SBA, 2 OCB 2d 41 (BCB 2009)

(Arb) (Docket No. BCB-2800-09) (A-13208-09).

***Summary of Decision*:** The City of New York and the New York City Police Department challenged the arbitrability of a grievance alleging that the City had failed to comply with the "reopener" provision of its agreement with the Union by declining to reopen negotiations based upon an adjustment to another union's longevity and health and welfare benefits, alleging that it had fully complied with the reopener provision after that other union's negotiations, and that, in any event, the reopener agreement in question was limited to adjustments to the "salary scale" and that the Union had failed to establish a nexus between longevity and welfare benefits and the reopener agreement. The Union argued that the term "salary scale" should be interpreted to include all forms of remuneration. The Board, based upon the long-established use of the term salary scale, as exemplified in the agreement at issue itself, found no nexus had been established and granted the petition. **(*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 CITY POLICE DEPARTMENT,

Petitioners,

-and-

THE SERGEANTS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On August 11, 2009, the Sergeants Benevolent Association ("SBA" or "Union") filed a Request for Arbitration ("RFA") alleging that the City of New York and the New York City Police Department ("NYPD" or, collectively, "City") failed to comply with the "reopener" provision of the 2005-2011 memorandum of understanding between the City and the SBA (the "SBA MOU") by

refusing to negotiate with the SBA over the effects of those provisions of the 2006-2010 agreement reached between the Patrolmens' Benevolent Association ("PBA") and the City increasing compensation terms, including longevity and welfare benefits. On September 28, 2009, the City filed the instant petition challenging arbitrability, claiming that the Union has failed to establish a reasonable relationship between the contractual language to which it adverts and the longevity and welfare fund benefits on which it now seeks a reopener, and that, in any event, the City had already complied with the reopener provision of the SBA MOU after the PBA's negotiation of an increased salary schedule in an agreement covering 2004 through 2006, and had negotiated to fruition a compensation increase to the SBA's salary schedule. Moreover, the City asserts that it had further engaged in negotiations with the SBA, which resulted in a memorandum of understanding extending the SBA MOU twenty-nine days again amending the salary schedule (the "SBA Extension MOU"). The Union argues that it has established a nexus between the contractual language upon which it relies and the adjustments made in the PBA Agreement and the reopener provision, as the term "salary schedule" should be read to encompass all forms of monetary compensation, and not just base annual wages, or salary. Because "salary schedule," the term used in the reopener provision is a commonly used and clearly understood term of art in municipal public sector negotiations within the City of New York, and as such, that term cannot reasonably be read to include longevity and welfare fund benefits, the Board finds that the SBA has failed to establish a reasonable relationship between the act complained of and the contractual provision alleged to provide a grievance remedy. Accordingly, the petition is granted, and the RFA denied.

BACKGROUND

The City and the SBA are parties to a collective bargaining agreement covering the period from June 1, 2003 through May 31, 2005 (the "SBA Agreement") (Pet. Ex. 2). On or about July 9, 2007, the parties executed the SBA MOU, which modified the terms of the SBA Agreement, while extending its term, except as modified in the SBA MOU or its accompanying side letters, from June 1, 2005 through July 31, 2011. (RFA Ex. B).

The SBA Agreement provides, at Article VI (entitled "Salaries"), for salary and increment rates during its term, for sergeants promoted before April 1, 2006, effective June 1, 2003 and June 1, 2004, and also for sergeants promoted on or after April 1, 2006, effective June 1, 2004. Additionally, rates at each step are provided for sergeants designated as supervisors of detective squads or to special assignment. (*Id.*, § 1 (i)-(iii)). The same article provides for salaries paid to laid off employees returned to service, general wage increases, delivery of paychecks and salary itemization. (*Id.*, §§ 2-5). Other articles address different topics such as Article VII (entitled "Uniform Allowance); Article VIII (entitled "Longevity Adjustments"); Article XII (entitled "Health and Hospitalization Benefits"); and Article XIII (entitled "Health and Welfare Fund").

The SBA MOU sets out in section 3, titled "Wages," the general wage increases applicable to incumbent employees during the term of the SBA MOU, and the base rates from which that general wage increase is to be calculated. In section 4, entitled "New Promotee Schedule," specific salary amounts for sergeants hired on or after April 1, 2006, to be effective July 1, 2008, are set out ranging from Year 1 through Year 5. Section 5 of the SBA MOU is entitled "Additional Compensation Funds," and provides for increased Health and Welfare Contributions for retired members. (SBA MOU § 5(a)). A separate subsection within the same section provides for increseses

to longevity payments at the 5, 10 15, and 20 year steps, effective July 1, 2008. (SBA MOU §5 (b)). Section 5 further provides, effective September 1, 2010, for further increases to Health and Welfare Contributions for retired members; longevity payments at the 5, 10, 15 and 20 year steps; Longevity payments at the 15 and 20 year steps; and annuity fund contributions for all active members. (SBA Agreement § 5 (c); (d); (e); and (f)).

Among the side letters attached to the SBA MOU was one providing that:

> [i]f another uniformed collective bargaining unit has an adjustment made to its salary schedule through the collective bargaining or arbitration process or otherwise during the time period covering June 1, 2005 through July 31, 2011, which results in a greater percentage wage increase, then, at the SBA's request, this agreement will be reopened for the purpose of negotiating the effect of that adjustment through the final steps of the bargaining process.

(*Id.*, side letter "Reopener Letter")).

On or about July 11, 2007, the New York State Public Employment Relations Board ("PERB") designated an public arbitration pursuant to section 209 of the New York City Civil Service Law to resolve the impasse between the PBA and the City had reached in attempting negotiate a collective bargaining agreement for August 1, 2004 through July 31, 2006. On or about May 19, 2008, the panel issued its award (the "PBA Impasse Award") (RFA, Ex. C), which found that "base annual salary rates of all bargaining unit members shall be raised 4.5% effective August 1, 2004 and further increased by 5.0% (compounded) effective August 1, 2005." (PBA Impasse Award ¶ 2).

Subsequent to the issuance of the Impasse Award, the SBA invoked its right, pursuant to the Reopener Letter, to renegotiate the terms of the SBA MOU, in view of the provisions of the PBA Impasse Award. On July 9, 2009, the parties executed a memorandum of understanding which

constituted a Reopener of the SBA MOU ("SBA Reopener"). In the SBA Reopener, the parties agreed to raise the basic maximum salary for a sergeant and for a sergeant designated on special assignment and/or designated as supervisor of Detective Squad. The parties further agreed that "this reopener has an economic impact on the period from covering from June 1, 2007 to July 31, 2011," and "to negotiate over the effects of the reopener on the successor agreement through the final steps of the bargaining process." (SBA Reopener § 3(b)).

On or about August 21, 2008, the City and the PBA executed a memorandum of understanding covering the period August 21, 2006 through July 31, 2010. (Pet. Ex. 3) ("PBA MOU"). Section 3 of the PBA MOU set forth a General Wage Increase of 4% for each year covered by the PBA MOU, effective August 1 of that year, and stated that each general increase "shall be based upon the base rates (including salary or increment schedules) in effect on July 31," that is, the day before the commencement of each year of the PBA MOU's duration. Other sections of the PBA MOU addressed subjects such as longevity (§4) welfare funds (§5), range day (§ 6), and vacation days (§ 7).

Pursuant to the SBA Reopener, the parties met in December 2008 and again in March, 2009, to negotiate an agreement extending the SBA Agreement, as modified by the SBA MOU and the SBA Reopener, from July 31 2011 to August 29, 2011 (the "SBA Extension MOU") (RFA Ex. E). The SBA Extension MOU explicitly provides that "the parties have agreed to adjustments to be made to the salary schedule during the term" of the SBA Agreement as amended, "and have agreed to a means of funding said adjustments." The funding of the salary increases contained in the SBA Extension MOU were explained as follows:

> Funding for this modification has been provided through the

> application, in full, of available funding as a result of the Reopener arising out on an Interest Award Arbitration Award covering the [PBA] for the period August 1, 2004 through July 1, 2006, and a twenty-nine (29) day extension of the current contract's expiration date from July 31, 2011 to August 29, 2011.

(SBA Extension MOU at § 4).

On June 11, 2009, SBA President Edward D. Mullins sent a letter to OLR Commissioner James Hanley in which he stated that the:

> [PBA MOU] has several compensation components that cause the PBA [MOU] to have a greater percentage wage increase that the SBA for the same time period. That remains the case even in light of the recently completed reopener agreement with the SBA signed on April 3, 2009. . . . Pursuant to the terms of the SBA [MOU] we hereby request that the City meet with the SBA as soon as possible in order to reopen the SBA [MOU] as modified by the April 3 [SBA Extension MOU] and negotiate the effect of those adjustments referred to above.

(RFA Ex. G).

On June 19, 2009, Commissioner Hanley replied in a letter stating, in pertinent part:

> The intent of the reopener language was to maintain the parity relationships that have long existed between uniformed titles at basic maximum salary, in the event that another uniformed union received a greater wage increase in the same round of bargaining. This Office has gone to great lengths in order to maintain those parity relationships, including but not limited to the re-opener agreements reached after the 2004-2006 PBA arbitration award. Those reopener agreements, including the July 9, 2008 agreement with the SBA, restored the parity relationships at basic maximum salary that were disrupted by the [Impasse] [A]ward. We also agreed to meet with you subsequent to the reopener agreement to discuss a salary compression issue, and reached yet another agreement on April 3, 2008 that addressed that issue.
>
> Your letter states that the [PBA MOU] contains "several compensation components that cause it to have a greater percentage increase than the SBA for the same period. As the SBA received the

> same general wage increase as the PBA in the two bargaining rounds included in the [PBA MOU], with the same 9.75% net cost and the same additional funding to address other economic items, we do not believe that any cause exists to reopen the SBA agreement.

(RFA Ex. H).

On July 8, 2009, the SBA filed a grievance at Step III in the form of a letter to NYPD Deputy Commissioner John P. Beirne, of the NYPD Office of Labor Relations, asserting that the City's refusal to reopen the SBA agreement violated the Reopener Letter. As the SBA explained:

> Specifically, the [PBA MOU] provides for increases in the Longevity portion of salary which are greater than the Longevity portion of salary contained in the 2005-2011 SBA Agreement covering the same period. The [PBA MOU] also includes increases in the health and welfare compensation formula which are greater than the health and welfare portion of compensation contained in the SBA agreements covering the same period. Because these compensation elements are greater than those contained in the SBA Agreement the reopener agreement allows for further negotiations. It was a violation of the reopener agreement for the City to refuse to reopen.

(RFA Ex. I).

On July 23, 2009, Deputy Commissioner Beirne denied the grievance, on the ground that, because "the only authorized collective bargaining agent for the City of New York and/or the Police Department of the City of New York," and that the correspondence to him "cannot be accepted as a grievance under the contractual grievance procedure," as "[n]either this Office nor the Police Department has any authority in this matter." (RFA Ex. J).

The RFA, and the instant petition challenging arbitrability, followed.

POSITIONS OF THE PARTIES

City's Position

The City founds its challenge to arbitrability on two claims. First, the City argues that it has fully complied with the Reopener Letter, by negotiating the Reopener increasing salaries in response to the Impasse Award and then further by negotiating the funding modifications to effectuate the Reopener in the SBA Extension MOU. The SBA's request for arbitration must be denied because the plain language of the Reopener Letter states that the duty to reopen is triggered solely by general wage increases, and the SBA has already negotiated the same general wage increase, with the same 9.75% net cost, as obtained by the PBA.

Additionally, the City argues that the SBA has failed to state a *prima facie* relationship between the act complained of and the source of the alleged right to be arbitrated, in that the Reopener Letter provides that the SBA may reopen negotiations "if another uniformed collective bargaining agreement has an adjustment made to their **salary schedule**." (Pet. ¶ 57) (emphasis in original) (quoting RFA Ex. I, quoting Reopener Letter). The SBA cannot establish a nexus between this provision and the asserted act complained of, as the alleged basis triggering the duty to reopen here was not an adjustment to salary schedule, but rather an adjustment to the Longevity Schedule and the Welfare Funds which are addressed in separate articles of the SBA Agreement and in separate sections of the SBA MOU and which are not addressed in the SBA Extension MOU.

Accordingly, the City asserts the instant petition must be granted and the RFA denied.

Union's Position

The SBA asserts that it has established the existence of a nexus between the dispute and the Reopener Letter based upon the reasonable construction of the term "salary schedule" as used in the

Reopener Letter. The SBA argues that reading the term "salary schedule" as restricting the City's duty to reopen negotiations exclusively to grievances concerning the payment of base annual salary is not a reasonable interpretation of the Reopener Letter's plain language, as well as leading to an absurd result, that is, the reduction of the term "salary schedule" to mean nothing more than base annual salary or even the unmodified word, salary. Clearly, the SBA claims, the addition of the expansive term "schedule" is meant to encompass "Longevity" and "Health and Welfare payments," or the parties would have simply used the terms salary or base annual salary.

Alternatively, the SBA argues, the term "salary schedule" as used in the Reopener Letter is ambiguous and therefore should be left to an arbitrator. In support of this contention, the SBA points out that the definition of "salary" in *Webster's Online Dictionary*, as denoting "fixed compensation paid regularly for services" would encompass both Longevity and Health and Welfare payments. Accordingly, a nexus has been established, and the grievance should proceed to arbitration.

DISCUSSION

In this case, the City asserts that the SBA cannot establish that the City failed to comply with its duty to reopen negotiations pursuant to the Reopener Letter based upon both its satisfaction of that duty in the Reopener and in SBA Extension MOU, and because the terms of the Reopener Letter clearly do not include the longevity and health and welfare fund payments at issue here as implicating the duty to reopen. We find that the Reopener Letter's provision is expressly limited to adjustments of another uniformed unit's "salary schedule," and that the SBA has, accordingly failed to establish the necessary reasonable relationship between the right asserted and the alleged source of that right. Accordingly, we grant the City's petition in its entirety, and dismiss the RFA.

We have often reaffirmed that:

> It has long been the stated policy of the NYCCBL to favor and encourage arbitration to resolve grievances. Therefore, the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration. However, the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.

Local 924, DC 37, 1 OCB2d 3, at 7 (BCB 2008); *see also NYSNA*, 2 OCB2d 6, at 7 (BCB 2009); *SBA*, 79 OCB 15, at 5 (BCB 2007); *CWA, Local 1180*, 1 OCB 8, at 6 (BCB 1968).[1]

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."[2] *See NYSNA*, 69 OCB 21 (BCB 2002).

As we have recently explained, we employ a two pronged 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. 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.

NYSNA, 2 OCB2d 6, at 7 (quoting *OSA*, 79 OCB 22, at 10 (BCB 2007) (citations and internal

---

[1] 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.

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

quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969); *Matter of Acting Supt. of Schools of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Assn.*, 42 N.Y.2d 509, 513 (1977) (similar standard applicable under Taylor Law); *Matter of Bd. of Educ. v. Watertown Educ. Assn.*, 93 N.Y.2d 132, 137-138 (1999) (same).

In the instant case, there is no contest as to the first prong; the City acknowledges that it is a party to the Reopener Letter, and does not assert any claim that it is not bound thereby, nor that it alleged breaches of its obligations under it would be arbitrable. However, it asserts both that it has fulfilled that obligation, and that, in any event, the SBA has failed to establish a nexus between the Reopener Letter and the alleged right to reopen the SBA Agreement as amended to negotiate longevity and welfare benefit payments. Because we agree with the City that no nexus has been made out between the Reopener Letter and the subjects sought to be reopened, we need not address the City's complaint that the Union acted improperly in seeking to negotiate various subjects seriatim, instead of in one round of reopened negotiations.

The Reopener Letter provides that:

> [i]f another uniformed collective bargaining unit has an adjustment made to its salary schedule through the collective bargaining or arbitration process or otherwise during the time period covering June 1, 2005 through July 31, 2011, which results in a greater percentage wage increase, then, at the SBA's request, this agreement will be reopened for the purpose of negotiating the effect of that adjustment through the final steps of the bargaining process.

Thus, by its own terms, the duty to reopen arises only when another uniformed unit has an adjustment made to its "salary schedule." Notably, the SBA Agreement itself, the document modified by the SBA MOU to which the Reopener Letter was an attached side letter, contains a separate Article entitled "Salaries," which provides for base annual salary and increment rates,

general wage increases, and other terms regarding salary. (SBA Agreement Art. VI). Similarly, the shorter SBA MOU, lacking defined "Articles," likewise provides for these items in separate sections. Such a scale of salary and increment rates is commonly referred to as a "salary schedule," as our prior cases exemplify. *See CEA*, 79 OCB 17, at 3-4, 11-12 (BCB 2007) (arbitrable dispute arising from allegedly erroneous placement of promoted employees at higher level of new title's "salary schedule" to ensure they received higher pay than in prior title, and their subsequent placement at lower step of salary schedule); *Intl. Brhd. Teamsters, L. 237*, 57 OCB 53, at 3, nn. 5, 1 (BCB 1996) (describing similar article of a collective bargaining agreement as "the salary schedule"); *Comm. of Interns & Resid.*, 47 OCB 50, at 2, n. 2 (BCB 1991) (summarizing similar collective bargaining agreement provision as "outlin[ing] the salary schedule").[3] Indeed, the SBA Agreement itself uses the term in just this way, providing that in the event the parties successfully negotiate that a "range day" can be done on compensable time, then the SBA "shall receive a credit of 0.05% to be added *to the salary schedule*." (Art. III § 4) (emphasis added).

The SBA argues, based on an online dictionary definition of the term "salary," that its common sense definition as "fixed compensation paid regularly for services" should be read to encompass both Longevity and Health and Welfare payments.[4] However, this argument does not

---

[3] We note that similar usage of the term "salary schedule" appears in other public sector agreements of other municipalities under the Taylor Law. *See, e.g.*, *Matter of McIntyre*, 41 PERB ¶ 3030 (2008) (describing collective bargaining agreement as containing "both negotiated annual percentage increases as well as the establishment of a new 12 step salary schedule" into which employees fit). Whether or not such usage is universal throughout the State, however, is not at issue; within the City of New York, the term's meaning is clear, and reflected in the agreement under review as well as in our past decisions.

[4] http://www.websters-online-dictionary.org/definition/salary. The complete definition reads: "Fixed compensation normally paid weekly, monthly or annually for services rendered, usually based on a certain number of hours of work."

dispel the term's use as a term of art in both our past cases and in collective bargaining within the City of New York generally. Additionally, the separation of salary components from longevity and of both from health and welfare benefits into separate articles of the SBA Agreement and sections of the SBA MOU likewise supports our conclusion that these topics are analytically separate.[5]

These explicit terms, however, merely confirm that nothing in the agreements before this Board suggests that the usage of the term "salary schedule" in the Reopener Letter was different from the normal and accepted use of that term in municipal bargaining in the City of New York. This Board's jurisdiction under the NYCCBL is original in part because of the need for just such specialized knowledge of the conventions and precedents in determining questions of public sector labor law as this usage. *See, e.g.*, *Unif. Firefighters Assn. v. City of New York*, 79 N.Y.2d 236, 241-242 (1992) (*quoting Levitt v. Bd. of Coll. Barg*., 79 N.Y.2d 120, 127 (1992)).

Because this clear example of customary usage establishes that the duty to reopen the SBA Agreement was not triggered by the PBA's negotiation of adjustments to the longevity and health and welfare benefits provisions of its collective bargaining agreement, the petition challenging arbitrability should be granted, and the RFA denied.

---

[5] Likewise, the SBA does not address the provisions of the SBA Agreement which further reinforce that separation. One such provision requires the NYPD to make available in each precinct the appropriate payroll work sheets for the purpose of enabling each employee to verify the salary components of the employee's paycheck.," (Art. VI §5), an implicit statement that not all forms of economic benefit are properly classified as salary. Indeed, the SBA Agreement explicitly provides that longevity payments for the 5th and 10th years, and for the 15th and 20th years, "shall not be computed as salary for pension purposes until after completing" 20 and 25 years of service, respectively. (Art. VIII § 2).

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 Police Department, docketed as No. BCB-2800-09, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by the Sergeants Benevolent Association, docketed as A-13208-09, hereby is denied.

Dated: New York, New York
November 23, 2009

MARLENE A. GOLD
CHAIR
CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I would have preferred an evidentiary hearing in this matter.

CHARLES G. MOERDLER
MEMBER