NYCHA, 12 OCB2d 8 (BCB 2019)

(Arb.) (Docket No. BCB-4307-19) (A-15550-19)

Summary of Decision: NYCHA challenged the arbitrability of the Union's grievance alleging that NYCHA failed to provide Grievants with performance evaluations and tasks and standards. It argued that the grievance has no nexus to the parties' collective bargaining agreement because neither the collective bargaining agreement nor NYCHA's Human Resources Manual requires the issuance of performance evaluations or tasks and standards. The Board found that there is a nexus between the Union's claim and the collective bargaining agreement and Human Resources Manual. Accordingly, NYCHA'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 NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

THE ORGANIZATION OF STAFF ANALYSTS,
on behalf of PAULETTE ANTHONY et al.,

Respondent.

DECISION AND ORDER

On January 18, 2019, the New York City Housing Authority ("NYCHA") filed a petition challenging the arbitrability of a grievance filed by the Organization of Staff Analysts ("Union") alleging that NYCHA violated the parties' collective bargaining agreement ("NYCHA

Agreement") and NYCHA's Human Resources Manual ("HR Manual") when it failed to provide performance evaluations and tasks and standards to Grievants. NYCHA argues that neither the HR Manual nor any provision of the NYCHA Agreement makes issuing performance evaluations and tasks and standards mandatory. As such, NYCHA asserts that the Union has not established a nexus between its claim and the cited provisions. The Board finds that there is a nexus to the NYCHA Agreement and the HR Manual relating to the issuance of performance evaluations and tasks and standards. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

Grievants are Staff Analysts currently assigned to the Lead Hazard Control Department ("LHCD") at NYCHA. (Pet. Ex. A.) The Union serves as the bargaining representative for employees holding the title of Staff Analyst. At all relevant times, NYCHA and the Union were parties to the NYCHA Agreement, which covers Staff Analysts.

On January 4, 2019, the Union filed a request for arbitration ("RFA") stating, "[t]here has been a violation, misinterpretation or misapplication of Article VI(a) of the [NYCHA Agreement] in that there was a violation of the [HR Manual] pertaining to . . . performance management … whereas the grievants' rights and entitlements were denied."[1] According to the Union, Grievants

[1] We take administrative notice of the RFA, docketed as A-15550-19. The RFA also referenced a failure to provide job descriptions and the Department of Citywide Administrative Services ("DCAS") title specifications. As those claims were subsequently withdrawn, we do not address them. Although the RFA cites Article "VI(a)," it is clear in context that it refers to Article 6(a) of the NYCHA Agreement.

had not been provided with performance evaluations or tasks and standards "[t]hroughout their tenure in the LHCD." (Ans. ¶ 6)

Article 6(a) of the NYCHA Agreement defines the term "grievance," in part, as:

> i. A dispute concerning the application and interpretation of the terms of written collective bargaining agreements and written rules and regulations.
>
> ii. A claimed violation, misinterpretation or misapplication of the rules and regulations of [NYCHA] affecting terms and conditions of employment.[2]
>
> * * *
>
> iv. Any dispute defined as a grievance by a collective bargaining agreement, or as expressly agreed to in writing by [NYCHA] and a public employee organization.

(RFA)

Section 52 of the HR Manual, entitled "Performance Management," states that "NYCHA generally requires that annual performance evaluations be issued to review job duties, job performance, and job goals as well as to recognize achievement, [and] outline NYCHA expectations . . . ."[3] (Ans., Ex. C, at 128) Under "Formal Reviews," the HR Manual provides that

[2] The definition of a grievance in Article VI § 1.b of the Union's collective bargaining agreement with the City of New York ("City") expressly provides that the City's Personnel Rules and Regulations are not subject to the grievance procedure or arbitration. The NYCHA Agreement does not contain a similar provision.

[3] According to the Union, the HR Manual incorporates the City's Personnel Rules and Regulations by reference. Rule 7.5.1 of the Personnel Rules and Regulations provide that "[e]ach agency shall establish and administer a performance evaluation program for sub-managerial employees in accordance with these rules or as prescribed by the commissioner of citywide administrative services in the regulations or procedures." (Ans. ¶ 20) Rule 7.5.4(e) provides that there should be "at least one performance evaluation a year" and that employees "shall be informed in writing at the beginning of the evaluation period of the performance standards that are to be used as the basis for evaluation." (Ans. ¶ 21) The Union notes that DCAS' Agency Guide to Performance Evaluation For Sub-Managerial Positions provides that "[a]gencies can follow the system

"[a] formal review is to be administered to employees only in accordance with the specific process approved for their position, if any." (*Id.*) Under the subsection, entitled "When the Performance Evaluation Should be Conducted," it states that "formal performance evaluations should be given in accordance with the frequency that is provided for in the approved plan for their position." (*Id.*) Further, it provides that "[g]enerally, employees during the first year of their employment should be reviewed quarterly in writing." (*Id.*)

POSITIONS OF THE PARTIES

NYCHA's Position

NYCHA challenges the arbitrability of the grievance on two grounds. First, it argues that the Union's claim has no nexus to the NYCHA Agreement. According to NYCHA, neither Article 6 nor any other provision of the NYCHA Agreement contains a reference to providing performance evaluations. Second, NYCHA asserts that, while § 52 of the HR Manual references performance evaluations, it does not mandate them. Instead, NYCHA takes the position that "a formal review is to be administered to employees only in accordance with the specific process approved for their position, if any." (Pet. ¶ 14) According to NYCHA, there is no approved performance review plan for the Staff Analyst title because the Union has not negotiated one, as evidenced by lack of references to performance evaluations in the NYCHA Agreement. Since procedural aspects of performance evaluations are mandatory subjects of bargaining, NYCHA contends that it cannot unilaterally implement the performance evaluations that the Union seeks.

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described in this guide or may devise other systems which meet [its] criteria and purposes . . ." (Ans., Ex. B, at 1)

Further, NYCHA asserts that, consistent with the New York City Charter and the City's Personnel Rules and Regulations t, it issues performance evaluations during probationary periods, upon hiring and transfer or promotion to a new position.[4] NYCHA argues that the Union cannot obtain additional evaluations through arbitration when it has not bargained for them.

Accordingly, NYCHA requests that the Board grant its petition challenging arbitrability and deny the Union's request for arbitration.

Union's Position

The Union argues that NYCHA is required to provide Grievants with performance evaluations and tasks and standards pursuant to the NYCHA Agreement and HR Manual. It is uncontested that Article 6 gives it the right to grieve any "written rule or regulation" and "any claimed violation, misinterpretation or misapplication" of "any [NYCHA] rule or regulation." (Ans. ¶ 17) According to the Union, NYCHA's HR Manual, which incorporates the City's Personnel Rules and Regulations by reference, is the source of its right to grieve this dispute.

The Union argues that it need only prove a reasonable relationship between NYCHA's failure to provide Grievants with performance evaluations and tasks and standards and the HR Manual. The Union argues that, pursuant to § 52 of the HR Manual, NYCHA is required to provide performance evaluations and tasks and standards. Additionally, it asserts that HR Manual incorporates the City's Personnel Rules and Procedures, which also require every City agency to provide performance evaluations and tasks and standards. The Union contends that the DCAS Guide to Sub-Managerial Performance Evaluations permits an agency to devise an alternative

[4] Chapter 35 § 815(a)(13) of the New York City Charter provides that agency heads shall "establish and administer performance evaluation programs to be used during the probationary period and for promotions, assignments, incentives and training."

system but does not allow an agency to have no performance evaluations system at all. As such, the Union maintains that the merits of the grievance concern the Grievants' right to performance evaluations and tasks and standards, as incorporated into the HR Manual, goes to the merits and is appropriate for an arbitrator to decide.

Accordingly, the Union requests that the Board deny the petition challenging arbitrability and grant its request for arbitration.

DISCUSSION

It is the 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).[5] 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." *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)).

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" within the scope of the parties' collective bargaining agreement. *OSA*, 10 OCB2d 17, at 9 (BCB 2017); *see also PBA*, 4 OCB2d 22, at 12.

[5] 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.

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

> (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.

OSA, 10 OCB2d 17, at 10; *see also UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011).

Here, it is undisputed that the parties agreed to resolve certain disputes as defined by Article 6 of the NYCHA Agreement through arbitration, and neither party argues that there are any court-enunciated, public policy, statutory, or constitutional restrictions. As such, the relevant inquiry is limited to whether a reasonable relationship exists between the grievance and § 52 of the HR Manual.

To establish a nexus between a collective bargaining agreement and the right that the grieving party asserts, the grieving party must "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 (BCB 2010)). This does not require a final determination of the rights of the parties in this matter. *See OSA*, 10 OCB2d 17, at 10. Instead, "once an arguable relationship is shown, the Board will not consider the merits of the grievance" where either interpretation of the parties' claims could be plausible. *Id.*, at 10-11.

Article 6(a)(ii) of the NYCHA Agreement defines a grievance as "a claimed violation, misinterpretation or misapplication of the rules and regulations of [NYCHA] affecting terms and conditions of employment." NYCHA does not dispute that the HR Manual is a "rule and

regulation." Section 52 of the HR Manual states, in relevant part, that "NYCHA generally requires that annual performance evaluations be issued." (Ans., Ex. C) Accordingly, the Union's claim that NYCHA has not provided Grievants with performance evaluations and tasks and standards "[t]hroughout their tenure in the LHCD" is reasonably related to § 52 of the HR Manual. (Ans. ¶ 6) *See Local 1180, CWA*, 67 OCB 1 (BCB 2001) (finding the union's claim that the employer's failure to provide the grievant with the required performance evaluations and tasks and standards was reasonably related to the employer's rules and regulations). Here, we find that the language of § 52 of the HR Manual is arguably broad enough to encompass the Union's grievance regarding the issuance of annual performance evaluations and accordingly find a nexus between § 52 of the HR Manual and the alleged dispute.

We reject NYCHA's argument that there is no nexus because the HR Manual does not provide a right to the issuance of performance evaluations and tasks and standards. This requires an inquiry into the merits, which is an appropriate issue for resolution by an arbitrator. *See OSA*, 10 OCB2d 17, at 11. Similarly, NYCHA asserts that it has already provided performance evaluations to Grievants during probationary periods, in compliance with the City's Personnel Rules and Regulations and the New York City Charter. Whether such action occurred and is consistent with the HR Manual goes to the merits of the grievance, and therefore, appropriate for arbitration. *See also OSA*, 7 OCB2d 22, at 10 (BCB 2014).

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

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining in New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the New York City Housing Authority, docketed as BCB-4307-19, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, docketed as A-15550-19, hereby is granted.

Dated: April 8, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER