matter of the grievance and Article XVIII of the Agreement. Accordingly, the petition challenging arbitrability is denied.

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).[4] 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

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[4] 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.

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
>
> (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.

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* CSL § 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, it is undisputed that the parties are contractually obligated to arbitrate disputes as defined by the Agreement, and HHC has not argued that there is any court-enunciated public policy, statutory, or constitutional restrictions. Thus, the first prong is satisfied. Therefore, the relevant inquiry is whether there is a reasonable relationship between the act complained of, the Grievant's allegation of sexual harassment, and the cited provision of the Agreement, Article VIII.

Article XVIII of the Agreement prohibits discrimination based on sex. The Union alleges that this provision has been violated because Grievant was subjected to sexual harassment and that despite HHC's investigation of her complaint, the issue has not been addressed. Therefore, the Union maintains that Grievant has the right to seek redress under the contract. Further, in its answer, the Union makes clear that it does not seek to arbitrate the process HHC followed in investigating Grievant's complaint. Accordingly, we find a nexus between this claim and Article XVIII of the Agreement, as the cited contract provision is directly related to the subject matter of the grievance. The Board "need only find a 'relationship' between the act complained of and the source of the alleged right in order to find a dispute arbitrable, and we have done so here." *DC 37, L. 983*, 6 OCB2d 17, at 11 (BCB 2013); *see also PBA*, 4 OCB2d 22, at 14-15.[5]

[5] *SSEU, Local 371*, 6 OCB2d 16 (BCB 2013) does not compel a different result. In *SSEU, Local 371*, the Board found that a contract provision regarding discourteous conduct did not apply to conduct between employees employed by different agencies and granted a petition challenging arbitrability. In doing so, the Board relied upon a prior decision regarding the same contract language holding that it did not apply to conduct between employees. It also relied on language in the provision limiting the clause to conduct between the employer and employees. In the instant matter, there are no prior Board decisions regarding the cited contract provision, nor does the contract provision contain similar limiting language.

There is no dispute that the subject matter of the grievance is sexual harassment.[6] Rather, HHC argues that this provision of the Agreement embodies the EEO Policy and that EEO policies are not arbitrable. HHC's argument is without factual or legal support, and we reject it.

HHC cites three Board decisions which found that certain EEO policies were not arbitrable. We find that *SSEU, L. 371*, 61 OCB 7 (BCB 1998), *COBA*, 61 OCB 26 (BCB 1998), and *DC 37, L. 1549*, 61 OCB 50 (BCB 1998), are all distinguishable in that they addressed an agency's unilaterally promulgated policy advising employees of their legal rights, and not a contractual provision that prohibits discrimination. Further, one of the three cases supports a finding of arbitrability. In *DC 37, L. 1549*, 61 OCB 50, the union grieved a violation of the collective bargaining agreement in addition to an agency policy. The contract claim was found to have a nexus and was determined to be arbitrable. *Id.*

In addition, the grievance procedure authorizes the arbitrator to issue a "final and binding" determination regarding matters involving "the application and interpretation" of the Agreement. (Pet., Ex. B) Nothing in the Agreement, including Article XVIII, expressly limits the forum that employees may bring discrimination claims. Accordingly, we find no impediment to an arbitrator's jurisdiction to hear the matter. We find that the remaining arguments go to the merits of the dispute and are therefore for the arbitrator to determine.[7]

It is well established that "arguments addressed to questions of remedy are not relevant to the arbitrability of a grievance." *CWA, L. 1180*, 41 OCB 7, at 24 (BCB 1988); *see SSEU, L. 371*, 43 OCB 39, at 22 (BCB 1989) ("We have long held that arguments addressed to questions of

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[6] The parties do not argue that sexual harassment falls outside the definition of sex discrimination.

[7] Our decision does not address the merits of HHC's remaining arguments that compliance with its EEO Policy or actions taken by third parties are defenses to the sexual harassment claim.

remedy are not relevant to the arbitrability of grievances. Neither is the propriety of the remedy sought by the [u]nion."); *DC 37, L. 1549*, 57 OCB 32, at 6 (BCB 1996) (finding the remedy is "separate and distinct" and "not relevant" to the question of arbitrability); *MEBA*, 7 OCB 2, at 4 (BCB 1971) ("The propriety of the remedy sought by the [u]nion…is a question for the arbitrator.").[8]

Accordingly, we find a nexus between the claim that the Grievant was subjected to sexual harassment and Article XVIII of the Agreement. The petition challenging arbitrability is denied, and the request for arbitration is granted.

[8] HHC's citation to *SSEU, Local 371*, 9 OCB2d 10 (BCB 2016) for the proposition that arbitration is not available because an arbitrator would be unable to provide "redress" is unavailing. (Reply at ¶ 18) The cited case provides that arbitration is appropriate "when redress is available through the grievance process." *Id.*; *SSEU, Local 371*, 9 OCB2d, at 12. The quoted language refers to whether the scope of the grievance process includes the dispute at issue. The Board was not addressing whether there were available remedies in 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-4342-19, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Committee of Interns and Residents, SEIU Local 1957, docketed as A-15620-19, hereby is granted.

Dated: October 2, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER