OSA, 1 OCB2d 42 (BCB 2008)

(Arb) (Docket No. BCB-2720-08) (A-12830-08).

***Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the Department of Health and Mental Hygiene violated the parties' collective bargaining agreement by failing to follow the Department's own procedures when it terminated the employment of a Staff Analyst allegedly without the required notice. The City argued that grievant had no contractual grounds to contest the termination. The petition was 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 HEALTH AND MENTAL HYGIENE,

Petitioners,

-and-

THE ORGANIZATION OF STAFF ANALYSTS,

Respondent.

DECISION AND ORDER

On June 28, 2008, the Organization of Staff Analysts ("Union" or "OSA") filed a Request for Arbitration alleging that the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH" or "Department") violated the parties' collective bargaining agreement ("Agreement") when it terminated the employment of David Wald ("Grievant"), allegedly without notice, prior to the completion of his probationary appointment to the permanent, competitive title of Staff Analyst. The City contends that the nature of the grievance is wrongful

discipline, that Grievant was a probationary employee at the time of his termination, and that probationary employees are specifically excluded from grievance rights under the Agreement. Therefore, the City argues that this grievance is not subject to arbitration because OSA failed to establish the necessary nexus between the subject matter of the grievance, the termination of Grievant, and the source of the alleged contractual rights. We find that the Union's grievance is arbitrable because the subject of the grievance arguably lies within the parties' obligation to arbitrate. Accordingly, the petition challenging arbitrability is denied and the request for arbitration is granted.

BACKGROUND

On or about June 26, 2006, Grievant was appointed to the permanent, competitive civil service title of Staff Analyst I in the Bureau of Financial and Strategic Management/Finance, a title represented by OSA.[1]

The Union asserts that the appointment was made orally by a Joanne Yarde, whom the Union identifies only as an "employee at DOHMH." (Answer ¶ 12.) The City denies knowledge and information that the appointment was made orally ; it asserts that the appointment was made by letter dated June 26, 2007 but it does not deny that the appointment letter was addressed to a location on 237th Street in Bellerose, Queens. The City admits that this address was not the address Grievant had said was his residence during the time that he was employed by DOHMH. The Union avers that the Grievant's correct address was a location on Healy Avenue in Far Rockaway. The Union adds that in all the "new hire" forms that Grievant was required to submit to the Department, the Healy

[1] The Union asserts that the date of appointment was June 25, 2006, rather than June 26, 2006. This discrepancy between the Union's and the City's assertions on the date of appointment is not relevant to the outcome of our determination as to arbitrability.

Avenue address was listed as his residence. The City admits that Grievant provided the Department with the lease to the Healy Avenue apartment as evidence of his compliance with the City's residency requirement. The appointment letter stated that Grievant's employment was contingent upon the completion of a one-year probationary period of satisfactory service. Under the Personnel Rules and Regulations of the City of New York ("City Personnel Rules"), § 5.2.1(a), promulgated by the Department of Citywide Administrative Services ("DCAS"):

> Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth in the terms and conditions of the certification for appointment or promotion as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period.

(Petition, Exhibit D.)[2]

The Union asserts that Grievant had sustained an injury during his employment at another City agency some fifteen years earlier and that it was that injury which, on January 22, 2007, caused him to not be able to report to work from that day through June 26, 2007. The City denies knowledge and information about the injury but acknowledges that Grievant was absent from work from January 22, 2007, through June 26, 2007.

---

[2] Additionally, City Personnel Rule 5.2.1(b) provides as follows:

> (b) Every original appointment to a position in the non-competitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of [DCAS]. Appointees shall be informed of the applicable probationary period. However, such probationary period may be terminated by the commissioner of [DCAS]or by the agency head before the end of the probationary period, and the appointment shall thereupon be deemed revoked. Nothing herein shall be deemed to grant permanent tenure to any non-competitive or exempt class employee.

There is no dispute that Grievant returned to the office on June 27, 2007. The Union states that he attempted to log into the City's computerized time-keeping system and was unable to do so. The Union asserts that on that date a supervisor approached him and handed him a letter, bearing the date May 7, 2007, terminating his services as a probationary Staff Analyst as of the close of business May 7, 2007.[3] The City generally denies the Union's allegation that this was the first notice that Grievant had of the Department's intent to terminate his employment but admits that this individual handed Grievant the letter. The City also admits that the letter was addressed to the Grievant at the location on 237th Street, Queens. The City states that the 237th Street address was "*an* address *also* on file with DOHMH." (Emphasis added.)

By means of a grievance dated August 7, 2007, the Union sought a Step I conference with the program location director to protest Grievant's termination. Since no Step I decision was issued, the Union filed at Step II of the contractual procedure on September 24, 2007. It stated the issue as follows:

> Did DOHMH violate Article VI § 1(b) of the OSA Contract by failing to adhere to the mandates of PSB 200-6R, Title 4, Section 5(g) of the [New York Codes, Rules and Regulations] NYCRR, and the Family [and] Medical leave Act ("FMLA") when it terminated David Wald on June 26, 2007?[4]

---

[3] The Department's letter incorrectly recites a date of May 7, 2006, and the Union does not deny that Grievant was first appointed to the position at issue on June 2006.

[4] Under § 1(b), Article VI (grievance procedure), upon which the Union relied, that the term "Grievance" means:

> A claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration. . . .

The remedy which the grievance sought was reinstatement with full back pay and benefits retroactive to May 9, 2007 when Grievant was allegedly removed from payroll.

Rules governing the probationary period of permanent appointees are detailed in the City Personnel Rules administered by DCAS, specifically, Rule V (Appointments and Promotions), and particularly Section II (Probationary Terms).[5] Probationary service is also addressed in Personnel

---

[5] City Personnel Rule § 5.2.7, pertaining to termination of probationary employees, states, in its entirety, as follows:

> (a) At the end of the probationary term, the agency head may terminate the employment of any unsatisfactory probationer by notice to such probationer and to the commissioner of [DCAS].
> (b) Notwithstanding the provisions of paragraph 5.2.1 (denoting, among other provisions for non-competitive and exempt class appointments, a one-year probationary period for appointments and promotions to competitive and labor class positions and requiring that appointees be informed of the applicable probationary period), whenever any agency has with the approval of the commissioner of [DCAS] established a prescribed formal course of study or training for all probationary employees in a given title or titles, the agency head may, at the close of such course of study or training, terminate the employment of any probationer who fails to complete successfully such course of study or training, as the case may be.
>
> (c) Notwithstanding the provisions of paragraphs 5.2.1 and 5.2.7(a) the agency head may terminate the employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the commissioner of [DCAS]. The specified minimum period of probationary service, unless otherwise set forth in the terms and conditions of the certification for appointment or promotion as determined by the commissioner of [DCAS], shall be:
>
> (1) two months for every appointment to a position in the competitive or labor class and
> (2) four months for every promotion to a position in the competitive or labor class.

Personnel Rule § 5.2.8, pertaining to extension of the probationary period of probationary

Services Bulletins ("PSB's"), such as PSB 200-6R, dated April 17, 2000. PSB 200-6R, at issue here, states on its face that it derives from multiple sources:

> Personnel Rules and Regulations of the City of New York 5.2 (probationary terms), 6.1.6, 6.2.2 and 6.6.3; General Examination Regulation E.20; New York Civil Service Law Sections 63 and 81.4; New York Military Law Section 243.9; and Citywide Agreement. (Parenthesis added.)

PSB 200-6R, at 1.

