Local 1157, District Council 37, **1 OCB2d 24 (BCB 2008)**
(Arb) (Docket No. BCB-2688-08) (A-12636-08).

***Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the Department of Transportation violated the Citywide Agreement by causing Area Supervisors to receive a lower salary following promotion than the rate they would have received prior to promotion. The City argued that the Union could not establish a nexus between the subject of the grievance and Citywide Agreement because the position the Area Supervisors were promoted out of was a prevailing rate position. The Board found that the petition should be denied and the request for arbitration 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 DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1157, AFSCME, AFL-CIO
Respondent.

DECISION AND ORDER

On March 13, 2008, the City of New York ("City") and the New York City Department of Transportation ("DOT") filed a petition challenging the arbitrability of a grievance brought by Local 1157, District Council 37, AFSCME, AFL-CIO ("Union" or "Local 1157"). On January 18, 2008, Local 1157 filed a Request for Arbitration alleging that the DOT violated Article IX, § 12, of the Citywide Agreement by causing employees in the title of Area Supervisors (Highway Maintenance), Levels I and II ("Area Supervisors"), to receive a lower salary following promotion than the rate they

would have received prior to promotion. The City argued that the Union failed to establish a nexus between the subject of the grievance and Citywide Agreement because the position the Area Supervisors were promoted out of was a prevailing rate position. The Board found that the petition should be denied and the Request for Arbitration granted.

BACKGROUND

Area Supervisors are covered by the Blue Collar Agreement, the latest of which expired on March 2, 2008, and remains in effect pursuant to the *status quo* provisions of the NYCCBL.[1] Explicitly incorporated in the Blue Collar Agreement is an agreement the parties entered into in September 2006, entitled "2005 District Council 37 Memorandum of Economic Agreement" (2005 DC 37 MEA") which was intended "to cover all economic matters." (Pet. Ex. F, p. 1).[2]

The Blue Collar Agreement contains a flat maximum salary rate with a guaranteed rate for

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[1] NYCCBL 12-311(d) provides, in relevant part:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdown, work stoppages or mass absenteeism nor shall such public employee organization induce any mass resignation, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . .

[2] The Agreement states that the parties intended "to incorporate the terms of this 2005 DC 37 MEA into the Successor Separate Unit Agreements. (*Id.*) (emphasis omitted). The 2005 DC 37 MEA defines "Successor Separate Unit Agreements" as "agreements successor to those terminating on January 2, 2005; June 30, 2005; and September 8, 2005." (*Id.*) The current Blue Collar Agreement succeeded an agreement that terminated on June 30, 2005, and the parties recognize it as a Successor Separate Unit Agreement that incorporates the 2005 DC 37 MEA.

special supervision. Area Supervisors are also covered under the 1995-2001 Citywide Agreement, which also remains in effect pursuant to the *status quo* provisions of the NYCCBL. Article IX, § 12 of the Citywide Agreement provides that "No employee shall receive a lower basic salary rate following promotion than the basic salary rates received preceding the promotion."

The Area Supervisors at issue herein supervise, and were all promoted out of, the Supervisor Highway Repairer ("SHR") title. SHR is a prevailing wage title as defined by New York State Labor Law § 220 ("Section 220"). Those in the title of SHR are paid an hourly wage. Section 220.8-d provides that the public employer and the employee organization "shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements . . ." These agreements must be approved by the City Comptroller and are referred to as Consent Determinations. The last negotiated Consent Determination for SHRs expired March 31, 2000. Section 220.8 (d) also provides that, if the parties "fail to achieve an agreement," the union may file a complaint under Section 220.7. After years of fruitless negotiations, the Union filed just such a complaint, resulting in a final Order and Determination in an opinion dated March 2, 2006, from the Comptroller ("Comptroller's Order") setting the prevailing rate for SHRs. The City implemented the Comptroller's Order on December 28, 2007.

As a result of the City's implementation of the Comptroller's Order, SHRs received a significant hourly rate increase. This in turn resulted in the Area Supervisors receiving a lower basic salary rate than the hourly wage equivalent received by the SHRs they supervise.

On July 17, 2007, the Salary Review Panel, a tripartite panel that was created to address inequities in City employees' salaries, heard the complaints of various supervisory positions, including Area Supervisors, who, as a result of the Comptroller's Order, receive a lower salary rate

than the hourly wage rate equivalent received by those they supervise. According to § 13 of the 2005 DC 37 MEA, the Salary Review Panel was established to review selected titles and occupational groups to determine whether or not salary adjustments or other compensation modifications appear to be indicated and, based on their findings, to make such recommendations as appropriate. The Salary Review Panel is comprised of one neutral selected by the parties, one member appointed by the Union, and one by the City. None of the recommendations for salary modifications and/or other adjustments can be implemented unless and until the parties agree on a source of funding.

On January 18, 2008, the Union filed a Request for Arbitration, alleging that DOT violated Article IX, § 12 of the Citywide Agreement by causing the employees in the title of Area Supervisor to receive a lower salary following a promotion than the rate that they would have received prior to the promotion. The Union seeks back pay with interest and an order for the City to pay employees at an appropriate rate above that of their subordinates. The City filed the instant petition challenging the arbitrability of this grievance on March 13, 2008.

POSITIONS OF THE PARTIES

City's Position

The City argues first that, in this novel instance, the Union cannot establish a nexus between the subject of the grievance and Article IX, § 12 of the Citywide Agreement, which provides that "No employee shall receive a lower basic salary rate following promotion than the basic salary rates received preceding the promotion." Here, all of the employees on behalf of whom this group grievance was filed were promoted from the SHR title, a prevailing rate title. Article IX, § 12 applies only to employees covered within the meaning of the Citywide Agreement, and all employees

covered by § 220 are specifically excluded from coverage under Article I, § 2(a) of the Citywide Agreement which provides that "[p]revailing rate employees are excluded from the coverage to this Agreement." Therefore, SHRs are not "employees" under the Citywide Agreement and its provisions cannot be said to apply in instances such as this one, where the direct promotional line is from SHR, a title not covered by the Citywide Agreement, to Area Supervisor, a title which does fall under the Citywide Agreement.

Furthermore, the City argues, the clear language of Article IX, § 12 of the Citywide Agreement only applies to employees who received a basic salary rate prior to promotion, not to employees who received an hourly wage rate prior to promotion. Article IX, § 12 speaks in terms of supervisors receiving a "lower basic salary rate" than subordinates, but SHRs, who are in a prevailing wage rate title, receive a wage that is per hour and not a basic salary rate. Labor Relations Order 84/1 ("LRO 84/1") defines "basic salary" as "[t]he annual rate of compensation paid to an individual employee, exclusive of any differential or overtime pay." The definition of a basic salary rate, by its own terms, addresses an annual, not hourly, rate of compensation. The Area Supervisors at issue, having been promoted from the SHR title, did not receive a "basic salary rate" preceding the promotion, they received an hourly prevailing wage rate. Therefore, it is clear that the meaning of Article IX, § 12, which speaks to a salary, was not meant to encompass employees who had been promoted from a title that formerly received an hourly wage under § 220.

In addition, Area Supervisors receive a guaranteed special rate of supervision under the 2005-2008 Blue Collar Agreement. If the Union had taken issue with the negotiated salary for Area Supervisors under that Agreement, it should have bargained to use its .34% Additional Compensation Fund money to increase the guaranteed rate of supervision during the course of

negotiations for the 2005-2008 Blue Collar Agreement.

Finally, arbitration is not the proper forum for a controversy of this nature. The forum which should hear and assist the parties to this grievance is the Salary Review Panel, since it is empowered through the 2005 DC 37 MEA to make recommendations regarding such as this one and this matter has already been heard by the Salary Review Panel. Therefore, the Salary Review Panel is the best avenue for resolving this novel and unique situation.

Union's Position

The Union argues that there is a nexus between Article IX, § 12 of the Citywide Agreement and the instant grievance. The City concedes that the affected grievants are covered by the Citywide Agreement, that they were promoted, and now receive a lower salary than that of their subordinates. The act complained of in the Request for Arbitration is that the grievants received a lower salary rate than that of their subordinates following their promotion, and Article IX, § 12 of the Citywide Agreement states that no employee shall receive a lower basic salary rate following promotion than the basic salary rate received preceding the promotion. Therefore, the Union has shown how the act complained of relates to the Citywide Agreement.

The City's entire petition challenging arbitrability rests on their own interpretation of terms used in the Citywide Agreement, specifically the terms, "basic salary rate," "employee" and "promotion" as used in Article IX, § 12. Contrary to the City's assertions that their interpretations of such terms are correct and absolute, the Union strongly disagrees with their interpretation of the terms. Since these terms are not clear, their interpretation is for an arbitrator to decide.

Furthermore, the Salary Review Panel is not authorized or empowered to hear disputes involving the interpretation of the parties' collective bargaining agreement or disputes involving the

misapplication of the collective bargaining agreement. The Union has cited a contractual violation and set forth a dispute to be resolved by an arbitrator whose determination is final and binding. The arbitrator's award is not a recommendation, as contrasted with that of the Salary Review Panel. The factual issues and the remedies are different. While there is nothing precluding the Salary Review Panel from issuing any recommendations regarding salary adjustments, the question of back pay, interest, and other remedies to make the grievants whole would be for an arbitrator to decide. Therefore, for all of the reasons above, this dispute should proceed to arbitration.

DISCUSSION

As an administrative body, this Board has exclusive power under § 12-309(a)(3) of the NYCCBL "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter."[3] *See New York State Nurses Ass'n*, 69 OCB 21 (BCB 2002) (in depth discussion of public sector arbitration and the Board's role therein). The policy of the NYCCBL, "as is made explicit by § 12-302 of the NYCCBL, . . . is to favor and encourage arbitration to resolve grievances."[4] *Local 1182, CWA*, 77

[3] NYCCBL § 12-312 promulgates the parties' rights and responsibilities in arbitrations and the Board's role in administering an arbitration panel.

[4] 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.

OCB 31, at 7 (BCB 2006); *see also Doctors Council*, 67 OCB 18, at 9-10 (BCB 2001). Thus, this Board has long held that "the presumption is that disputes are arbitrable, and that 'doubtful issues of arbitrability are resolved in favor of arbitration.'" *Id.* (*quoting Organization of Staff Analysts*, 77 OCB 19, at 10 (BCB 2006); *DC 37*, 13 OCB 14, at 12 (BCB 1974).

This Board has formulated a two-prong test to determine arbitrability: "(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.'" *New York State Nurses Ass'n*, 69 OCB 21, at 7 (BCB 2002) (*quoting SSEU*, 3 OCB 2, at 2 (BCB 1969) (additional citations omitted). In other words, the Board will inquire "whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." *Id.* at 8.

There is no dispute that the Agreement provides for grievance and arbitration procedures, and there is no claim that arbitration of the issue would violate public policy. Therefore, this Board must determine whether the parties' obligation is broad enough in its scope to include the present controversy. To make this determination, the Board must examine whether a grievant or grievants have shown "a *prima facie* relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *Local 924, DC 37*, 1 OCB2d 3 (BCB 2008); *COBA*, 45 OCB 41, at 12 (BCB 1990).

In the instant matter, the Union claims that the City violated Article IX, § 12 by causing the employees in the title Area Supervisor to receive a lower salary following a promotion than the rate they would have received prior to promotion. Article IX, § 12 of the Citywide Agreement provides that "No employee shall receive a lower basic salary rate following promotion than the basic salary

rates received preceding the promotion." The Union argues, and it is undisputed, that the grievants are covered by the Citywide Agreement, that they were promoted, and that they receive less money per year than their subordinates. However, whether an Area Supervisor/employee is required to have been an "employee" covered by the Citywide Agreement in his or her prior title is unclear based upon the nature of the language used by this clause. Similarly, the way the term "basic salary rate" is used in this context is also unclear. Although the City points to LRO 84/1, which was composed and issued by it, to define the term, Article IX, § 12 of the Citywide Agreement makes no reference to this particular document for a definition, leaving the meaning of the term "basic salary rate" uncertain as it applies to these employees.

Both parties' arguments regarding the meaning of the term "employee" call for an interpretation of the language of the Citywide Agreement that this Board is not empowered to undertake. We have long held that where the interpretation that each party proffers is plausible, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide. *Id.; Superior Officers Ass'n, NYCHA Police Union*, 13 OCB 18, at 8 (BCB 1974). Thus, since the Union has shown a reasonable relationship between the act complained of and the Citywide Agreement, it has shown the requisite nexus for proceeding to arbitration.

Although the City argues that the Salary Review Panel is the correct body to which the grievants should submit their dispute, the Union is correct in asserting that only an arbitrator is authorized or empowered to hear disputes involving the interpretation of the parties' collective bargaining agreement or disputes involving the misapplication of the collective bargaining agreement. Therefore, we deny the City's petition challenging arbitrability and grant the Union's Request for 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, the petition challenging arbitrability filed by the City of New York and the New York City Department of Transportation, docketed as No. BCB-2688-08, hereby is denied; and it is further

ORDERED, that the Request for Arbitration filed by the Local 1157, District Council 37, AFSCME, AFL-CIO, docketed as A-12636-08, hereby is granted.

Dated: June 9, 2008
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
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