COBA, 13 OCB2d 19 (BCB 2020)

(Arb.) (Docket No. BCB-4384-20) (A-15732-20)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that it violated a DOC order when it denied Grievant release time for physical therapy appointments in connection with a workers' compensation incident. The City asserts that there is no nexus between the grievance and the DOC order, since determinations regarding eligibility for release time are made by the DOC's Health Management Division and are final and binding. The City also argued that the Union's requested remedy of compensatory time was inappropriate because it is outside of an arbitrator's authority to order such a remedy. The Board found that the Union established the requisite nexus between its claim and the DOC order and that the issue of remedy was for the arbitrator to determine. Accordingly, the City's petition challenging arbitrability was denied, and the Union's 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 DEPARTMENT OF CORRECTION,

Petitioners,

-and-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION
on behalf of NIVEA LOPEZ,

Respondent.

DECISION AND ORDER

On June 4, 2020, the Correction Officers' Benevolent Association ("Union") filed a request for arbitration on behalf of Nivea Lopez ("Grievant"), alleging that the City of New York ("City") and its Department of Correction ("DOC" or "Department") violated the parties' collective bargaining agreement ("Agreement") and DOC Teletype Order No. HQ-02439-0 ("Teletype HQ-

02439-0") when it denied Grievant release time for physical therapy appointments in connection with a workers' compensation incident. On July 10, 2020, the City filed a petition challenging the arbitrability of the grievance. The City asserts that there is no nexus between the grievance and Teletype HQ-02439-0, since determinations regarding eligibility for release time are made by the DOC's Health Management Division ("HMD") and are final and binding. The City additionally argues that that the Union's requested remedy of compensatory time ("comp time") is inappropriate because it is outside of an arbitrator's authority to order such a remedy. The Board finds that the Union has established the requisite nexus between its claim and Teletype HQ-02439-0 and that the issue of remedy is for the arbitrator to determine. Accordingly, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

BACKGROUND

Grievant is employed by the DOC as a Correction Officer ("CO"), and the Union represents employees in this title. The parties' Agreement covers the period of November 1, 2011, through February 28, 2019, and currently remains in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Agreement sets forth the applicable grievance procedure in Article XXI, § 1, which provides that a grievance includes:

> b. A claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1(a), the term "grievance" shall not include disciplinary matters.

(Pet., Ex. 1)[1]

[1] While the Union's request for arbitration cites Article XXI, § II as the provision of the Agreement

Teletype HQ-02439-0 was issued on August 9, 2019, by the DOC's Chief of Department and is titled "Excused Time for Worker's Compensation - Medical/Physiotherapy Follow Up Treatment."[2] (Pet., Ex. 4) It provides, in relevant part:

> 1. A uniformed employee who has incurred a workers compensable injury and returns to a full and/or restricted duty status, may require follow up medical or physiotherapy treatment. When such treatment is only available during the employee's working hours, such employee shall be excused from duty with sufficient time to keep the medical service appointment. Such excused time shall not be chargeable to the employee's leave balances and shall be recorded as excused sick.
>
> 2. An employee in order to receive the medical excusal time shall be required to contact the Health Management Division who upon need determination shall authorize the excusal time and will notify the employee and the facility commanding officer as to the extent and term of the medical follow up need. Physiotherapy will not be approved for more than ninety (90) days from the date of the first treatment.
>
> 3. The Health Management Division's approval shall be based on medical need and availability of the medical service provider during non-working hours.
>
> 4. Determination by the Health Management Division shall be final and binding.

(*Id*.)

On June 21, 2018, the Union filed a Step I grievance alleging that the Department violated Teletype 1480-0 by failing to grant Grievant release time for physical therapy appointments. The grievance states, in relevant part:

> [Grievant] has a qualified injury and, within the last 90 days has worked in a full[-]duty capacity. Likewise, she required physical therapy for that injury, which has been approved by HMD within the

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that had been violated, the City acknowledges that the Union amended its grievance at Step III, without objection, to clarify that it was grieving Article XXI, § 1(b).

[2] It is a reissuance of Teletype Order No. 1480-0 ("Teletype 1480-0"), which was issued on April 15, 1987, and is substantively identical to Teletype HQ-02439-0.

> last 90 days. Likewise, within the last 90 days, there were occasions on which a physical therapy appointment was not available outside of her shift, yet the administration . . . refused to provide her with paid time off for therapy, thus depriving her of treatment.

(Pet., Ex. 2)

The City did not answer the grievance at Step I or II. On August 3, 2018, a Step III hearing was held. During the hearing, the Union alleged that Grievant was denied release time to go to physical therapy on several dates and therefore did not attend. However, the Union acknowledged that since the grievance was filed on June 21, 2018, the only days that she was denied release time within the 90-day grievance period were March 26, 29, and 30, 2018.[3] The DOC argued that there was no evidence that Grievant was denied any requested release time. Regarding a remedy, the Union stated that in addition to a cease and desist order it was requesting that the Department compensate Grievant 7.5 hours of comp time "to deter the Agency from violating the Teletype Order in the future." (Pet., Ex. 5)

The Step III determination denied the grievance, finding that Teletype HQ-02439-0 is not grievable since its language states that the determination by HMD "shall be final and binding." (*Id*.) Additionally, it found that even if Teletype HQ-02439-0 was grievable, "HMD approved excusal time for follow-up treatment for the period of February 27, 2018 through March 27, 2018" and, therefore, the only remaining date at issue was March 26, 2018.[4] Finally, the decision found that the requested remedy has no basis in the contract, nor does Teletype HQ-02439-0 provide for any remedy if it is violated.

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[3] Article XXI, § 2 of the parties' Agreement states that a Step I grievance must be presented verbally or in the form of a memorandum "not later than ninety (90) days after the date on which the grievance arose." (Pet., Ex. 1)

[4] Neither party provided documentary evidence regarding HMD's determination.

The Union subsequently filed the instant request for arbitration. As a remedy, it sought a finding that the DOC violated the parties' Agreement and Teletype HQ-02439-0 as well as an award of 7.5 hours of comp time for the Grievant.

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration must be dismissed because the Union has failed to establish the requisite nexus between the subject of the grievance and the parties' Agreement. The grievance claims that the DOC violated its own rule or regulation, Teletype HQ-02439-0, when it denied Grievant release time during working hours to attend physical therapy appointments. However, the City contends that Teletype HQ-02439-0 provides no grievance rights because it explicitly states that the determination by the HMD is "final and binding." (Pet., Ex. 4) Thus, the City contends that "[a]ny grievance alleging a violation of this Teletype, whether it be the [HMD's] decision or the application of that decision, it is still grounded on the Teletype which is clearly and unambiguously not appealable via arbitration." (Rep., p. 2)

The City additionally asserts that that the request for arbitration must be dismissed because there is no remedy for an arbitrator to award. Since Grievant did not use or lose any of her own leave time, an award of 7.5 hours of comp time would be purely punitive. Citing arbitration cases, the City contends that losses in labor arbitration traditionally do not include punitive damages, which are inappropriate and inconsistent with the purpose of arbitration. With regard to a cease and desist order, the City argues that there is no evidence of any ongoing or additional alleged violations of Teletype HQ-02439-0 and, therefore, this remedy is purely speculative and without merit. As such, the City contends that the grievance is unsuitable for arbitration and the petition challenging arbitrability should be granted.

Union's Position

The Union argues that the petition challenging arbitrability should be denied because it has established a nexus between its claim and the DOC's rules and regulations. Contrary to the City's argument, the Union contends that it is not challenging HMD's determination, pursuant to Teletype HQ-02439-0, that Grievant was entitled to paid time off without the loss of accruals to seek physical therapy. Rather, the Union is challenging the DOC's failure to give Grievant release time to attend therapy pursuant to HMD's final and binding determination that she was entitled to such, as was required by Teletype HQ-02439-0.

The Union contends that the City's argument that there is no remedy for an arbitrator to award must also be rejected. The City did not cite any Board decisions that stand for the proposition that a possible lack of remedy is a part of the test for arbitrability. Moreover, the Union argues that there is value in a cease and desist order and that an arbitrator has flexibility in how he or she determines to make a grievant whole. While the Union contends that there is nothing punitive about any of the remedies it seeks, any determination regarding remedy is for the arbitrator to decide. Since the only analysis for the Board is whether the grievance is arbitrable, and since the Union has established the requisite nexus, the Union contends that the petition challenging arbitrability should be denied.

DISCUSSION

"The policy of this Board, as is made explicit by § 12-302 of the NYCCBL . . . is to favor and encourage arbitration to resolve grievances." *OSA*, 7 OCB2d 28, at 8 (BCB 2014) (quoting *OSA*, 1 OCB2d 42, at 15 (BCB 2008)) (internal quotation and editing marks omitted).[5] In

[5] Section 12-302 of the NYCCBL provides:

recognition of this policy, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)) (internal quotation marks omitted).

The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test considers:

> (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.

DC 37, L. 420, 5 OCB2d 4, at 12 (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). The Board lacks jurisdiction to enforce contractual rights, and therefore, it will generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citations omitted); *see also* N.Y. Civ. Serv. Law § 205(5)(d).

Here, it is clear that the parties have agreed to submit certain disputes to arbitration. Article XXI, § 1 of the parties' Agreement contains a grievance procedure, which provides for final and binding arbitration. The definition of a grievance includes disputes concerning a claimed violation of the rules, regulations, or procedures of the agency. Since Teletype HQ-02439-0 clearly constitutes a rule or regulation of the DOC, we find that the first prong is established.

> 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.

Regarding the second prong, in order to establish a nexus "a party need only demonstrate a *prima facie* 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 (BCB 2011) (quoting *PBA* 3 OCB2d 1, at 11 (BCB 2010)) (internal quotation marks omitted). 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 (quotation omitted); *see also* CSL § 205.5(d). "If the Union's interpretation is plausible, the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *OSA*, 7 OCB 2d 22, at 9 (BCB 2014) (quoting *Local 3, IBEW*, 45 OCB [59], at 11 (BCB 1990)) (internal editing marks omitted).

Here, the Union alleges that Grievant was approved for release time to attend physical therapy appointments pursuant to a determination made by HMD but that the DOC denied Grievant's request for such release time. Teletype HQ-02439-0 governs the rules and procedures related to release time for physical therapy appointments when an employee incurs a "workers compensable injury and returns to a full and/or restricted duty status." (Pet., Ex. 4) Thus, the claim raised in the grievance relates directly to the subject matter of the Teletype.

We reject the City's argument that the Teletype "clearly and unambiguously" cannot be arbitrated. (Rep., p. 2) As noted above, the definition of a grievance includes disputes concerning a claimed violation of the rules, regulations, or procedures of the agency. Although the Teletype provides that a determination by HMD that an employee is eligible for release time is "final and binding," neither the Teletype itself nor the Agreement contains any language stating that the implementation of that determination is not subject to arbitration. (Pet., Ex. 4) Thus, to the extent that the grievance concerns the question of whether the DOC properly implemented HMD's determination made pursuant to the Teletype, that Grievant was eligible for release time to attend

physical therapy, we find that there is a nexus between the grievance and Teletype HQ-02439-0.[6]

Finally, we do not find that the Union's requested remedy of 7.5 hours of comp time renders its grievance ineligible for arbitration. As we have previously stated, "[q]uestions of remedy are distinct from those of arbitrability, and 'arguments addressed to questions of remedy are not relevant to the arbitrability of the grievance.'" *DC 37, L. 376*, 75 OCB 20, at 9 (2005) (quoting *DC 37, L. 2507*, 59 OCB 47, at 9 (BCB 1997); *DC 37, L. 1549*, 57 OCB 32, at 6 (BCB 1996)). Rather, "[i]t is for an arbitrator to determine the propriety of a remedy sought by a union and to fashion one appropriate to the circumstances." *Id*. (citing *SSEU, L. 371*, 43 OCB 39, at 18-19 (BCB 1989)).

Accordingly, for the reasons stated above, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

[6] We note that although the parties appear to dispute the time period that HMD determined that Grievant was eligible for release time, we find that this is a question of fact for the arbitrator to determine. Similarly, whether the DOC actually denied any of Grievant's requests for release time is also a question of fact for the arbitrator.

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 its Department of Correction, docketed as BCB-4384-20, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers' Benevolent Association, docketed as A-15732-20, hereby is granted.

Dated: October 2, 2020
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