In addition to addressing length of probationary service of a permanent, competitive appointee (§ I, ¶ A), PSB 200-6R also contains provisions governing extension of probationary service (§ I, ¶ B)[6] and termination from service (§ I, ¶ F),[7] as well as procedures with regard to the

---

employees, states, in its entirety, as follows:

> (a) Notwithstanding the provisions of paragraph 5.2.1, upon the written request of the agency head setting forth the reasons therefor and with the written consent of the probationer, the commissioner of [DCAS] may authorize the extension of the probationary term for one or more additional periods not exceeding in the aggregate six months; provided, however, that the agency head may terminate the employment of the probationer at any time during any such additional period or periods.
> (b) Notwithstanding the provisions of paragraphs 5.2.1, 5.2.2 (pertaining to the effect of certain prior service and military law) and 5.2.8(a), the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example:
> limited duty status, annual leave, sick leave, leave without pay, or use of compensatory time earned in a different job title; provided, however, that the agency head may terminate the employment of the probationer at any time during any such additional period.

(Parenthesis added.)

[6] PSB 200-6R states, at § I, ¶ B (extension of the probationary period), as follows:

> 1. At the written request of the agency specifying the reasons for the extension, and with the written consent of the probationer, the Deputy

giving of notice at the beginning of service (§ II, ¶ A),[8] extension of probation (§ II, ¶ C),[9] and

---

> Commissioner for [DCAS] may authorize the extension of the probationary period for one or more additional periods totaling no more than six months . . .
>
> 2. The probationary period shall be extended by the number of days the probationer is absent or does not perform the duties of the position during both the original probationary period and the extended probationary period, if any . . . However, the employee must be so notified prior to the expiration of the original probationary period or the extension.

[7] PSB 200-6R states, at § I, ¶ F (termination), as follows:

> 1. Employees may be terminated by the agency at any time during their probationary periods. The agency should not give such employees a reason for dismissal other than unsatisfactory probationary period. . . .

[8] PSB 200-6R states, at § II, ¶ A (notice), as follows:

> All employees should be informed in writing of the applicable probationary period prior to the start of the probationary period. Notice should also be given at this time of the requirement that the probationary period will be extended by the number of days the probationer is absent or does not perform the duties of the position. This written notice should be given at the job interview or by mail.

[9] PSB 200-6R states, at § II, ¶ C (extension of the probationary period), as follows:

> 1. At least one month prior to the completion of the regular probationary period, the agency must notify the employee in writing that the employee's probationary period will be extended.
>
> 2. The notice should include a specific fixed period of extension. The probationary period may be extended one or more times for a period totaling not more than six months plus the number of days the probationer has been absent and/or has not performed the duties of the position, during both the original probationary period and the extended probationary period.
>
> 3. The employee must give unconditional written consent for that

termination due to unsatisfactory completion of probationary service (§ II, ¶ D).[10]

The language of City Personnel Rules and PSBs is, in part, similar with respect to the particular topic which the Union raises, *i.e.*, termination of a probationer, but the language is not identical. Notable differences are as follows:

City Personnel Rules state that an agency head may discharge an unsatisfactory probationer at the end of the probationary term, at Rule 5.2.7(a), and also before the end of the probationary term

---

> portion of the extension based on evaluation of performance.
>
> 4. Following this notice and consent, the agency must send a letter requesting the extension and stating the reasons therefor to the Control and Service Division immediately, but no less than two weeks before the extension begins. A copy of the employee's consent must be enclosed. The Control and Service Division will submit the request to the Deputy Commissioner for Citywide Personnel Services for approval. . . .

[10] PSB 200-6R states, at § II, ¶ D (termination procedure), as follows:

> At the end or at any time after the minimum probationary period, the agency may terminate the employment of any unsatisfactory probationer by giving written notice of the termination to the employee and the Deputy Commissioner for [DCAS].

Specifically, with respect to competitive appointments prior to the end of the probationary period, PSB 200-6R states, in pertinent part:

> Agencies may terminate the services of a probationer appointed from an open competitive list . . . after the two-month minimum probationary period by notifying, in writing, the probationer and the Payroll Audit Division of DCAS. No reason for the termination other than unsatisfactory probation should be provided. Agencies wishing to terminate the services of such probationer prior to the two months must send a letter to the Control and Service Division requesting permission to terminate and specifying the reasons for the request. The Deputy Commissioner for Citywide Personnel Services will review the request and notify the agency of the determination. If approved, the action should be payrolled. . . .

but after the completion of the applicable minimum period of probationary service, at Rule 5.2.7(c), in both events, "by notice" to the probationer and the DCAS commissioner. By contrast, PSB 200-6R provides that such notice be "written," at PSB § II, ¶ D, and "in writing," at PSB § II, ¶ D(1).

Also, City Personnel Rules state that such notice be issued to the probationer and to the DCAS commissioner, Rule 5.2.7 (a) and (c). By contrast, PSB 200-6R provides, at PSB § II, ¶ D, that "written notice of the termination" be given to the employee and the deputy commissioner of DCAS, not the commissioner. It also provides, at PSB § II, ¶ D(1), that this written notice of termination be given to the Payroll Audit Division of DCAS. City Personnel Rule 5.2.7 makes no reference to the role of the Payroll Audit Division.

In addition, City Personnel Rule 5.2.7 pertaining to termination lacks any procedural steps required to terminate the service of a probationary employee before that employee completes the minimum probationary period of service.[11] However, PSB 200-6R states, in relevant part:

> Agencies wishing to terminate the services of such probationer prior to the two months must send a letter to the Control and Service Division requesting permission to terminate and specifying the reasons for the request. The Deputy Commissioner for Citywide Personnel Services will review the request and notify the agency of the determination. If approved, the action should be payrolled. . . .

PSB 200-6R, § II, ¶ D(1).

Furthermore, City Personnel Rule 5.2.8 pertaining to extension of probationary service is devoid, also, of reference to (1) a provision, in PSB 200-6R, requiring written notification to the probationer of the agency's desire to extend the probation, (2) a provision urging that the notice

[11] Reference to termination of a probationer before completion of the minimum probationary service, in Rule 5.2.1(b), pertains to non-competitive and exempt employees; the Grievant at issue in the case at bar is of the competitive class.

specify a fixed period of time that the probation would be extended, (3) a requirement that the probationer give unconditional, written consent for the portion of the extension based on performance evaluation, and (4) a requirement that the agency send a written request for the extension to the Control and Service Division, presumably of DCAS, before the extension is to begin, together with a copy of the employee's written consent. PSB 200-6R also provides that the Control and Service Division "will submit" the extension request to the deputy commissioner of DCAS.[12]

By letter dated December 7, 2007, the Department's director of labor relations found the request for a Step "II" hearing "unwarranted," as Grievant was allegedly terminated "during his probationary year and did not earn nor is entitled to any grievance rights."[13] (Petition Exhibit J.)

By letter dated July 10, 2008, the Chief Review Officer of the Mayor's Office of Labor Relations found that the grievance, as stated, did not assert claims subject to the contractual grievance procedures. She noted that, under § 1(b) of the grievance procedure upon which the Union relied, that the term "grievance" does not permit arbitration of disputes involving Personnel Rules. Accordingly, she determined that PSB 200-6R is a Personnel Rule not subject to arbitration.

On July 28, 2008, the Union filed the instant Request for Arbitration ("RFA"), Docket No. A-12830-08, stating the matter to be arbitrated as follows:

> Did DOHMH violate Article VI § 1(b) of the OSA Contract by failing to adhere to DCAS's PSB 200-6R and Title 4, Section 5(g) of the

---

[12] *See n.* 9, *ante*.

[13] The December 7, 2007, letter recited Step "II" but the Department's letter dated July 10, 2008, recites a Union request, received "[o]n or about December 5, 2007," requesting a Step III review of the grievance. (Petition Exhibit K.)

NYCRR when it terminated David Wald on June 26, 2007?[14]

The remedy sought remained full back pay with benefits restored to May 9,2007. On September 8, 2008, the City filed the instant petition challenging the arbitrability of the Union's grievance on the grounds that a grievance based on the City Personnel Rules, arguably including PSB's, is not arbitrable and that, in any event, the Grievant in this case was not entitled to contest his dismissal either as a probationer or on a claim of wrongful discipline.[15]

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union failed to establish a nexus between the act complained of in the grievance, that is, the dismissal of Grievant, and the provision invoked in the grievance, Article VI § 1(b) or even under § 1(e) pertaining to wrongful discipline (which the RFA does not invoke).

First, no nexus to the Agreement can be stated where the dispute, such as this, involves those City Personnel Rules. PSB 200-6R, as a derivative of the City Personnel Rules, is a DCAS Rule or Regulation expressly precluded from arbitration under the cited section of the Agreement. A ruling that the Department could not terminate Grievant's employment while under probation without first

---

[14] Since filing the RFA, the Union has withdrawn claims with regard to both the New York Codes, Rules and Regulations ("NYCRR"), which establishes minimum procedures for state agencies to follow in adopting rules governing their business practices, and the FMLA, a federal law governing procedures by which an employee may seek leave from work for medical reasons.

[15] Under § 1(e), Article VI, the term "Grievance" means:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

arbitrating the question would render the New York Civil Service Law void and unforceable as it relates to probationary periods for employees in the City's mayoral agencies. A claim that City Personnel Rules have been violated may sound in another jurisdiction but not in the arbitral forum.

Second, with regard to the claimed violation of Article VI, § 1(b), the City asserts that, because the Grievant was appointed to a competitive position, he was required to serve a probationary period of one year, extended under §5.2.1(a) of the Personnel Rules by the number of days that he did not perform the duties of the position. After his appointment on June 26, 2006, Grievant's year-long probationary period was scheduled to have ended on June 26, 2007, absent any extension. The termination letter recited May 7, 2007, as the date his services were directed to cease. Even if the Board accepts the Union's argument that Grievant did not receive the notice of that employment action until June 27, 2007, when he admittedly returned to work, Grievant was still probationary on June 27, 2007, because his five-month absence from duty extended the length of the probationary appointment some five months longer.

Moreover, even if it could be argued that DOHMH failed to provide Grievant notice of the extension of his probationary period, there is no requirement in the City Personnel Rules that an employee be informed of the increase of his or her probationary period; nor is such an extension contingent upon the employee's consent. The City argues that, because of Grievant's extended probationary status, any claim that DOHMH failed to follow the procedures described in PSB 200-6R with respect to notifying him of the termination is moot.

Finally, the City contends that the instant RFA is intended as a claim for wrongful discipline. Under the terms of the wrongful discipline provision of the contractual grievance procedure, Article VI, § 1(e), of the Agreement, competitive class employees who have not completed probationary

service are not entitled to disciplinary grievance rights.

For these reasons, Grievant is not eligible to claim rights and/or protection under these contractual provisions. Therefore, the Union cannot establish a reasonable relationship between Grievant's dismissal, the act complained of in the instant grievance, and either § 1(b) or § 1(e) of Article VI of the Agreement.

Union's Position

The Union argues that it has indeed established the requisite nexus between the termination of Grievant's employment and the cited section of the Agreement, Article VI, § 1(b), and that the instant dispute should be heard at arbitration.

The Union asserts that PSB's are a category of communications by City agencies to employees formerly known as Personnel Policies and Procedures ("PPP's"), currently called PSB's. The Union points to a printout from the DCAS web page on the official website of the City of New York cross-referencing PSB's with the PPP's. (Ans. Ex. B.) The Union supports its assertion that the instant matter is arbitrable by citing *District Council 37*, 39 OCB 28 (BCB 1987), which denied a challenge to arbitrability, upon finding (i) that the union in that case had articulated the requisite nexus between the provisions of the PPP at issue and the alleged violations, specifically, failure to evaluate probationer before termination, and further (ii) that the union had done so by pointing to the document's "specific standards and requirements [which] thus constitute written policies subject to arbitration" under a contractual provision with language identical to that in the instant Agreement. *Id.* at 24.

Notwithstanding the Union's characterization in the RFA of the grievance as a violation of a "DCAS rule," the Union contends that PSB 200-6R constitutes a written policy of DOHMH, rather

than a provision of the City Personnel Rules which are not subject to arbitration under the Agreement. The Union argues that PSB 200-6R, and other PSB's, are simply "bulletins," not rules themselves, and that, in any event, this very PSB 200-6R has already been the subject of an arbitration proceeding finding that a failure to notify a grievant of the extension of her probationary period of service resulted in the attainment of permanent status, thus affording the grievant in that case civil service rights to appeal her termination. (*Organization of Staff Analysts v. City of New York, Dep't of Transportation*, A-10771-04.)[16]

Further addressing the City's assertion that PSB 200-6R is a City Personnel Rule which cannot give rise to disputes heard at arbitration, the Union contends that the key to determining arbitrability of such a provision is whether, on one hand, its language is broad, precatory, and general, in which case the matter might not be subject to arbitration or, on the other hand, it specifies standards and requirements and thus constitutes written policies subject to arbitration. The Union claims that PSB 200-6R specifies certain requirements for probationary periods and is therefore

---

[16] The threshold issues in that case, pertaining to PSB 200-6R, were stated, among others, as follows:

> Does [PSB] 200-6R apply to [the Department of Transportation, "DOT"]? What is the consequence of the absence of written notice to Grievant of the extension of her probationary period?

The arbitrator made several preliminary findings of fact. One was that the date of the grievant's probationary period had, in fact, passed without notice to her that DOT had opted to extend it. Some four weeks later, she received a written memorandum that DOT wished to extend her probation due to a change of supervisory personnel. The grievant agreed in writing, after the fact, to the extension. Her employment was terminated during the extended probationary period. The City did not file a challenge before this Board. The arbitrator also concluded in another preliminary finding of fact that, by default, the grievance was arbitrable because the City presented no evidence that DOT had its own procedures for extending probation. The arbitrator further found that PSB 200-6R applied to DOT and that DOT's failure to provide written notice that it would extend the grievant's probation, despite the grievant's consent, resulted in the grievant's attainment of permanent status.

arbitrable. The Department's failure to give written notice of termination violated PSB 200-6R, § II, ¶ D, and renders the dispute a proper one for arbitration.

With regard to Grievant's appointment status, the Union maintains that Grievant had attained permanency when the Department failed to notify him, prior to the expiration of the original probationary period, that it wished to terminate his services. Since he was not a probationer at the time of his discharge, the Union argues, he was entitled to grievance rights under Civil Service Law § 75. Moreover, since he was never served with charges of incompetency or misconduct prior to his termination, his termination was improper under PSB 200-6R and the employment action against him squarely falls within the definition of a grievance under the cited section of the Agreement.

The Union urges that the City's petition be denied.

DISCUSSION

The policy of the NYCCBL, "as is made explicit by § 12-302 of the NYCCBL, . . . is to favor and encourage arbitration to resolve grievances." *Local 1182, CWA*, 77 OCB 31, at 7 (BCB 2006); *see also New York State Nurses Ass'n*, 69 OCB 21 (BCB 2002) (in depth discussion of public sector arbitration and the Board's role therein). This Board has exclusive power under NYCCBL § 12-309(a)(3) "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." 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 presumption is not without limits, of course; "we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate

beyond the scope established by the parties." *District Council 37*, Decision No. 77 OCB 13 at 8-9 (BCB 2006) (citations omitted).

This Board applies 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.

In this case, 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. The first prong of the test to determine arbitrability has been met.

The issue we must determine is whether the parties' obligation is broad enough in scope to include the present controversy. To make this determination, we must examine whether the Union has 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, at 12 (BCB 2008); *COBA*, 45 OCB 41, at 12 (BCB 1990). A *prima facie* showing, by definition, 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." *L. 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008). Rather, we "have long held that where the interpretation that each party proffers is plausible, the conflict between the parties' interpretation presents as substantive question of interpretation for an arbitrator to decide." *Id.*, quoting *Superior*

Officers' Assn., NYCHA Police Union, 13 OCB 18, at 8 (BCB 1974).

Here, to determine the existence of a claimed nexus, we must first determine whether the PSB in question presents a viable source of a claimed right subject to arbitration. The arbitrability of PSBs, just like that of their predecessor PPPs cannot be determined in a categorical manner, but rather turns upon the nature of the PSB in question and, where relevant, the relationship of the PSB in question to an arbitrable, or excluded, source. Thus, we have held, a policy "[c]ouched in general and precatory language," which merely constitutes "a statement of goals and objectives relating to the effective use by City agencies of the probationary period" "cannot arguably be the source of rights" subject to arbitration. *SSEU, L. 371*, 37 OCB 1, at 14, 15 (BCB 1986).

The parties do not dispute that the PSB in question contains what purports to be procedural requirements; there is no claim that the language is purely hortatory, or that it lacks specificity. The RFA poses the question to be decided in arbitration as whether DOHMH violated Article VI, § 1(b), of the Agreement by "failing to adhere to PSB 200-6R." In its answer to the instant petition, the Union more fully describes the asserted violation as a failure to give written notice of termination, under § II, ¶ D, of PSB 200-6R. The City does not dispute that such is in fact the claim.

Nor is it in dispute that the PSB in question applies to DOHMH, although issued by DCAS. In our prior decisions, we have consistently emphasized that a policy promulgated by the City and made enforceable at each of its agencies may constitute a predicate for arbitration. *See, e.g.*, *DC 37*, 39 OCB 28, at 24-26 (BCB 1987) (finding Personnel Policy and Procedure ("PPP") "about the rules governing the probationary period" a potential source of rights subject to arbitration); *L. 924, DC 37*, 1 OCB2d 3, at 10-12 (BCB 2008) (same as to Executive Orders promulgated by the Mayor; citing, *inter alia*, *Local Union No. 3, IBEW*, 19 OCB 13, at 4 (BCB 1977). The City, while not

contesting this general rule, nonetheless claims that the PSB at issue is excluded from arbitration, citing Article VI, § 1(b), which expressly precludes arbitration of claims concerning the violation, misapplication, misinterpretation of DCAS rules, and contending that PSB 200-6R merely restates the cognate provisions of the City Personnel Rules and, therefore, falls within the exclusion from arbitration. *See, e.g.*, *SSEU, L. 371*, 77 OCB 4, at 8 (BCB 2006) (where no independent provision other than DCAS personnel rules was identified, challenge to arbitrability granted); *SSEU*, 77 OCB 5 (BCB 2006) (same).

In *DC 37*, 39 OCB 28 (BCB 1987), which, like this case, involved a union's claim of procedural rights beyond those contained in the Personnel Rules allegedly afforded to a probationary employee, this Board explained:

> PPP 616-85 speaks in explicit terms about the rules governing the probationary period. While most of its provisions refer to another document from which the rule apparently derives, others do not. Thus, the document on its face appears to be more than simply a compilation of rules from other sources. Accordingly, we hold that PPP 616-85 is arguably a source in support of the claim for arbitration herein; beyond that point, any further determination as to the nature and scope of rights, if any, created by PPP 616-85 and their application in a given case would be matters to be dealt with by an arbitrator and not this Board.

Id. at 25.

Indeed, in *DC 37*, the policy at issue explicitly "define[d] itself as an advisory bulletin that does not give or create any rights or privileges to probationary employees." *Id.* This Board found that such a characterization did not forestall arbitration, as "a contrary ruling would enable the City to avoid arbitration simply by adding this type of language to any document it issues, even where it otherwise clearly constitutes a written policy within the meaning of the agreement." *Id*.

In the instant case, PSB 200-6R states on its face that it derives from several sources,

including the Personnel Rules (thus potentially supporting the exclusion from arbitration contended for by the City), but also including the Citywide Agreement itself, clearly a potential source for rights subject to arbitration. Thus, the PSB's own text is inconsistent with the argument that it merely replicates the Personnel Rules, and does not rule out the existence of a nexus.

A comparison between the provisions of PSB 200-6R and the similar provisions of the Personnel Rules strengthens the possibility of a nexus between the right sought to be arbitrated and the PSB, independent of the Personnel Rules. Where PSB 200-6R at § I (B) does replicate in large part the content of Rule 5.2.8 (a), it contains a separate section, at § II (C) creating procedures by which the agency may extend a probationary period, stating unequivocally that "[a]t least one month prior to the completion of the regular probationary period must notify the employee in writing" of its intent to extend probation. *Id*., at § II (C)(1). Such notice "should include a specific fixed period of extension," as well as provisions for the employee to provide "unconditional written consent" to the extension, to be followed by a formal request to the extension to be made in writing to the Control and Service Division "stating the reasons therefor." *Id.*, at § II (C) (2), (3), (4). Similarly, the extension of probation may be for a period "totaling not more than six months plus the number of days the probationer has been absent and/or has not performed the duties of the position, during both the original probationary period and the extended probationary period."[17] *Id.* at II § C(2). Moreover, § II (D) provides that, the agency may "terminate the employment of any unsatisfactory probationer by giving written notice of the termination to the employee and the Deputy

[17] Likewise, should the agency choose to not count a period of time during which the employee has been on leave of absence in another City position, the PSB requires the agency to "send a letter to the Control and Service Division," which "must be sent no later than one month before the one-year anniversary of the appointment," and states that a "copy of this notice should be given to the affected employee." *Id.*, at § II (C)(5), *cf* Rule 5.2.8.

Commissioner" of DCAS, with further procedural requirements to effectuate the termination. *Cf.* Rule 5.2.7.

These procedural requirements do not appear in the analogous Personnel Rules, and therefore, to the extent that the Union claims that such procedural requirements create rights enforceable through arbitration, such rights would, under our prior cases, stand outside of the exclusion from arbitration of claims arising under the Personnel Rules in Article VI, § 1(b). *DC 37*, 39 OCB 28, at 25; *see also District Council 37, Local 1407*, 75 OCB 7 (BCB 2005) at 15 (finding a reasonable relationship between termination of grievant for failing to maintain residency and agency's own policies relating to residency requirement separate from DCAS residency rules).

Finally, we find that the Union has established a nexus, in that it has advanced a "plausible" reading of the provisions of PSB 200-6R under which it can be taken as giving rise to rights subject to arbitration. *L. 1157, DC 37*, 1 OCB2d 24, at 9. Here, the PSB employs mandatory language with set time frames by which the agency is required to perform steps to extend a probationary employee's probationary period, or to deny such an employee credit for such service during which the employee is on a leave of absence, or to act to terminate a probationary employee. This use of mandatory language coupled with the Union's allegations that the agency failed to comply with at least one of the steps required of it, providing the employee the requisite timely notice, states a reasonable relationship of right and deprivation to make out "a *prima facie* relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *L. 924, DC 37*, 1 OCB2d 3, at 12. Accordingly, the requisite nexus has been established, and, as was the case in *DC 37*, 39 OCB 28, we find that PSB 200-6R is arguably a source in support of the claim for arbitration herein. Further determination as to the nature and scope of rights, if any, created by

PSB 200-6R and their application to the instant case are matters to be decided by an arbitrator and not this Board. Accordingly, the issues to be determined by the arbitrator are first, whether the City's actions with respect to its extension of Grievant's probation violated PSB 2206R, and second, if so, what if any shall be the remedy.

For the reasons stated above, we deny the City's petition challenging arbitrability and grant the RFA.

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 Health and Mental Hygiene, docketed as No. BCB-2720-08, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, docketed as A-12830-08, hereby is granted.

Dated: December 17, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER