Captains Endowment Ass'n, 3 OCB2d 3 (BCB 2010)

(Arb.) (Docket No. BCB-2799-09) (A-13223-09).

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 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 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-

CAPTAINS ENDOWMENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On September 10, 2009, the Captains Endowment Association ("Union" or "CEA") filed a request for arbitration ("RFA") on behalf of fourteen Lieutenants promoted to the rank of Captain on December 23, 2008, alleging that the City of New York and the New York City Police

Department ("City" or, collectively "NYPD") effectively reduced their overall compensation on their promotion, because the general wage increase negotiated between the City and the CEA does not offset the unmatched increase in longevity obtained by the Lieutenants Benevolent Association ("LBA") in its "reopener" agreement, executed on July 7, 2008. ("LBA Reopener") (Pet., Ex. 7). As a result, the newly-promoted Captains receive a combination of wages and longevity payments that is less than the combination of wages and longevity they received as Lieutenants.

On September 22, 2009, the City filed the instant petition challenging arbitrability, claiming that the CEA has failed to articulate a reasonable relationship between the contractual language to which it adverts and the longevity increase to which it claims its members are entitled. The Union claims that it has established a nexus between the contractual language upon which it relies and the adjustments made in the LBA Reopener, as the term "salary schedule" in the CEA's reopener provision should be read to encompass longevity and not just base annual wages, or salary.

Because, as was recently reiterated in our decision in *SBA*, 2 OCB2d 41 (BCB 2009), "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, the Board finds that a reasonable relationship cannot be established 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 CEA is an employee organization under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-303(l) and is the sole

and exclusive bargaining representative for employees within NYPD in the ranks of Captain, Captain detailed as Deputy Inspector, Deputy Chief, Police Surgeon, Surgeon, Surgeon detailed as Deputy Chief Surgeon, and Chief Surgeon. The Lieutenants Benevolent Association ("LBA") is also an employee organization under NYCCBL § 12-303(l) and is the sole and exclusive bargaining representative for employees within NYPD in the rank of Lieutenant.

The City and the CEA are parties to a memorandum of understanding covering the period from November 1, 2003 through March 31, 2012 (the "CEA MOU") (Pet. Ex. 4). The CEA MOU sets out in section 3, titled "Wages," the general wage increases applicable to incumbent employees during the term of the CEA 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 Captains hired on or after September 1, 2007, are set out ranging from Year 1 through Year 5. Section 5 of the CEA MOU is entitled "Annuity Reduction," and contains a $650 per year reduction in annuity contributions for new promotees in their first five years of service; section 7 similarly reduces annual leave by six days for new promotees in their first five years. Section 11, entitled "Additional Compensation Funds," provides for the reduced salary schedules and annual leave provisions to sunset (CEA MOU § 11(a),(c)), and increases annuity payments for active employees, first in 2009 and then again in 2011 (CEA MOU § 11 (b), (f)), A separate subsection of §11 provides for increased Health and Welfare Contributions for active and retired members. (CEA MOU § 11(d)). A separate subsection within the same section provides for an increase of $1,500 to longevity payments, effective July May 11, 2011. (CEA MOU § 11(e)).

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

> [i]f another uniformed collective bargaining unit has an adjustment

> made to their salary schedule through the collective bargaining or arbitration process or otherwise during the time period covering November 1, 2003 through March 31, 2012, which results in a greater percentage wage increase, then, at the CEA'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 "CEA Reopener Letter")).

Previously, in November 2006, the City and the LBA executed a collective bargaining agreement covering the period June 16, 2003 through August 31, 2007. (Pet., Ex. 3) ("LBA CBA"). Article VI of the LBA CBA, entitled "salaries" sets forth base annual salary rates and increment rates which prevailed during the term of the LBA CBA. The LBA CBA contains a reopener letter similar to the CEA Reopener Letter. On or about August 6, 2007, the City and the LBA executed a memorandum of understanding covering the period of September 1, 2007 through October 31, 2009 ("LBA MOU") (Pet., Ex 5). Although different in its specific amounts, it is similar in structure to the CEA MOU. Like the CEA MOU, it also contains a reopener letter, expressed in identical terms, although keyed to the time frame from July 31, 2005 through October 31, 2009.

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 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") (Pet., Ex. 6), 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).

After the issuance of the PBA Impasse Award, the LBA exercised its right to reopen

negotiations pursuant to the reopener letters attached to the LBA CBA and the LBA MOU. On or about July 7, 2008, the City and the LBA executed a reopener agreement to cover the period June 16, 2003 through August 31, 2007. ("LBA Reopener") (Pet., Ex. 7). The LBA Reopener provided for an increase to the basic maximum salary for Lieutenants, and a higher basic maximum salary for Lieutenants "Designated on Special Assignment" or "Designated as Commander of Detective Squad." (*Id*. § 3).

Similarly, the CEA also exercised its right pursuant to the Reopener Letter to request negotiations after the Impasse Award. The negotiations culminated in the execution, on or about July 30, 2008, of a reopener agreement between the City and the CEA amending the CEA MOU. ("CEA Reopener") (Pet., Ex. 8). The CEA Reopener which covers the period from November 1, 2003 to March 31, 2012, provides in § 3, entitled "Salary Adjustments," that: (a) revised basic maximum salary for a Captain and for the titles of Surgeon and Police Surgeon; (b) effective January 31, 2008, each step of the salary schedules of the remaining titles covered by the CEA agreements shall be adjusted to reflected the effective difference between the 4.5% and 5% and the 3% and 3.15% wage increases for February 1, 2006 through February 1, 2007, respectively. (*Id.*) Additionally, the CEA Reopener provides in § 4, entitled "Adjustment to Pay Plan," for increases, effective September 1, 2008, Step 1 and Step 2 of the salary schedule for Captain promoted on or after September 1, 2007. These increases sunset on February 1, 2009. (*Id.*). The CEA Reopener provides that each employee shall be required to perform one additional tour per year. (CEA Reopener § 5). Section 6, entitled "Annuity," provides for a reduction in the City's Annuity Fund contribution for active employees effective September 1, 2008, and then for an increase smaller than that called for in the CEA MOU effective March 1, 2009. Effective May 1, 2011, an increase of the

contribution larger than that provided for the same period in the CEA MOU is prescribed. (*Id.*). The CEA Reopener also provides for elimination of a specified contribution to the 401(a) Savings Incentive Plan (CEA Reopener § 7, "Deferred Compensation Fund"), and eliminates quarterly compensatory days, effective September 1, 2008 (*id.* § 8).

On or about March 10, 2009, the CEA and the City executed a collective bargaining agreement covering the period from November 1, 2003 through March 31, 2012. ("CEA CBA") (Pet., Ex. 9). Article V of the CEA CBA, entitled "Salaries," provides at § 1 the "basic annual salary and increment rates" which "shall prevail for employees." (*Id.*). The salary and increment rates are grouped by "Class of Positions or Detail and Step," and for the title Captain are distinguished between those promoted prior to September 1, 2007, and those promoted on or after that date. (*Id.*). Section 2 provides for the advancement of employees upon promotion to a specified rank to the step rate of that rank, "except as provided in section 4d below." Section 4(d) provides that "[e]mployees in the rank of Captain shall be subject to the salary schedule set forth in Section 1 above."[1]

On or about March 2, 2009, CEA President Roy T. Richter filed a grievance pursuant to Article XVIII of the CEA CBA[2] at Step III stating that, despite the correction of "certain inequities

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[1] Section 3 provides for the annual progression of employees one increment step in rank on the employee's anniversary date. Section 4 provides for general Wage increases annually, in varying percentage amounts per year. (CEA CBA Art. V., § (a-b)). Subsection (c) provided that "[s]uch general wage increases shall be applied to the base rates and salary grades fixed for the applicable titles, except to the extent that the base rates and salary grades are modified by section 4d below." (*Id.*).

[2] Art. XVIII § 1 (a) defines a grievance as meaning, in pertinent part:
(1) a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
(2) a claimed violation, misinterpretation, or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment...

(continued...)

in salary structure" in the CEA Reopener, "on October 1, 2008, incumbent Lieutenants received a $1,000 increase in longevity pay . . . The [CEA] will not receive this longevity increase until 2011. What the December 2008 group of Captains experienced is that being promoted from the top salary step Lieutenant to Captain their overall salary was reduced . . ." (RFA, Attachment "D") (Pet., Ex. 1).[3] As a remedy, the grievance requests that "Lieutenants promoted to Captain on December 23, 2008 be placed at the next longevity pay increment in the CEA agreement to correct the identified salary reduction.," and asserted as grounds for the grievance that "[t]his action would be consistent with the past practice of the Department to not reduce salary on promotion." (*Id.*). The grievance was denied on March 4, 2009, in a letter by Deputy Commissioner John Beirne, which stated that there "has been no violation, misinterpretation or misapplication of" either the CEA CBA or of the rules or procedures of the Department. (RFA, Attachment "C").

The CEA appealed to Step IV in a letter by its counsel dated March 12, 2009, which asserted that:

> The CEA believes that uniform members should expect that the increased responsibilities associated with the higher rank of Captain[] requires that a pay level equal to or greater than the rank of Lieutenant [] is paid even to the newly promoted. The continuation of this inequity will result in some senior Lieutenants declining

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[2](...continued)
(3) a claimed improper holding of an open-competitive rather than a promotional exam;
(4) a claimed assignment of the grievant to duties substantially different from those stated in the grievant's job description.

[3] Although the attachments to the RFA are not labeled with exhibit letters or numbers, they will be referred to for convenience by letters in sequential order as follow: (A) August 17, 2009 Letter from NYPD Commissioner Kelly denying Step IV grievance; (B) March 12, 2009 Letter from CEA counsel appealing to Step IV the denial of the grievance; (C) March 4, 2009 Letter, from Deputy Commissioner Beirne denying Step III grievance; (D) March 2, 2009 Letter filing grievance at Step III.

> promotion rather than accepting promotion at lower pay. This wage formula is counterproductive to sound management and creates unnecessarily poor morale.

(RFA, Attachment "B").

The Step IV grievance was denied on August 17, 2009, in a letter from the Police Commissioner which stated that "the Step IV grievance . . . on behalf of the lieutenants promoted to captain on December 23, 2008, seeking to increase their longevity pay by $1,000 is denied," asserting that "there has been no violation, misapplication, or misinterpretation of" either the NYPD's rules and procedures or of "the current collective bargaining agreement." (RFA Attachment "A").

The RFA was filed with the Office of Collective Bargaining on September 8, 2009. The RFA states the grievance as "a pay reduction," and alleges that "[t]his outcome is contrary to the terms and conditions of employment. Additionally, this configuration is violative of the past practice of the agency." (*Id*.). The instant proceeding followed.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union failed to cite to and/or identify any provision of the CEA CBA, or, for that matter, its predecessors, or any NYPD rule, regulations or procedure giving rise to this grievance. Moreover, the City claims that no such provision can be found in the CEA CBA. Citing, *inter alia*, *SBA*, 79 OCB 15 (BCB 2007), the City contends that in the absence of a contractual provision incorporating, referencing, or modifying the CEA CBA in light of changes to provisions of the LBA's collective bargaining agreement, or otherwise permitting the Captains to

grieve a benefit afforded the Lieutenants, no nexus has been stated between the right asserted and the agreement providing a right to arbitration.

Additionally, the City argues that the CEA CBA does not provide for a right to arbitrate the occurrence of an event or condition that results in an "outcome. . . contrary to the terms and conditions of employment," but is limited to claims of violation, misinterpretation or misapplication of the CEA CBA, or of departmental rules, regulations, or procedures having to do with terms and conditions of employment. (Pet. ¶ 47-48).

The City also notes that the present case is distinguishable from our recent decision in *Local 1157, DC 37*, 1 OCB2d 24 (BCB 2008), in which we found arbitrable a grievance on behalf of newly promoted supervisors claiming that their basic salaries after promotion were lower than the rate prior to promotion. The City stresses the Board's reliance on the contractual language in finding that a nexus existed between the claims of these employees, who were governed by the Citywide Agreement, and that agreement, which provides in Art. IX, § 12 that "[n]o employee shall receive a lower basic salary rate following promotion than the basic salary rate received preceding the promotion." The City asserts that the CEAL CBA has no similar provision.

The City responds to the Union's contention that the CEA Reopener Letter provides a right to arbitration by noting that the members in question did receive an increase of salary, but did not receive the longevity adjustment they had received as Lieutenants. Thus, the City argues, the "grievance is not based in any way upon the salary schedule negotiated between the CEA and the [City], but on the longevity adjustments in the CEA [CBA] as they relate to the longevity adjustments in the LBA [CBA]." (Rep. At 2). As no such relationship has been established, the CEA cannot establish the requisite nexus. Finally, the City denies that the pendency of any similar

arbitrations precludes it from challenging the arbitrability of the instant RFA, citing *UFA*, 15 OCB 20, at 5-6 (BCB 1975). Nor can the existence of such grievances state grounds for the existence of the instant claim and the CEA CBA. Accordingly, the Petition should be granted, and the RFA denied.

Union's Position

The CEA contends that a nexus exists between the reduction of the Captains' salaries and the violation and/or misapplication of the pay plan set forth in the CEA CAB. In general, the CEA asserts, "disputes relating to earned wages and the payment thereof are arbitrable." (Ans. ¶ 6) (quoting *Local 30, Intl. Union of Op. Eng.*, 77 OCB 7, at 6 (BCB 2006).

Additionally, the CEA asserts that it has established the existence of a nexus between the dispute and the Reopener Letter. The CEA argues that the Reopener Letter's use of the term "salary schedule" encompasses the entire compensation package, and thus encompasses the dispute at hand. It buttresses this contention by claiming that the "reduced wages changed a mandatory subject of a contract previously bargained in that it violated the specific provisions of the governing contract, then in effect between the petitioners and respondents which prohibits unilateral changes in working conditions." (Ans. ¶ 10).

The CEA further argues that the "[s]alary reduction upon promotion in rank did not conform to the past practices" of the parties, and violated the *status quo* provisions of the NYCCBL and of Article IX § 12 of the Citywide Agreement. The CEA also contends that "[t]his Board has repeatedly and consistently held that a mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment." (Ans. ¶ 13) (citing *Local 376 DC 37*, 79 OCB 20, at 9 (BCB 2007);

COBA, 69 OCB 26, at 7 (BCB 2002); *DC 37*, 75 OCB 14, at 12-13 (BCB 2005); *DC 37*, 71 OCB 12, at 7 (BCB 2003); *SSEU*, 69 OCB 22, at 7 (BCB 2002).

The CEA argues that the Board "does not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." (*Id.*). Thus, the CEA's RFA should not be deemed to have been insufficient based on its contents.

Finally, the CEA points out that a similar arbitration based upon the substantially identical language in the LBA's Reopener letter has been allowed to proceed to arbitration. Therefore, the City's petition must be dismissed, and the grievance allowed to proceed to arbitration.

DISCUSSION

In this case, the City asserts that no nexus can be shown between the right asserted–to an increase in longevity pay such that the total compensation of the newly-promoted Captains will exceed their prior total compensation under the LBA CBA–and any contractual provision giving rise to a right to arbitrate. We find that the circumstances here do not establish the requisite nexus between a contract or other source of arbitration rights to which the CEA is a party. Specifically, the Reopener Letter cannot be deemed to create a right to encompass longevity payments in light of our recent decision in *SBA*, 2 OCB2d 41 (BCB 2009). As was the case in *SBA*, we similarly find here that the Reopener Letter's provision, expressly limited to adjustments of another uniformed unit's "salary schedule" does not include the subject of longevity payments, and that, accordingly the necessary reasonable relationship between the right asserted and the alleged source of that right to support the RFA is not present. 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.

SBA, 2 OCB2d 41, at 9-10 (quoting *Local 924, DC 37,* 1 OCB2d 3, at 7 (BCB 2008); (citing *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)).[4]

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."[5] *SBA,* 2 OCB2d 41, at 10*; see NYSNA*, 69 OCB 21 (BCB 2002).

In making such a determination, we employ a two pronged test, pursuant to which we inquire:

> (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

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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.

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

> 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 quotation marks omitted); *SBA,* 2 OCB2d 41, at 10-11 (citing *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 short, the Board must examine whether a grievant or grievants have shown "a *prima facie* relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *Local 924, DC 37*, 1 OCB2d 3 (BCB 2008); *COBA*, 45 OCB 41, at 12 (BCB 1990).

In the instant case, there is no contest as to the first prong; the City acknowledges that it is a party to the CEA MOU, to the CEA CBA, and to the Reopener Letters, identical in their terms, attached to both. The City does not assert any claim that it is not bound thereby, nor that alleged breaches of its obligations under it would not be arbitrable. However, it contends that no nexus has been established between the demand for an increase in longevity pay, and any contractual obligation of the City. We agree.

As a threshold matter, we note that we have repeatedly held that this "Board does not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." *CEA*, 79 OCB 17, at 9 (BCB 2007) (quoting *Local 420, DC 37*, 69 OCB 9, at 6 (BCB 2002)). However, this refusal to adopt a heightened standard of pleading does not obviate the need for a party claiming a right to arbitrate a dispute to establish a nexus between the claim to be arbitrated and some source of that right. The RFA does

not do so, and the additional grounds set forth in the Answer to the instant petition fail to cure the defect, even were we to find that under the facts pleaded here, that the City had sufficient notice to prepare and to defend its position.

Thus, the grounds for arbitration asserted in the RFA, are two-fold; first, that the lower longevity payment applicable to the newly-promoted Captains resulted in an "outcome [] contrary to the terms and conditions of employment," and second, that "this configuration is violative of the past practice of the agency." The first contention, as asserted in the Answer, appears to be a claim of a unilateral change, and does not of its own weight state a claim under any agreement to which the CEA is a party, or otherwise entitled to bring a grievance. Moreover, there is no claim by the CEA that the City is not paying the contractually mandated base wage and salary, or the longevity payments under the CEA MOU and, now, the CEA CBA. The suggestion that an employee's terms and conditions of employment are changed upon that employee's promotion does not, without more, state a nexus to a contractual provision giving rise to a right to arbitration of such changes in duty or compensation.

The second contention is that the lower longevity payment violates the agency's past practice. As long ago as 1992, we explained that:

> We have long held that before we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation of past practice is within the scope of the definition of the term "grievance" which is set forth in the parties' agreement.

Dist No. 1, MEBA, 49 OCB 24, at 16 (BCB 1992); *see also NYSNA*, 67 OCB 42, at 5 (BCB 2001) (citing cases).

Here, as in *NYSNA* and *MEBA*, "the definitional section does not include claimed violations

of past practice," and thus no grievance remedy is available. *NYSNA*, 67 OCB 42, at 5; *MEBA*, 49 OCB 24, at 16; *see also SBA*, 79 OCB 15, at 7-8 (BCB 2007). Accordingly, the grounds for arbitration asserted by the CEA in the RFA are insufficient.

Nor does the *status quo* provision of the NYCCBL as a basis for arbitration provide a nexus; § 12-311(d) of the NYCCBL by its term applies "[d]uring the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement," and forbids "unilateral changes in wages, hours, or working conditions" during such a period. No grounds exist upon which we could infer that this provision creates a right to arbitrate disputes not subject to arbitration under the prior collective bargaining agreement held in *status quo*, especially, as is the case here, to a dispute arising during a period in which the parties had already negotiated a MOU, and then had incorporated that MOU into a collective bargaining agreement. Accordingly, we also dismiss this ground for arbitration.

We are not persuaded by the CEA's contention that because wages in general are mandatory subjects of collective bargaining and that disputes regarding wages are generally arbitrable, the instant dispute is arbitrable. The mere fact that the parties were required to and in fact did bargain regarding wages does not mandate, absent a claimed violation of the agreement reached in that bargaining process, that the bargained-for arbitration remedy applies to any claim the union subsequently chooses to bring concerning remuneration. *SBA*, 2 OCB2d 41, at 9-10; *SBA*, 79 OCB 15, at 7-8.

Nor can the CEA establish a right to arbitrate the instant dispute based on its allegation that the City failed to object to what the CEA contends is a similar dispute between the City and the LBA

which has proceeded to arbitration, whether that claim is styled one of preclusion or waiver.[6] This decision to allow one dispute to proceed to arbitration is not a finding by a quasi-judicial body of law or fact, and is not, we find, to be taken as establishing a precedent over different disputes alleged to arise under different agreements, supervening this Board's ability to fulfill its statutory duty to determine whether a specific dispute meets the well-established criteria for arbitrability. *See, e.g., PBA*, 37 OCB 22, at 10-13 (BCB 1986); *UFA*, 15 OCB 20, at 5-6 (BCB 1975).

Additionally, the CEA's claim that the Citywide Agreement's proscription in Article IX § 12 of the Citywide Agreement that "[n]o employee shall receive a lower basic salary rate following promotion than the basic salary rates received preceding the promotion" must fail because the CEA CBA does not incorporate, reference, or in any other way suggest that the signatories to the CEA CBA intended for the terms and provisions of the Citywide Agreement, which does not include uniform titles, to be applicable to employees covered by the CEA CBA. *SBA*, 70 OCB 15, at 6-7 (BCB 2007). The CEA's effort to asserts a nexus between a provision of the CEA's CBA and the claim it seeks to arbitrate, in its invocation of the Reopener Letter, which it asserts should be read to extend to longevity payments as well as base salary. As we recently held in *SBA* 2 OCB2d 41, involving a substantially identical reopener provision, such is not the case:

> 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

[6] Moreover, the Board takes administrative notice that the dispute being arbitrated between the LBA and the City under the Office of Collective Bargaining's arbitration docket number A-13009-09, does not in fact assert a claim dispute arising from the inclusion of "longevity" within the scope of a reopener agreement limited to its terms to another unit's increases in a "salary schedule."

> 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"). 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).

Id., at 11-12 (footnote omitted).

The CEA Reopener Letter appended to the CEA CBA, and to the CEA MOU, similarly uses what we called in that case "the customary usage" of "salary schedule," which does not include longevity. Accordingly, consistent with our decision in *SBA* we find that the CEA Reopener Letter does not provide a nexus between the dispute and any right to arbitration.

For these reasons, the petition challenging arbitrability should be granted, and the RFA denied.

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-2799-09, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by the Captain's Endowment Association, docketed as A-13223-09, hereby is denied.

Dated: New York, New York
January 25, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER