DC 37 L. 154, 17 OCB2d 2 (BCB 2024)

(Arb.) (Docket No. BCB-4529-23) (A-16000-23)

Summary of Decision*:** The City filed a petition challenging the arbitrability of the Union's grievance alleging that DOHMH violated the parties' collective bargaining agreement. The Union claimed that DOHMH failed to pay Grievant for time spent on leave awaiting the resolution of her appeal of the denial of her reasonable accommodation request to be exempt from the COVID-19 vaccine requirement. The City contended that the right to be paid for such time arose from a Memorandum of Agreement that was not in effect until after Grievant's appeal had been resolved. The City thus argued that this grievance was not subject to arbitration because the Union failed to establish the necessary nexus between the subject matter of the grievance, the payment for time spent on leave, and the source of the alleged right, the parties' collective bargaining agreement. The Board found that the Union established the requisite nexus. 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 Improper Practice Proceeding

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT
OF HEALTH AND MENTAL HYGIENE,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 154, AFSCME,
AFL-CIO

Respondent.

DECISION AND ORDER

On July 14, 2023, the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 154 ("Union" or "DC 37") on behalf of Qiana

Outlaw ("Grievant"). The grievance, filed on January 12, 2022, asserts that DOHMH violated the parties' collective bargaining agreement when it failed to pay Grievant for the time spent on leave awaiting the resolution of the appeal of the denial of her reasonable accommodation request to be exempt from the COVID-19 vaccine requirement. The City contends that the right to be paid for such time arose from a subsequent Memorandum of Agreement that was not in effect until after Grievant's appeal had been resolved. Thus, the City argues that this grievance is not subject to arbitration because the Union failed to establish the necessary nexus between the subject matter of the grievance, the payment to Grievant for time spent on leave, and the source of the alleged right, the parties' collective bargaining agreement. The Board finds that the Union established the requisite nexus. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

The Union is the certified bargaining representative for DOHMH employees in the title of Special Consultant (Mental Health Standards and Services) ("Special Consultant"). The City and the Union are parties to the Social Services and Related Titles Agreement, ("Agreement") dated March 3, 2010, to September 25, 2017, which remains in *status quo* pursuant to NYCCBL § 12-311(d).

Grievant was appointed to the position of Special Consultant, Level I, in the DOHMH Office of School Health on September 25, 2016. On October 25, 2019, Grievant was promoted to the position of Special Consultant, Level II.

On August 24, 2021, the DOHMH Commissioner issued an order ("DOE Order") requiring that all Department of Education ("DOE") staff and other City employees working in DOE buildings and schools be vaccinated against COVID-19 by October 1, 2021. There is no dispute

that as a school-based employee, Grievant was subject to this DOE Order. On September 25, 2021, Grievant submitted a reasonable accommodation request to be exempt from the DOE Order based upon her religious beliefs. DOHMH informed her that she needed to submit additional information regarding her exemption request. As a result, Grievant resubmitted her reasonable accommodation request on September 28, 2021.

On October 3, 2021, the Union and the City entered into the DOE Memorandum of Agreement ("DOE MOA"), which outlined the "process for exemptions to [the COVID-19 vaccine] mandate and the leave status of those who do not comply with the mandate" and provided that "[w]hile the exemption/accommodation review process and/or any appeal is pending the individual shall remain on Leave without pay with Health Benefits." (Pet., Ex. 3)

Also on October 3, 2021, Grievant was placed on leave without pay pursuant to the DOE MOA. On October 5, 2021, Grievant again resubmitted her reasonable accommodation request, this time stating she "was informed by HR that [she qualifies] for an expedited review due to religious grounds." (Pet., Ex. 8) On October 6, 2021, DOHMH denied Grievant's request for a reasonable accommodation.[1] Grievant subsequently appealed DOHMH's determination.

On October 20, 2021, the DOHMH Commissioner issued an additional order ("General Order") requiring that all City employees, not only those working in DOE facilities, be vaccinated against COVID-19 by October 29, 2021. The General Order provides that:

> This Order shall not apply to individuals who already are subject to

[1] DOHMH informed Grievant that her request was denied in an email that provided the following rationales for the denial:

> 1. Religious leaders of the Christian faith have spoken publicly in favor of the vaccine.
> 2. The religious organization you belong to (Grace and Mercy Church of God in Christ) is not a recognized and established religious organization.

(Pet. Ex. 8)

> another Order of the Commissioner of Health and Mental Hygiene, Board of Health, the Mayor, or a State or federal entity that requires them to provide proof of full vaccination and have been granted a reasonable accommodation to such requirement.

(Pet. Ex. 9) On November 1, 2021, the Union and the City entered into a Memorandum of Agreement ("DC 37 MOA"), which provides that "[i]f an employee's appeal is granted… the employee shall be granted excused leave with pay retroactive to the date they were placed on leave without pay." (Pet., Ex. 2) The DC 37 MOA contains no language limiting its applicability based on previous agreements or the timing of reasonable accommodation requests, or expressly defining covered "employees."[2]

DOHMH claims to have been notified on November 4, 2021, that Grievant's appeal had been granted on or about October 26, 2021, and that she was entitled to an exemption to the vaccine mandate based upon her religious beliefs. On or about November 7, 2021, Grievant was restored to her previous employment status. However, she was not granted excused leave with pay from the date she was put on unpaid leave to November 7, 2021, when she was returned to pay status.

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[2] The DC 37 MOA sets forth the following terms for whether employees submitting reasonable accommodation requests are to be put on leave based on when their requests are submitted:

> Employees who submitted their initial reasonable accommodation request to their Agency by end of day on November 2nd, will remain working and on payroll, subject to weekly COVID testing, pending the initial determination of the Agency and/or the determination of the employee's appeal by [the employee's agency or a private arbitration service]. Employees who submit their request after November 2nd but by end of day on November 5th will remain working and on payroll, subject to weekly COVID testing, after the request has been submitted and pending the initial determination of the Agency, but may be placed on Leave without Pay pending appeal. Employees who submit their request after November 5th will be placed on Leave without Pay starting November 1st and will remain on such leave pending the determination of the employee's request.

(Pet., Ex. 2)

On or about January 12, 2022, the Union filed a Step I Grievance with DOHMH on behalf of Grievant. DOHMH denied the Step I Grievance that same day and directed the Union to file at Step III if it would like to proceed. The Union filed a Step III Grievance Conference Request with the New York City Office of Labor Relations on March 9, 2022. On June 14, 2023, the Union filed a request for arbitration, claiming that DOHMH violated the DC 37 MOA by not compensating Grievant for the time spent on leave awaiting review or appeal of her reasonable accommodation request.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union failed to cite and/or identify any contract provision on which to base this grievance. It acknowledges that the provision of the DC 37 MOA cited by the Union provides for paid leave to retroactively be granted for the period spent on leave awaiting an appeal of an accommodation request if the request is granted. However, it argues that the DC 37 MOA is not applicable to the instant case. It maintains that Grievant is not covered by the DC 37 MOA but instead is subject to the earlier DOE MOA. Thus, the City claims that Grievant was correctly placed on leave without pay pursuant to the DOE MOA while her exemption request was pending and then restored to her previous status when her appeal was granted.

The City avers that it entered into the DC 37 MOA in response to the issuance of the General Order on October 20, 2021, at which time Grievant was already awaiting the results of her appeal to the denial of her exemption request. The City claims that Grievant's appeal was granted on October 26, 2021, at which time the DC 37 MOA did not exist. The City asserts that Grievant fully availed herself of the appeals process contained in the DOE MOA prior to the finalization of the DC 37 MOA and that there is no provision in the DC 37 MOA to supersede or

amend that prior agreement. It relies on the General Order provision, which indicates that it does not apply to individuals subject to a prior vaccine mandate to which they had already received a reasonable accommodation, as evidence that the subsequent DC 37 MOA does not apply to Grievant. With the DC 37 MOA thus inapplicable to Grievant, the City argues that there is no nexus between Grievant's claim to backpay and the applicable collective bargaining agreement, including the DOE MOA.

Union's Position

The Union argues that the petition challenging arbitrability should be denied. The Union claims that there is a clear nexus between the provisions of the DC 37 MOA and the grievance at issue. It notes that the DC 37 MOA applies to all City employees who filed reasonable accommodation requests to be exempt from the vaccine and that the appeals process incorporated into that MOA states that an appellant would be entitled to excused leave with pay retroactive to the date they were placed on leave without pay if the appeal of an exemption denial is granted. There is no provision in the DC 37 MOA explicitly barring Grievant from availing herself of its terms, and it makes no reference to prior orders or MOAs. Grievant is a City employee who successfully appealed the denial of her reasonable accommodation request to be exempt from the vaccine. Thus, according to the Union, there is no bar to her availing herself of the relevant provisions of the DC 37 MOA. The Union claims that the City's argument that Grievant began her appeal under the DOE MOA prior to the issuance of the DC 37 MOA goes to the merits of the case, and thus is an issue for an arbitrator. The Union notes that when Grievant first submitted and resubmitted her reasonable accommodation request, neither the DOE MOA nor the DC 37 MOA, were in effect.

The Union asserts that the City's claim that the Union had not cited a relevant contractual provision is misplaced. It argues that when parties assert conflicting interpretations of a contract,

the conflict between the interpretations presents a question for the arbitrator, without the need for citation to a particular contract provision. It notes that the City neither cites any public policy or statutory or constitutional restrictions barring arbitration of the Union's grievance nor disputes that the directives at issue affected DOHMH employees' terms and conditions of employment. The Union claims that requests for arbitration are not dismissed based on technical omissions such as a failure to cite a contractual provision when, as here, the Petitioner was on notice of the Union's claim based on the prior steps of the grievance process.

DISCUSSION

The "policy of the NYCCBL is to encourage the use of arbitration to resolve grievances."[3] *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011). Accordingly, we have 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)); *see also DC 37*, 13 OCB 14, at 11 (BCB 1974). However, "[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *SSEU, L. 371*, 4 OCB2d 38, at 7 (quoting *DC 37, L. 768*, 3 OCB2d 7, at 15 (BCB 2010)); *see also COBA*, 53 OCB 14, at 5 (BCB 1994).

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "to make a final

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

> Statement of policy. 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.

determination as to whether a dispute is a proper subject for [the] grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter." The Board employs a two-pronged test to determine whether a matter is arbitrable:

> (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 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.

SBA, 3 OCB2d 54, at 7 (BCB 2010); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969).

It is undisputed that the parties agreed to resolve certain contractual and disciplinary disputes through a grievance procedure, and no other policy or legal restriction has been raised that limits the applicability of that grievance procedure to the issue. Consequently, the first prong of the test is satisfied.

With respect to the second prong, the burden is on the Union to "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 (quoting *PBA*, 3 OCB2d 1, at 11 (2010)); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). Such a 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)). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . [as] [w]here 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 (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).

We find that a nexus exists between the DC 37 MOA and the Union's claim in the grievance that the City violated the DC 37 MOA when it failed to pay Grievant for her time on leave awaiting the results of her appeal. The DC 37 MOA sets forth a procedure for bargaining unit members to seek an exemption from the COVID-19 vaccine mandate, as well as certain rights, including paid leave and benefits during that process. Thus, there is a nexus between the nature of the dispute, the denial of paid leave during the appeal process, and the provisions of the DC 37 MOA providing for such benefits. The City argues that the rights enumerated in the DC 37 MOA do not apply to Grievant because she was already covered by the DOE MOA and had already completed the appeal process for her accommodation request under that agreement prior to the issuance of the DC 37 MOA. However, as the Union argues, on its face, the DC 37 MOA also applies to City employees subject to the vaccine mandate. The City's arguments that the DC 37 MOA does not apply to Grievant for various reasons all address the merits of the dispute. Whether the language in the General Order providing that it does not apply to individuals who received a reasonable accommodation under the DOE Order, or the DOE MOA's reasonable accommodation process bars Grievant from obtaining the benefits of the DC 37 MOA are issues of contract interpretation appropriate for arbitration. Therefore, the request for arbitration presents a substantive question of contract interpretation that is appropriate for an arbitrator to decide. *See DC 37*, 47 OCB 52 (BCB 1991) (finding a grievant's wrongful termination claim arbitrable despite City's argument that an amendment to the collective bargaining agreement made him ineligible because that argument presented a substantive question of contract interpretation). Thus, there is a nexus between the Union's claim that Grievant was entitled to be paid for the time she was awaiting the resolution of her reasonable accommodation appeal and the DC 37 MOA.

Accordingly, for the reasons stated above, the City's 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 by the New York City Collective Bargaining Law, it is hereby

ORDERED, the petition challenging arbitrability filed by the City of New York and its Department of Health and Mental Hygiene, docketed as No. BCB-4529-23, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 154, AFSCME, AFL-CIO, docketed as A-16000-23, hereby is granted.

Dated: February 21, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

CHARLES MOERDLER
MEMBER