OSA, 10 OCB2d 9 (BCB 2017)

(Arb.) (Docket No. BCB-4191-17) (A-15223-16)

Summary of Decision*:** NYCHA challenged the arbitrability of a grievance alleging that it assigned the grievant duties substantially different from those stated in his job specification. NYCHA argued that arbitration of the Union's claim is precluded by public policy and that there is no nexus between the claim and the collective bargaining agreement. The Board found that arbitration of the Union's claim is not precluded by public policy and that a nexus exists. Accordingly, the Board denied NYCHA's petition challenging arbitrability and granted the Union's request for arbitration. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS,
on behalf of ANTHONY FRIEDMAN,

Respondent.

DECISION AND ORDER

On January 17, 2017, the New York City Housing Authority ("NYCHA") filed a petition challenging the arbitrability of a grievance brought by the Organization of Staff Analysts ("OSA" or "Union") on behalf of Anthony Friedman ("Grievant") alleging that NYCHA assigned Grievant duties substantially different from those stated in his job specification. NYCHA argues that the arbitration of the Union's claim is precluded by public policy and that there is no nexus between the Union's claim and the collective bargaining agreement. The Union argues that the arbitration

of its claim is not precluded by public policy and that there is a nexus between its claim and Article 6(a)(iii) of the collective bargaining agreement. The Board finds that arbitration of the Union's claim is not precluded by public policy and that a nexus exists. Accordingly, the Board denies NYCHA's petition challenging arbitrability and grants the Union's request for arbitration.

BACKGROUND

NYCHA and the Union are parties to a collective bargaining agreement ("Agreement") and the Citywide Agreement. On or about May 2012, Grievant was appointed as an Administrative Community Relations Specialist ("ACRS") (Title Code No. 10022) at NYCHA.[1]

In July 2011, the Union sought to add employees in the ACRS title in managerial pay levels I, II and III to its bargaining unit. On January 10, 2014, the Board of Certification found that, with certain exceptions, employees in ACRS title in managerial pay levels I, II and III were not excluded from collective bargaining as managerial or confidential under New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") and certified the Union as their bargaining representative.[2] *See OSA,* 7 OCB2d 2, at 1 (BOC 2014) ("Certification"). After the issuance of the Certification, the Department of Citywide Administrative Services ("DCAS") created Title Code No. 1002F for the employees in the ACRS title who were found eligible for collective bargaining and were added to the Union's certification, including Grievant. DCAS maintained Title Code No. 10022 for the managerial employees in the ACRS title. DCAS has one job specification for the ACRS title, which provides that "this is a

[1] According to the Union, Grievant was hired as an ACRS in managerial pay level I.

[2] The Board also designated certain ACRS positions in managerial pay levels I, II and III as managerial and excluded them from collective bargaining. *See OSA,* 7 OCB2d 2, at 30-31, 35-36.

management class of positions, with several assignment levels." (Ans., Ex. B) According to NYCHA, after the issuance of the Certification, the managerial pay levels apply only to employees in Title Code No. 10022, who are excluded from collective bargaining as managerial under the NYCCBL or by agreement of the parties.

According to the Union, on or about January 2014, Grievant was assigned to serve as Bronx Borough Manager of the Resident Engagement Department ("RED") and reported to Deputy Director Juan Santiago.[3] On or about February 2014, Grievant was assigned responsibilities over NYCHA's Tenant Participation Funds and placed in charge of all Long Island City staff and the RED district teams in the five City boroughs. On or about March 2014, Santiago recommended a salary increase for Grievant, which the Union claims was in recognition of a "de facto promotion" and "commensurate with the annual salar[ies] of other similarly situated ACRS" on a March 11, 2014 organizational chart. (Ans. ¶ 14) On April 28, 2014, pursuant to the Certification, Grievant's title was reclassified to non-managerial.[4]

Grievant did not receive the recommended salary increase and, on January 26, 2016, filed a grievance at Step I, alleging that "since November 23, 2015[, he] has been performing duties substantially different from those stated in his job description[,]" in violation of Article 6(a)(iii) of the Agreement.[5] The grievance also alleged a violation of Article IX, § 12, of the Citywide

[3] NYCHA acknowledges that Grievant was employed as an ACRS in RED, but denies that he served as a Borough Manager.

[4] In its Reply, NYCHA claims that the parties entered into a Stipulation of Settlement ("SOS") in June 2015 identifying employees who were reclassified as non-managerial. It did not provide a copy of the SOS, or quote the relevant language, but claims that paragraph 3 of the SOS disqualifies Grievant from having a managerial pay level.

[5] Section 6(a) of the Agreement, in relevant part, provides:

Agreement ("Citywide Agreement claim"), which provides that "[n]o employees shall receive a lower rate following promotion than the basic salary rate preceding the promotion."[6]

NYCHA did not respond to the grievance at Step I. Consequently, on August 30, 2016, the Union appealed the grievance to Step II with NYCHA's Director of Human Resources, alleging a violation of Article 6(a)(iii). On September 8, 2016, the Director of Human Resources denied the grievance at Step II, finding that it was time-barred and that Grievant was not performing out-of-title work.

On September 21, 2016, the Union appealed the grievance to Step III, but NYCHA did not respond. Consequently, on December 30, 2016, the Union filed the instant request for arbitration pursuant to Article 6(b)[7] of the Agreement, alleging that "NYCHA violated Article 6(a)(iii) of the. . . [A]greement by assigning grievant duties substantially different from those stated in his job description. . . ."[8] (Ans. ¶ 16)

Definition of Grievance

* * *

> (iii) A claimed assignment of employees to duties substantially different from those stated in their job classifications.

* * *

[6] Since the Union's claim under the Citywide Agreement is not raised in the Union's request for arbitration or NYCHA's petition challenging arbitrability, we do not address it here.

[7] Section 6(b) of the Agreement, in relevant part, provides that "an appeal from an unsatisfactory determination at Step III may be brought . . . by the Union . . . to the Office of Collective Bargaining for impartial arbitration by an arbitrator. . . ."

[8] The parties did not submit the Union's request for arbitration with their pleadings. We take administrative notice of the request for arbitration docketed by the Office of Collective Bargaining ("OCB") as Case # A-15223-16 ("RFA").

POSITIONS OF THE PARTIES

NYCHA's Position

NYCHA challenges the arbitrability of the grievance on several grounds. First, NYCHA argues that arbitration of the grievance is precluded by public policy. It asserts that DCAS has exclusive authority to create title codes and assignment levels, and arbitration of the grievance would undermine that authority.[9] It argues that the ACRS job specification does not contain assignment levels. Therefore, allowing arbitration of the grievance will effectively recognize assignment levels within the ACRS title that do not exist, and which DCAS has the exclusive authority to create.

Second, NYCHA argues that the Union's claim has no nexus to the Agreement. NYCHA contends that Grievant's motivation for filing the grievance is a factor this Board should consider in determining whether a nexus exists. It argues that Grievant filed the grievance because he was denied a salary increase and that such a salary dispute, couched as an out-of-title claim, has no

[9] Section 814 of the New York City Charter, in relevant part provides:

> The commissioner shall have the following powers and duties in addition to the powers and duties of a municipal civil service commission provided in the civil service law, and those vested in the commissioner as the head of the department, except where any specific power or duty is assigned to the mayor, heads of city agencies or the civil service commission pursuant to this chapter:
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> * * *
>
> (2) To make studies in regard to the grading and classifying of positions in the civil service, establish criteria and guidelines for allocating positions to an existing class of positions, and grade and establish classes of positions;

nexus to the collective bargaining agreement.[10] NYCHA also asserts that the Agreement only "provides a mechanism for arbitrating . . . out-of-title claims," which it contends requires "performing the work of a higher title, if a promotional title exists." (Rep. ¶ 18, Pet. ¶ 3) It argues that there is no basis for an out-of-title claim because the ACRS title does not promote into a higher title. Further, NYCHA characterizes the Union's claim as an out-of-level claim and argues that such claims are not grievable under the Agreement because Article 6(a)(iii) does not reference "assignment levels," and because its language was negotiated prior to the existence of any assignment levels for any OSA represented title.[11] NYCHA further argues that to the extent an out-of-level claim is grievable, it requires "performing. . . the work of a higher level, if assignment levels exist." (Pet. ¶ 3) NYCHA contends that there is no basis for an out-of-level claim because the ACRS job specification does not contain assignment levels. It insists that ACRS managerial pay levels are not assignment levels. It argues that the managerial pay levels only apply to managerial ACRS employees in Title Code No. 10022 and that they do not apply to Grievant because he is a non-managerial ACRS in Title Code No. 1002F. Further, it argues that the SOS expressly makes Grievant ineligible for a managerial pay level.

Finally, NYCHA disputes that the ACRS job posting, an organizational chart, and the Administrative Staff Analyst ("ASA") job specification are evidence of ACRS assignment levels. NYCHA argues that the October 30, 2013 ACRS job posting and the March 11, 2014 RED organization chart cited by the Union are irrelevant because they predate Grievant's April 28, 2014

[10] NYCHA also argues that Grievant has no viable remedy because his annual salary of $73,444 falls within the ACRS Title Code No. 1002F salary range of "53,373 – 130,671." (Rep., Ex. 2) (NYCHA September 23, 2016 Human Resources Department Salary Schedule for non-managerial titles).

[11] NYCHA cites no authority for this argument.

reclassification to a non-managerial ACRS position. Further, NYCHA argues that the ACRS job posting does not establish ACRS assignment levels and that the ASA job specification is not relevant because the ASA title is not at issue here.

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

Union's Position

The Union asserts that NYCHA assigned Grievant duties substantially different from those stated in his job specification and that it has raised a viable claim under Article 6(a)(iii) of the Agreement. In response to NYCHA's public policy argument, the Union argues that the arbitration of the Union's claim does not infringe upon DCAS' authority under § 814 of the New York City Charter. It asserts that the issue for arbitration is not whether DCAS "incorrectly established" Grievant's job specification, "but whether Grievant was assigned duties substantially different from DCAS' [job specification for] the [ACRS] title." (Ans. ¶ 19)

Further, the Union argues that a nexus exists between the act complained of in the grievance, that is, the assignment of duties substantially different from those stated in his job specification, and Article 6(a)(iii), the contractual provision invoked in the request for arbitration, which includes out-of-title claims in the definition of a grievance.

In response to NYCHA's argument that the ACRS title does not have assignment levels, the Union points to the ACRS job specification, which explicitly states that "this is a management class of positions, with several assignment levels." (Ans., Ex. B) The Union argues that Grievant is currently in ACRS Title Code No. 1002F, at managerial pay level I, but that he is performing

the duties of an ACRS in Title Code No. 1002F, managerial pay level III.[12] It also presents an October 30, 2013 ACRS position posting and a March 11, 2014 organizational chart to show that ACRS assignment levels exist. Finally, the Union claims that assignment levels may exist even when a job specification does not explicitly set forth duties by level. As an example, it offers the ASA job specification, which also provides that the title is "a management class of positions with several Assignment Levels."[13] (Ans., Ex. C)

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

DISCUSSION

NYCHA challenges the arbitrability of a grievance alleging Grievant was assigned to perform duties substantially different from those stated in his job specification. For the following reasons, the Board finds that arbitration of the Union's claim is not precluded by public policy and that a nexus exists between the subject of the grievance and Article 6(a)(iii) of the Agreement.

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). As such, "the NYCCBL explicitly promotes and encourages the use of

[12] At OCB's request, on March 7, 2017, the Union clarified this argument in an email that was made part of the record.

[13] The Union also disputes the factual basis of NYCHA's argument that an out-of-title claim requires "performing the work of a higher title, if a promotional title exists." (Pet. ¶ 3) While the Union does not claim that Grievant was assigned duties of an ACRS in Title Code No. 10022, it asserts that the performance of such work by an ACRS in Title Code No. 1002F is sufficient to establish an out-of-title claim and claims that Title Code No. 1002F can promote into Title Code No. 10022.

arbitration, and '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." However, the Board "cannot create a duty to arbitrate if none exists, [nor can we] enlarge a duty to arbitrate beyond the scope established by the parties" in their collective bargaining agreements. *DC 37, L. 768,* 4 OCB2d 45, at 12 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 12). *See also CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L.371*, 69 OCB 34, at 4 (BCB 2002). The Board applies a two-pronged test to determine whether a grievance is arbitrable. This test considers:

> (1) whether the parties are obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so
>
> (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

DC 37, L. 420, 5 OCB2d 4, at 12 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 9 (BCB 2011)) (citations and internal quotation marks omitted).

Here, it is undisputed that the parties agreed to resolve certain disputes, including claims alleging assignment of duties different from an employee's job specification, through the Agreement's grievance procedure. However, NYCHA argues that the first prong is not satisfied because arbitration of the instant claim implicitly recognizes assignment levels, a matter over which DCAS has exclusive authority. We are not persuaded that arbitration of the Union's claim infringes on DCAS' authority or would otherwise be against public policy. While it is undisputed

that DCAS has the authority to establish title codes or assignment levels, the fact that the ACRS job specification was created by DCAS does not preclude the interpretation of the job specification by an arbitrator or mean that such an interpretation infringes upon or modifies DCAS's authority. DCAS' job specification for the ACRS title states that "this is a management class of positions with several assignment levels." (Ans., Ex. B) NYCHA and the Union disagree on whether such "assignment levels" exist and whether they apply to Grievant. In resolving this dispute, an arbitrator will be required to interpret the ACRS job specification in applying the Agreement. The issues for interpretation by an arbitrator do not require the creation of assignment levels or alter the ACRS job specification and, therefore, do not modify DCAS' authority. Rather, the disputed issues merely raise questions of contract interpretation, which is precisely what the parties intended an arbitrator to decide.[14] *See PBA*, 4 OCB2d 22, at 13 ("Once an arguable relationship [exists], the Board will not consider the merits of the grievance"). Therefore, the first prong of the test is satisfied.

With respect to the second prong, the burden is on the Union "to demonstrate a . . . [reasonable] '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

[14] The Board's certification did not address the issue of assignment levels. Any reference to levels in that decision referred to managerial pay levels as a means of describing the employees at issue.

of the grievance . . . [as] where 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 Union's claim and Article 6(a)(iii) of the Agreement. In the RFA, the Union alleges a violation of Article 6(a)(iii) of the Agreement, which defines a grievance to include "[a] claimed assignment of employees to duties substantially different from those stated in their job classifications." (Pet., Ex. A) The Union's claim, that NYCHA "assign[ed] [G]rievant duties substantially different from those stated in his job description," has a direct nexus with this cited provision.[15] (Ans. ¶ 16, ¶ 19)

We reject NYCHA's contention that there is no nexus because out-of-level claims are not grievable under the Agreement. Although we do not rule on the merits of the grievance, this Board has recognized the viability of out-of-level claims. *See CWA, Local 1180,* 39 OCB 35 (BCB 1987) (finding an out-of-level claim arbitrable); *see also L. 1757, DC 37*, 670 OCB 10 (BCB 2001) (Board acknowledged existence of out-of-level grievances in a retaliation claim). Similarly, NYCHA acknowledges the existence of out-of-level claims. It admits that "when employee organizations bring grievances under the [ ] out-of-level provision of their [ ] CBA's, they assert that the grievant [is] performing the work of a … higher level, if assignment levels exist." (Pet. ¶ 3) Additionally, the Agreement does not expressly exclude out-of-level claims from the definition of a grievance. *Plumbers Local Union No. 1 of Brooklyn and Queens,* 49 OCB 27, at 16 (BCB

[15] We decline to consider Grievant's motivation in determining whether a nexus exists. Grievant's motivation does not alter the Union's stated grievance that the Grievant was "assigned duties substantially different from those stated in his job description" or its burden to establish it in arbitration. (Ans. ¶ 16)

1992) (finding claim arbitrable when it is not specifically excluded from a collective bargaining agreement's definition of a grievance). As such, we find that there is a nexus between the Union's claim and Article 6(a)(iii) of the Agreement and that Article 6(b) provides a mechanism for arbitrating such claims.

The parties' remaining arguments raise substantive questions of contract interpretation for an arbitrator to decide. *See PBA*, 4 OCB2d 22, at 13 ("Once an arguable relationship [exists], the Board will not consider the merits of the grievance.").

Consequently, the petition challenging arbitrability is denied and the Union's request for arbitration is granted. *See CWA, Local 1180,* 39 OCB 35.

ORDER

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

ORDERED, that the portion of the petition challenging arbitrability filed by the NYCHA, docketed as BCB-4191-17, hereby is denied, and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, docketed as A-15223-16, hereby is granted.

Dated: April 19, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

DANIEL F. MURPHY
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER B. PEPPER
MEMBER