COBA, 13 OCB2d 4 (BCB 2020)

(Arb.) (Docket No. BCB-4358-19) (A-15658-19)

Summary of Decision: The DOC challenged the arbitrability of a grievance alleging that the City violated the DOC's rules regarding the housing of inmates. It argued the grievance fails to establish a nexus with the collective bargaining agreement and that allowing arbitration would interfere with the City's management right to classify inmates, in violation of public policy. The Board found that arbitration would not violate public policy and 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-

THE CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Petitioners,

-and-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On November 13, 2019, the City filed a petition challenging the arbitrability of the grievance that alleges that the New York City Department of Correction ("DOC" or "City") was housing inmates in violation of the DOC's rules. The City contends that there is no nexus between the grievance and the collective bargaining agreement ("Agreement") and that allowing arbitration of the grievance would violate public policy. The Board finds that arbitration of the grievance

would not violate public policy and that there is a nexus to the Agreement. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

The Union and the City are parties to the Agreement, which covers the period of November 1, 2011, to February 28, 2019, and remains in *status* quo pursuant to NYCCBL § 12-311(b). The Agreement includes a grievance process culminating in final and binding arbitration. Article XXI, § 1(b) of the Agreement sets forth the definition of a grievance as including "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." (Pet., Ex. 1)

On September 24, 2018, the Union filed a grievance alleging that the DOC was violating its rules regarding the housing of inmates at the Vernon C. Bain Center ("VCBC"). According to the Union, the DOC's rules prohibit the housing of maximum custody inmates with medium or minimum custody inmates, and maximum custody inmates are being housed with minimum and medium custody inmates. DOC rules require that inmates are assigned a classification score that is relative to their level of "custody" (maximum, medium, and minimum). The grievance states:

> On September 5, 2018 it was made known and verified to the COBA that the Administration at the Vernon C. Bain Center is inappropriately housing inmates at the Command. Inmates with a Classification score of 13-13+ (Maximum custody) are being housed in the same housing areas with Minimum custody inmates (Classification score 0-6) and Medium custody inmates (Classification score 7-12). The Administration is also housing inmates based upon SRG affiliation (same gangs) and not in accordance with their Classification score. There are approximately 34 inmates that are not properly housed.

(Pet., Ex. 2)

The grievance cites to Directive 4100R-D, which concerns "Classification" promulgated by the agency and sets forth rules regarding the classification and housing of inmates. (Ans., Ex. A) In addition, it cites to Directive 6302, the DOC's "Workplace Violence Prevention Program."[1] (Ans., Ex. B)

Under the heading "PURPOSE," Directive 4100R-D provides:

> The inmate classification system is a critical tool for facility managers to ensure the safe and proper housing and management of all inmates committed to the [DOC's] custody. The inmate classification system is designed to minimize the potential for violence, escape, and institutional misconduct based upon objective criteria predictive of behavior. Classification includes establishment of a custody score and a custody level, and the identification of inmates who have special housing and other needs or require special status designation. It consists of an initial and reclassification process, both of which have been tested and validated on the [DOC] inmate population. These two assessment processes (initial and reclassification) inform the assignment of inmates to the most appropriate custody level and housing units, and management strategies.

(Ans., Ex. A at 1) Under the heading "POLICY," § E of this Directive provides:

> E. Inmates shall be housed in accordance with their custody level and special housing needs.
>
> 1. Inmates in the general population who are classified as maximum custody shall not under any circumstances be housed with minimum or medium custody inmates.

* * *

[1] The Union highlights § (B)(3)(b) of the Guidelines section of Directive 6302 in its answer, which provides that the DOC "meets on an on-going basis with the District Attorney's office to discuss the arrest of inmates who commit crimes while incarcerated." (Ans., Ex. B at 10) It also cites to 2014 COBA Risk Assessment Findings that state "[i]nmates are housed by 'category' and unofficially by Security Risk Group (SRG) affiliation." (Ans., Ex. B, Attachment E at 3) This document also states, in a field entitled "COBA and DOC Comments," that this system was reviewed by the DOC and approved by the Board of Correction and State Commission on Correction. (*Id.*)

> H. During both the initial classification and reclassification processes, classification staff shall apply … overrides as described in this directive. The classification officer's supervisor (captain and above) must review and approve prior to application [of] any … override.[2]

(Ans., Ex. A at 3) Directive 4100R-D expressly incorporates portions of the New York City Board of Correction Standards and the New York State Commission of Correction Standards relating to the housing of inmates. (*See,* Ans., Ex. A at 3-4)

The purpose of Directive 6302 is:

> to implement and outline the requirements of the New York State Labor Law 27-b and regulation 12 NYCRR Part 800.6 that public employers establish a workplace violence prevention program designed to prevent, minimize, and respond to any workplace violence. The policy deals with all types of workplace violence against staff members including inmate on staff violence, staff on staff violence, visitor on staff violence, etc.

(Ans. Ex. B at 1) Under the heading "POLICY," Directive 6302 provides:

> A. It is the policy of the [DOC] to maintain places of work that are free from workplace violence. Workplace violence is contrary to the core mission of the agency. The [DOC] does not condone workplace violence and is committed to take every measure to minimize its occurrence in the workplace.

(*Id.*) Directive 6302 also contains several attachments, such as a DOC "Work Place Violence Prevention Policy and Incident Reporting" guideline that states:

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[2] Directive 4100R-D provides that gang affiliation is a factor used to determine the classification score of an inmate. A gang is a Security Risk Group ("SRG"). (Ans., Ex. A, Appendix A at 13) Appendix C of Directive 4301R-D sets forth instructions for determining an inmate's classification score and provides for non-discretionary and discretionary overrides in setting an inmate's custody level. A non-discretionary override restricts inmates from being classified as minimum custody if they are charged with certain serious crimes enumerated in the directive or have other factors including SRG membership. A discretionary override permits an inmate to be classified at one custody level up or down based on various factors. (Ans., Ex. A, Appendix C at 6-10)

> The [DOC] is committed to the prevention of workplace violence and the safety and security of its workforce, the inmates in its custody, visitors and others in its facilities. Workplace violence against others in the workplace will be investigated thoroughly and appropriate action will be taken promptly, including summoning criminal justice authorities when warranted. All employees are responsible for creating an environment of mutual respect for each other, complying with [DOC] policies, procedures, and workplace violence program requirements, and for contributing towards the maintenance of a safe and secure workplace.

(Ans., Ex. B, Attachment A) In addition, Appendix G to Directive 6302 notes Directive 4100R-D in its "List of Directives and Operations Orders Related to Workplace Violence." (Ans., Ex. B, Appendix G at 1)

The grievance was processed through Step III of the grievance procedure. In response to the grievance, the DOC acknowledged that 27 inmates at VCBC were mis-housed. In doing so, the DOC added that the inmates were mis-housed to address the potential for violence when members of two different gangs are housed together. In order to reduce the potential for violence, inmates in the same gang were being housed together, rather than based on their classification score. The Union filed a request for arbitration on October 3, 2019.

POSITIONS OF THE PARTIES

City's Position

According to the City, the request for arbitration must be dismissed because the Union has not established a nexus between the grievance and the Agreement and because granting the request for arbitration would violate public policy. The City asserts that the classification of inmates is a management right, thus there is no nexus between the grievance and the Agreement. It argues that the DOC Commissioner's statutory authority concerning the care and custody of felons is

exclusive and includes the classification of inmates. Therefore, it argues that arbitration would interfere with its management right to classify inmates, which would violate public policy.

The City further argues that Directive 4100R-D "is directed at DOC facility managers and supervisors for the purpose of providing guidance." (Pet. ¶ 23) It argues that because the directive "applies only to Department managers," it does not grant rights to employees that are subject to the grievance procedure. (*Id.* at ¶ 26)

The City also argues that the Union's claim that Directive 6302 was violated should be dismissed because the allegations are conclusory, as the Union fails to allege facts or circumstances that would support a violation of the rule. Lastly, the City argues that reliance on the definitional section of a grievance procedure, Article XXI §1, is insufficient to establish a nexus between the grievance and the Agreement. In doing so, the City notes that the Agreement does not address the issue of classification of inmates and cites to Board decisions that declined to find a nexus where the union failed to cite a relevant contractual provision.[3] Accordingly, the City 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, the alleged housing of inmates in violation of the DOC's rules, and the Agreement. Article XXI §1(a) of the Agreement defines a grievance, and the remainder of the Article sets forth the procedure for resolving grievances, which culminates with arbitration. Included within this definition are disputes regarding "a claimed violation of the rules, regulations, or procedures of the agency

[3] The City also argues that the Union's citation to Article XVI, § 1, of the Agreement, which relates to safety helmets, has no relationship to the grievance at issue, and thus fails to support a nexus. As the request for arbitration and the Union's answer make no reference to this contract provision, we find that the Union is not seeking to arbitrate a claim under this provision and need not address it further.

affecting terms and conditions of employment." (Pet., Ex. 1) The Union argues that the DOC violated Directive 4100R-D and Directive 6302, which constitute "rules, regulations, or procedures." Thus, the Union asserts that there is a nexus between the DOC's alleged violation of Directive 4100R-D and Directive 6302 and the Agreement's definition of a grievance, which includes violations of written rules and regulations of the agency.

The Union also argues that its request for arbitration does not violate public policy or interfere with the DOC's management rights because it is not challenging the DOC's right to classify inmates or the classifications assigned to inmates. Rather, its grievance goes to the manner in which certain inmates are housed once they have been classified by the DOC. Specifically, it contends that inmates classified as maximum custody are being housed with minimum and medium custody prisoners, in direct violation of the DOC's rules.

Moreover, the Union argues that once management rights are reduced to written rules or regulations, those rules are subject to contractual grievance procedures where, as here, the Agreement includes such violations in its definition of a grievance.

Lastly, the Union contends that the DOC's violations of Directive 4100R-D and Directive 6302 have jeopardized its members' safety. It maintains that "[t]he DOC is knowingly violating its own policies and in putting the health, safety and security of all the officers assigned to VCBC and all inmates at risk." (Ans. ¶ 26)

Accordingly, the Union requests that the Board dismiss 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).[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 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

[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.

> 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 (quoting *UFOA*, 4 OCB2d 5, at 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* Civil Service 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, it is undisputed that the parties are contractually obligated to arbitrate disputes as defined by the Agreement. However, the City argues that allowing the grievance to go forward would violate public policy because arbitration of the grievance would interfere with its management right to classify inmates and its ability to run the prison system without undue interference.[5] We find that arbitration of the grievance would not interfere with the City's ability

[5] The DOC's public policy argument is limited only to its claim that arbitration would interfere with the DOC's right to classify inmates.

to classify employees or violate public policy. The Union explicitly disclaims any challenge to the City's classification of inmates. Specifically, in its answer, the Union writes that "[the Union] is not challenging the classification number the DOC assigns to the inmate, 0-13+, or the method." (Ans. ¶ 26)[6] Rather, it is seeking compliance with the DOC's directive to house inmates based on that classification.[7]

Inherent in the City's argument is the claim that it is against public policy to permit arbitration of an action that falls within management's rights under the NYCCBL. However, "it is well-settled that once an employer unilaterally adopts a written policy concerning a managerial prerogative, that subject, to the extent so covered, becomes arbitrable under contracts which render employer non-compliance with written policies grievable and arbitrable." *Local 30*, *IUOE*, 49 OCB 2 (BCB 1992). In *Local 30*, *IUOE*, we found arbitrable a grievance arising from a unilaterally promulgated memo establishing minimum staffing levels. The union claimed that the employer had failed to maintain those staffing levels. We found that the staffing memo created an arguable limitation on the management right to staff. *Id.* at 16-17 (citations omitted). *See also CWA*, 52 OCB 27 at 20 (BCB 1993), *affd*., *Matter of City of New York v. MacDonald*, Index No. 405350/1993 (Sup. Ct. N.Y. Co. Sept. 29, 1994) (Fisher-Brandveen, J.), *affd*., 223 A.D.2d 485 (1st Dept. 1996) (holding that a written policy regarding the assignment of employees, a management right, was arbitrable, and that even though "the employer can unilaterally amend or even rescind

[6] The City did not submit a reply in response to the Union's answer.

[7] We express no opinion as to whether or to what extent an arbitration award that in any way restricts or sets conditions upon the manner in which the City houses inmates would be subject to modification or vacatur by a court on public policy grounds. *See County of Westchester v. Westchester County Corr. Officers Benevolent Assn.*, 269 A.D.2d 528 (2d Dept. 2000)(upholding the modification of an arbitration award which was found to violate public policy by "usurp[ing]" the employer's authority to assign its correction officers.)

[the policy] does not alter the fact that it is a term and condition of employment until it is changed").

Similarly, in *UFA*, 75 OCB 19 (BCB 2005), the City challenged the arbitrability of a grievance alleging that a memorandum issued by the FDNY that directed fire companies to respond to calls with less than four firefighters per company violated two existing policies. The City argued that the matter was not arbitrable because it involved staffing, a management right. The parties' collective bargaining agreement defined a grievance as including "a complaint arising out of a claimed violation, misinterpretation or inequitable application … of existing policy or regulations…affecting terms and conditions of employment." *Id*. at 14. Relying upon *Local 30, IUOE*, the Board found the alleged violation of the policies was arbitrable. *See also UFOA*, 35 OCB 29, at 7 (BCB 1985) (finding that a directive regarding the supervision of field Fire Marshals that addressed staffing levels established a limitation on management's right and was arbitrable).

Here, the DOC has the right to determine how its inmates are housed. Indeed, Directive 4100R-D embodies the public policy on the housing of inmates. It incorporates portions of the New York City Board of Correction Standards and the New York State Commission of Correction Standards on this issue. Similarly, Directive 6302 expresses the public policy on insuring the safety of inmates and correction staff. That directive states that its purpose is to "implement and outline the requirements of the New York State Labor Law 27-b and regulation 12 NYCRR Part 800.6 that public employers establish a workplace violence prevention program." (Ans., Ex. A at 1) Accordingly, the DOC has set forth rules and procedures that implement the public policy on the housing of inmates and insuring the safety of inmates and staff in Directives 4100R-D and 6302. As a result, these Directives create an arguable limitation on the DOC's right. Accordingly,

we find that arbitration of the Union's grievance would not violate public policy and that the first prong is satisfied.

Therefore, the relevant inquiry remaining is whether there is a reasonable relationship between the act complained of, the housing of inmates in violation of the DOC's rules, and the Agreement. 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.

Article XXI § (1)(b), defines a grievance as a violation of "rules, regulations or procedures of the agency affecting terms and conditions of employment." (Pet., Ex. 1) The Union alleges that two DOC rules have been violated.[8] First, it alleges that the DOC has violated Directive 4100R-D by housing maximum custody inmates with minimum and medium custody inmates at the VCBC facility.[9] Directive 4100R-D describes the purpose of the custody levels as intended to minimize the potential for violence in DOC's facilities. Second, the Union alleges that the DOC's housing of inmates violates Directive 6302. Several portions of Directive 6302 set forth the DOC's goal to eliminate workplace violence, including incidents of violence by and between inmates, and between inmates and staff, and it expressly refers to Directive 4100R-D. Accordingly, we find

[8] We reject the City's argument that the request for arbitration should be dismissed because the Union cites to Article XXI, the definitional section of the grievance procedure. Here, it has been clear throughout the grievance process that the Union is seeking to arbitrate alleged violations of Directive 4100R-D and Directive 6302 by housing inmates in a manner inconsistent with those Directives. Accordingly, the absence of a contractual provision governing the classification and/or housing of inmates does not render the grievance inarbitrable.

[9] Directive 4100R-D provides that "inmates in the general population who are classified as maximum custody shall not under any circumstances be housed with minimum custody or medium custody inmates." (Ans., Ex. A at 2)

that the Union has established an arguable nexus between the grievance and the Agreement.[10] In reaching this conclusion, we note that it is not for this Board to determine whether the DOC has deviated from those rules or procedures. These are questions for the arbitrator to decide.

Therefore, the petition challenging arbitrability is denied, and the request for arbitration is granted.

[10] Regarding the City's argument that Directive 4100R-D is solely directed to managers and supervisors, and therefore does not fall within the scope of the parties' definition of a grievance, we find that this argument lacks a factual basis. Directive 4100R-D contains several pages and appendices that set forth procedures for Correction Officers and DOC staff to follow in the classification process.

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 New York City Department of Correction, docketed as BCB-4358-19, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers' Benevolent Association, docketed as A-15658-19, hereby is granted.

Dated: February 3, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER