PBA, 3 OCB2d 1 (BCB 2010)

(Arb.)(Docket No. BCB-2789-09).

***Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the City violated a Memorandum of Understanding and the PBA Retiree Health and Welfare Fund Agreement when it failed to contribute a $400 one-time lump sum payment for each covered retiree to the PBA Retiree Health and Welfare Fund. The City argued that the Union could not establish the requisite nexus as the Retiree Agreement expressly excludes from arbitration disputes regarding the procedures for making payments to the Retiree Fund. The Board found that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. 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 CITY POLICE DEPARTMENT,

Petitioners,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On August 11, 2009, the City of New York ("City") and the New York City Police Department ("NYPD") filed a petition challenging the arbitrability of a grievance brought by the Patrolmen's Benevolent Association of the City of New York ("Union" or "PBA"). On July 28, 2009, the PBA filed a Request for Arbitration ("RFA") alleging that the City violated the 2006-2010

Memorandum of Understanding ("2006-2010 MOU") and the PBA Retiree Health and Welfare Fund Agreement ("Retiree Agreement"), which require the City to make a one-time lump sum payment of $400 for each covered retiree to the PBA Retiree Health and Welfare Fund ("Retiree Fund"). The PBA argues that the City utilized the wrong list to determine the number of covered retirees and omitted 44 covered retirees. The City argues that the Union could not establish the requisite nexus as the Retiree Agreement expressly excludes from arbitration disputes regarding the procedures for making payments to the Retiree Fund. The Board finds that the Union's grievance is arbitrable because the subject of the grievance is reasonably related to the collective bargaining agreement and, thus, falls within the parties' obligation to arbitrate. Accordingly, the petition challenging arbitrability is denied, and the RFA is granted.

BACKGROUND

On August 21, 2008, the City and the PBA entered into the 2006-2010 MOU, which covers the period of August 1, 2006, through July 31, 2010. Section § 5(a) thereof reads, in full:

> Effective July 31, 2008, the Employer shall contribute a $400 one-time lump sum payment per retiree to the PBA Retiree Health and Welfare Fund pursuant to the terms of a supplemental agreement to be reached between the parties subject to the approval of the Corporation Counsel as to form.

(Pet., Ex. 1: 2006-2010 MOU). The 2006-2010 MOU does not itself address arbitration but states that "[t]he terms of the predecessor separate unit agreement . . . shall be continued," and that agreement contained an arbitration provision. (*Id.* at § 2).[1]

[1] It is undisputed that the predecessor side agreement referred to in the 2006-2010 MOU is the 2002-2004 collective bargaining agreement between the PBA and the City, of which we take

On February 9, 2009, the City and the PBA entered into the Retiree Agreement, covering the period of August 1, 2002, through July 31, 2010. It is undisputed that the Retiree Agreement is the supplemental agreement referred to in the 2006-2010 MOU. Appendix B of the Retiree Agreement references the 2006-2010 MOU and details the dates and payments to be made by the City to the Retiree Fund, including that "effective **July 31, 2008**, there shall be a one-time lump sum payment in the amount of **$400** for each covered retiree." (Pet., Ex. 1: Retiree Agreement)(bold type in original).

The term "covered retiree" is defined in § 1(a) of the Retiree Agreement with reference to a list of names generated by as the Office of Labor Relations ("OLR") Retiree Welfare Benefits Subsystem ("RWBS"). Specifically, covered retirees are:

> defined as those retirees whose names appear on the list generated by the [OLR RWBS] for purposes of determining eligibility for benefits under this [Retiree] Agreement, regardless of whether or not the retiree is or was a member of the Union whose title is covered and listed in Appendix "A"' of this [Retiree] Agreement.

(*Id.*). Appendix A of the Retiree Agreement lists the ten titles covered by the Retiree Agreement, which are divided into three groups: NYPD Police Officers (two titles); Transit Authority Police Officers (five titles), and Housing Authority Police Officers (three titles).

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administrative notice. Article XXI, § 8, thereof provides that "the Union shall have the right to bring grievances unresolved at Step IV to impartial arbitration . . ." Article XXI, § 1, thereof defines the term "grievance," in pertinent part, as:

> 1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
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> 2. a claimed violation, misinterpretation or misapplication of the written rules, regulations or procedures of the [NYPD] affecting the terms and conditions of employment . . .

Section 10 of the Retiree Agreement addresses arbitration and excludes from arbitration underpayments and overpayments. It reads, in full:

> Disputes between the City and the Union concerning the interpretation, application, or alleged violation of this Agreement shall be submitted for arbitration in accordance with the procedures for arbitration set forth in section 12-312 of the New York City Collective Bargaining Law. However, any issue or dispute concerning the interpretation, application, or alleged violation of sections 2(g), 4, 7 and 12 of this Agreement shall not be subject to arbitration. Neither underpayments nor overpayments resulting from the application of sections 2(c), 2(d)(i) and 2(d)(ii) shall be subject to arbitration, or recovery in any other forum.

(*Id.*, at p. 12-13).[2]

Section 2(c) of the Retiree Agreement referred to in § 10 above reads, in full:

> Every month payments of the amounts described in Appendix "B" will be made in accordance with the following procedure. One-twelfth of the annual sum payable on behalf of each retiree covered by this Agreement whose name appears on the OLR RWBS list of each month as a "covered retiree" in the period covered by said pension payroll, will be paid for each month within the terms of this Agreement as provided herein. The amount due to the Union every month will be computed by multiplying the number of covered retirees whose names appear on the OLR RWBS [list] by one-twelfth of the annual sum payable on behalf of each covered retiree.

(*Id.*, at p. 5). Section 2(d)(i) of the Retiree Agreement referred to in § 10 above states that the amount computed pursuant to § 2(c) will constitute the full monthly payment, and that the Union will have 90 days to notify OLR of any errors; § 2(d)(ii) states that if the City fails to make a contribution for an individual on the OLR RWBS list, the Union will be entitled to a contribution provided it

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[2] Retiree Agreement §§ 2(g), 4, 7, and 12 are not at issue in the instant matter; § 2(g) concerns provisions of the Trust Agreement created for the administration of the Retiree Fund; § 4 states that the Union will comply with all City, State, or Federal laws applicable to the Retiree Fund; § 7 states that the Union shall hold City officials and employees harmless; and §12 states that Appendix A may be modified to correct errors.

notifies OLR within 90 days.

The City avers that in July 2008, OLR RWBS generated lists for the each group listed in Appendix A, totaling 23,266 covered retirees.[3] It is undisputed that on March 26, 2009, the City made three lump sum payments to the Retiree Fund–one for each group of titles–totaling $9,306,400. The City avers that it made those payments pursuant to the procedures outlined in § 2(c) of the Retiree Agreement and that the payment consisted of $400 each for the 23,266 covered retirees listed on the July 2008 OLR RWBS lists.

On April 17, 2009, the PBA, by email ("PBA Email"), notified OLR that it believed that the March 2009 payment was incorrect because it did not "reflect contributions for 44 retirees who were 'covered retirees' for the month of July, including July 31, 2008, the effective date of the lump sum payment." (Pet., Ex. 1: PBA Email). The PBA Email noted that the "July 2008 monthly contribution [required by the Retiree Agreement] was initially based on the same 23,266 covered retiree headcount, but was later adjusted, through payments made to the PBA . . . to include an additional 44 retirees who were determined to be covered retirees for the month of July." (*Id.*). The PBA Email concludes that the number of covered retirees for the July 31, 2008, lump sum payment required by the Retiree Agreement should be consistent with the number of covered retirees for the July 31, 2008, monthly payment required by that agreement.

OLR, by letter, replied on April 28, 2009 ("OLR Letter"), that the $9,306,400 "payment made by the City is consistent with the language of the [Retiree Agreement]." (Pet., Ex. 1: OLR Letter). The OLR Letter references § 1(a) of the Retiree Agreement, which defines the term "covered retiree"

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[3] The City avers that the three lists consisted of 20,782 NYPD retirees, 1,792 Transit Authority retirees, and 692 Housing Authority retirees.

as those on the list generated by OLR RWBS, and states that OLR "used the July 2008 Current Month Headcount ("CMH") generated by OLR RWBS to calculate the $400 one-time lump sum payment of $9,306,400.00." (*Id.*).

On May 4, 2009, the PBA, by letter ("PBA Letter"), responded to the OLR Letter, stating that the CMH list relied upon by OLR is not referenced in the Retiree Agreement and was not generated by OLR RWBS, but by OLR's Employee Benefits Program. The CMH list is an "incomplete document that . . . merely provides a preliminary list of covered retirees that is subsequently corrected by OLR." (Pet., Ex. 1: PBA Letter). The PBA explained that while "PBA members who retire on or before the 15th day of any month are considered eligible, covered retirees for that month . . . the CMH routinely omits . . . retirees who retired on or before the 15th." (*Id.*). According to the PBA Letter, OLR regularly corrects this oversight. Further, the 44 retirees at issue "were subsequently determined by OLR to be covered retirees for the month of July [2008]." (*Id.*). Therefore, "OLR's determination that the 44 retirees are 'covered retirees' for the purposes of the July monthly contribution, but not covered retirees for the purposes of the July 31, 2008 lump sum payment, is incongruent and simply not reasonable." (*Id.*).

On July 28, 2009, the PBA filed the RFA stating the issue as:

> Whether the [City] violated the [2006-2010 MOU] between the City and the [PBA] dated August 19, 2008 and the [Retiree Agreement], by failing to contribute a $400 lump sum contribution to the [Retiree Fund] on behalf of certain retirees who were "covered retirees" as of July 31, 2008.

(Pet., Ex. 1: RFA, § 3(c)). As a remedy, the PBA seeks "[t]hat the [City] remit payment in the amount of $400 for each of the affected retirees to the [Retiree Fund]." (Pet., Ex 1: RFA, § 3(d)). On August 11, 2009, the City filed the instant challenge to arbitration.

POSITIONS OF THE PARTIES

City's Position

The City asserts that the RFA must be denied because the PBA "has not established a *prima facie* relationship between the act complained of and the source of the alleged right" as the City made the lump sum payment pursuant to the procedures set out in § 2(c) of the Retiree Agreement and "[t]he Retiree Agreement expressly precludes arbitration of alleged underpayments resulting from the application of [§] 2(c)." (Pet. ¶ 27). The Union's argument that § 1(a), and not § 2(c), controls "must [] be disregarded by the Board" as § 1(a) contains no payment procedures but only defines the term "covered retiree." (Rep., at p. 2). The payment procedures are contained in § 2(c), and "[f]or that reason, both sections must be applied in order to make any payment under the Retiree Agreement." (*Id.*, at p. 3).

The City further argues that "there is no ambiguity in the Retiree Agreement permitting interpretation" as the only payment procedures in the Retiree Agreement are § 2(c), (d)(i), and (d)(ii), and underpaymnets made under these sections are not subject to arbitration. (*Id.*, at p. 2). While the City "strongly disagree[s] with [the Union's] characterization of [§ 2] (d)(i) and (ii) . . . as an 'alternative dispute resolution procedure' . . . [it] agrees with [the Union] that 'under the [City's] . . . interpretation of the Retiree Agreement, there [is] no means to enforce [its] obligation to make lump sum payments on behalf of the covered retirees." (*Id.*, at p. 3)(quoting Ans. ¶ 45). Further, "this argument [is] wholly irrelevant, as [the City's] obligation to make monthly contributions on behalf of the covered retirees is similarly unenforceable." (*Id.*).

At a conference held at the Office of Collective Bargaining on November 30, 2009, the City replied to the Union's argument that the CMH list was not OLR RWBS generated, asserting that the

term OLR RWBS refers to a computer system that generates several lists, including the CMH.

Union's Position

The Union describes the City's position as "at best a misunderstanding" of the Union's claim, limiting the RFA to an allegation of "an underpayment." (Ans. ¶ 3). Rather, "the issue presented in [the RFA is] that the City failed to make lump sum payments to [the Retiree Fund] for 44 covered retirees as required by Appendix B of the Retiree Agreement." (*Id.* ¶ 2). Section 1(a) of the Retiree Agreement defines covered retirees with reference to an OLR RWBS list; the lump sum payment made by the City, however, was based on the CMH list, which, the Union argues, was not generated by OLR RWBS and failed to list 44 covered retirees. As such, "there is a clear and direct relationship between the claimed violation and Appendix B." (*Id.* ¶ 38). The Union argues that the Board should not consider the City's assertion, made at the conference, that the CMH list was generated by OLR RWBS, as that claim does not appear in the City's pleadings.

The Union argues that the City "erroneously rel[ied] on a limited exception to the arbitrability clause" regarding underpayments made under § 2(c) of the Retiree Agreement, as that section does not apply to the one-time lump sum payments contained in Appendix B. (*Id.* ¶ 39). Rather, it applies to the "monthly, pro rata portions of the City's annual contribution to the [] Retiree Fund." (Ans. ¶ 40)(underlining in original). Therefore, the City's "argument relies upon a complete misconstruction of [the Union's] claim" as the Union does not allege an underpayment arising out of § 2(c). (*Id.*). The Union's claim does not involve monthly installments of an annual contribution but a one-time lump sum payment arising under Appendix B.

The City cannot avoid arbitration based upon its claim that it applied the procedures outlined in § 2(c) as "the parties never agreed that the [§] 2(c) procedures for monthly installments of the

annual sum would apply to the lump sum payment." (*Id.* ¶ 43). The Union notes that the City did not assert that it made the payments pursuant to § 2(c) until it filed the instant petition challenging arbitration; no such assertion can be found in the April communications between the parties, and the OLR Letter references § 1(a) of the Retiree Agreement.

Assuming, *arguendo*, that "the City did in fact apply [§] 2(c) to determine the lump sum payments," it had "no justifiable reason" to do so. (*Id.* ¶ 44). Section 2(c) is intended to determine *pro-rata* monthly installments. The parties could have drafted the Retiree Agreement to indicate "that lump sum payments would be paid in accordance with the procedures outlined in [§] 2(c). They did not." (*Id.*). The parties could have, but did not, exclude disputes arising from the lump sum payments from arbitration.

The Union also notes that "while underpayments of monthly contributions pursuant to [§] 2(c) are not arbitrable, [§ 2(d)(i) and (ii) of] the Retiree Agreement provides for an alternative dispute resolution procedure that is intended to serve in lieu of arbitration." (*Id.* ¶ 45). Specifically, § 2(d)(i) and (ii) provide that the Union can notify OLR of an error and then receive the proper contribution. However, these "informal dispute resolution procedures do not apply to one-time lump sum payments made pursuant to Appendix B." (*Id.*). Therefore, "[u]nder the [City's] self-serving interpretation of the Retiree Agreement, there would be no means to enforce their obligation to make lump sum payments on behalf of covered retirees." (*Id.*).

DISCUSSION

The long standing policy of the NYCCBL, "as is made explicit by § 12-302, . . . is to favor and encourage arbitration to resolve grievances." *Local 1182, CWA*, 77 OCB 31, at 7 (BCB 2006);

see also NYSNA, 69 OCB 21 (BCB 2002)(discussing public sector arbitration and the Board's role therein).[4] As such, "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration. 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." *OSA*, 1 OCB2d 42, at 15-16 (BCB 2008)(citations and quotation marks omitted); *see also DC 37*, 13 OCB 14, at 12 (BCB 1974).

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 [§] 12-312 of this chapter." In reaching such a determination, we apply a two-prong test:

> (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 CBA.

OSA, 79 OCB 22, at 10 (BCB 2007)(citations and internal quotation marks omitted); *see also*

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[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.

NYSNA, 69 OCB 21, at 7-8; *SSEU*, 3 OCB 2, at 2 (BCB 1969)

The first prong has been met in the instant case; there is no dispute that the Retiree Agreement provides for arbitration procedures, and no applicable statutory, contractual, or court-enunciated restrictions are claimed to bar this dispute's consideration.

The City disputes whether the Union can satisfy the second prong. To do so, the Union must demonstrate "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). Such 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.'" *OSA*, 1 OCB2d 42, at 16 (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)); *see also* CSL § 205.5(d).[5] Where "[e]ach interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

In its pleadings, the City has framed the underlying issue as an underpayment made pursuant to the procedures outlined in § 2(c) of the Retiree Agreement, and disputes regarding such underpayments are explicitly excluded from the arbitration provision in the Retiree Agreement. In contrast, in its Answer, the Union frames the issue for arbitration as whether the City applied the

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[5] CSL § 205.5(d) reads, in pertinent part:

> the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

correct list of covered retirees, and argues that dispute is arbitrable as a violation of § 1(a) and Appendix B of the Retiree Agreement, as well as § 5(a) of the 2006-2010 MOU.[6]

We find that the Union has established the requisite nexus between the act complained of and the Retiree Agreement.[7] The City's argument that the instant dispute is excluded from arbitration because it was made pursuant to § 2(c) of the Retiree Agreement is unavailing. The record is devoid of any support that the City followed the procedures outlined in § 2(c). To the contrary, it is undisputed that, rather than being made in 12 installments pursuant to § 2(c), the $9,306,400 lump sum payment was made in one installment on March 26, 2009.

Assuming, *arguendo*, that the City followed the procedures outlined in § 2(c) of the Retiree Agreement when it made the March 26, 2009, lump sum payment to the Retiree Fund, the instant dispute does not concern those procedures, or whether following those procedures resulted in an underpayment. Rather, the instant dispute turns on how the City determined the number of covered retirees. That is, the instant dispute does not concern the payment procedures themselves, but how the City determined the number of covered retirees. That factor is determined by § 1(a), a section which, under the terms of the Retiree Agreement, is arbitrable.

The City argues that §§ 1(a) and 2(c) of the Retiree Agreement are intertwined–that no

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[6] In its Answer, the Union further argues that the list used by the City–the CMH–was not created by OLR RWBS, but by another unit of OLR. At the November 30 conference, the Union argued that the Board should disregard the argument made by the City at that conference that the CMH list was generated by OLR RWBS, as that argument was not made in the City's pleadings. We need not address these contentions as our analysis on the question of arbitrability does not turn on whether the CMH list is described as not being generated by OLR RWBS or, alternatively, is described as the wrong OLR RWBS list.

[7] As we have found the instant matter grievable under the Retiree Agreement, we need not determine whether it would be grievable under the 2006-2010 PBA MOU.

payment can be made without reference to both sections–and that, therefore, since disputes arising under § 2(c) are excluded from arbitration, this dispute is not subject to arbitration even if stemming, in part, from § 1(a). However, the existence of a tenable defense is not grounds for a finding that the dispute is not arbitrable. *See Local 3, IBEW*, 45 OCB 59 at 11; *Local 371, SSEU & Gooden*, 61 OCB 17, at 8 (BCB 1998). Such arguments would require us to interpret the contract, and the interplay between its provisions, a matter which is for an arbitrator to determine. *OSA*, 79 OCB 22, at 12 (BCB 2007); *Local 237, IBT, CSBA*, 17 OCB 5, at 7 (BCB 1976). Accordingly, we deny the City's petition challenging arbitrability and we direct that the parties to proceed to 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, that the petition challenging arbitrability filed by the City of New York, docketed as No. BCB-2789-09, hereby is denied; and it is further

ORDERED, that the Request for Arbitration filed by the Patrolmen's Benevolent Association of the City of New York, docketed as A-13194-09, hereby is granted.

Dated: January 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER