CCA, 3 OCB2d 43 (BCB 2010)

(Arb.) (Docket No. BCB-2855-10) (A-13451-10).

Summary of Decision: The City filed a petition challenging the arbitrability of a union grievance alleging a violation of a Memorandum of Agreement and an arbitration award concerning the reduction of shifts. The City asserted that there was no nexus because shift elimination was not the same as shift reduction. The City further asserted that an arbitration award may only be enforced in court pursuant to Article 75, not by filing a new grievance. The Union argued that the parties had an agreement that called for arbitration and that the underlying grievance fell within its scope. The Board found that a reasonable nexus existed between the grievance and the parties' agreement. Accordingly, the petition challenging arbitrability was dismissed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Petitioners,

-and-

THE CORRECTION CAPTAINS ASSOCIATION,

Respondent.

DECISION AND ORDER

On April 29, 2010, the City of New York ("City") and the New York City Department of Correction ("DOC") filed a petition challenging the arbitrability of a grievance brought by the Correction Captains Association ("CCA" or "Union"). In its request for arbitration, the Union alleged that the City reduced certain shifts in violation of a Memorandum of Agreement ("MOA") and an arbitration award. The City asserts that the Union's request for arbitration must be dismissed

because there is no nexus between the Union's claim and the specific MOA provision upon which the grievance is based. Further, because an arbitration award may only be enforced pursuant to Article 75 of the Civil Practice Law and Rules ("CPLR") § 7501 and New York City Collective Bargaining Law ("NYCCBL") § 12-312(b), not by filing a new grievance. The Union argues that the parties' existing agreements, the MOA and their collective bargaining agreement ("CBA"), both call for arbitration and that the underlying grievance falls within their scope, thus the Board should dismiss the City's petition. This Board finds a nexus between the grievance and the parties' MOA. Accordingly, the petition challenging arbitrability is dismissed.

BACKGROUND

DOC is a City agency that provides for the care, custody, and control of individuals sentenced to one year or less of jail time, and those awaiting trial. DOC manages 15 facilities and averages a daily population of between 14,000 and 19,000, and it employs approximately 10,000 uniformed staff and 1,500 civilian staff. The CCA is a labor organization and is certified as the collective bargaining representative for the title "Correction Captain."

On November 19, 1995, following a 1993 arbitration award rendered by Arbitrator Carol Wittenberg ("Wittenberg Award"), which found that the City violated the parties' CBA and Department Orders by "shift reducing" certain posts, the parties entered into MOA and Stipulation of Settlement. The Wittenberg Award defined shift reduction as "reassigning an individual to work in a location other than his/her usual post, filling the vacancy left on that post by someone else and then not filling the vacancy created by the reassigned person." The MOA divided Correction Captains posts into three categories; it states that Correction Captains that serve on certain posts,

such as Food Services, could not be shift-reduced; a second group of posts could be shift-reduced, leaving the status of a third group of posts to be determined as follows:

> (c) the parties agree to form a committee to discuss which other posts shall be eligible to be shift reduced. The following are the Correction Captains posts to be discussed
>
> 1. Programs
> 2. Environmental Health
> 3. Other unnamed posts heretofore unidentified
>
> This committee will consist of three (3) representatives from the CCA and three (3) representatives from the City. In the event the committee cannot agree on a determination, the issue of whether or not such post can be shift reduced will be submitted directly to binding arbitration in accordance with the contractual grievance procedures and the NYCCBL. The parties agree that Carol Wittenberg shall be the arbitrator and has the jurisdiction to resolve which posts can be and which posts cannot be shift reduced.

(Pet., Ex. 1 at 2-3). Section 4 of the MOA states:

> Future Staffing
> The City agrees to provide the CCA with seven (7) days' notice to meet and confer with the CCA before any changes are made to any of the posts referenced in this MOA or any proposed new post to be established. This shall not prohibit DOC from staffing new facilities or expanding or contracting a current facility as long as the staffing complies with this MOA. Such modification cannot violate the express terms or spirit of this MOA.

(Pet., Ex.1 at 3). Finally, § 10 states in pertinent part that:

> The parties agree that any disputes that arise under the terms of this MOA or the CBA involving the terms in this MOA are to proceed directly to binding arbitration with Carol Wittenberg. The parties confer upon the arbitrator the jurisdiction to decide disputes and grievances as defined herein, in accordance with the CBA and in accordance with the applicable law.

(Pet., Ex.1 at 5).

Subsequently, according to the City, the Union contested the City's right to shift-reduce Environmental Health and Programs Captains ("EHO") posts. On April 16, 2002, DOC advised CCA that it considered most EHO posts eligible for shift reduction pursuant to the MOA. Thereafter, the Union demanded arbitration and Arbitrator Wittenberg attempted to mediate the matter in October 2003. The parties were unable to reach a resolution. The parties proceeded to binding arbitration before Arbitrator Arthur Riegel to hear the Union's claims regarding EHOs and other posts. Hearings on the matter were held between May 2006 and March 2009. On November, 8, 2009, Arbitrator Riegel issued his award ("Riegel Award"), which stated in pertinent part:

> 1. The grievance concerning the EHO posts is sustained.
> 2. EHO posts are not subject to shift reduction. . .
> 6. DOC is to cease and desist from shift reducing the posts of EHO Captains.

(Pet., Ex. 2).

On January 11, 2010, according to the City, DOC informed the Union that it planned "to eliminate permanently several captain posts from the table of organization," which was "necessary as part of DOC's overall plan to meet large budget reductions." (Pet. ¶ 15). On or about January 28, 2010, DOC placed a telephone call to the Union during which, according to the City, DOC's Director of Labor Relations informed the Union President that "effective February 1, 2010, [DOC] was eliminating from the facilities' table of organization, i.e., closing permanently, the seven temporary evening tour EHO posts and the temporary food service post at [Anna M. Kross Center]." (Pet. ¶ 16). According to the City, some of these posts did not exist when the MOA was created, and the Food Services post was not part of the grievance before Arbitrator Riegel. On February 1, 2010, DOC permanently closed those posts and they have not since been reopened. The Union filed its

request for arbitration on April 14, 2010, alleging that "DOC has violated the Riegel Award . . . and the [MOA] by shift reducing posts for both EHO Captains and Mess Hall/Food Service Captains." (Pet., Ex. 2).

The City filed this petition challenging arbitration on April 29, 2010.

POSITIONS OF THE PARTIES

City's Position

The City asserts the Union's request for arbitration must be denied because there is no nexus between the alleged harm and the MOA, and to the extent the Union complains of a failure to comply with the Riegel Award, such a claim may only be brought in court pursuant to Article 75 of the CPLR.

The MOA deals solely with shift reduction, not shift elimination, and the City has the right to permanently eliminate job posts under NYCCBL § 12-307(b). Shift reduction involves a decision not to staff a particular post for a specific shift. Shift reduction is often used in order to reassign an individual who usually works the shift-reduced post to another post, in order to fill a vacancy. Shifts are also reduced when the individual who usually works the shift-reduced post is on leave or is otherwise unavailable. The posts at issue here, however, were temporary positions that DOC permanently eliminated due to changes in operational needs and budgetary constraints. Post elimination is not shift reduction; therefore, the Union's reliance on the MOA's shift reduction provision to address post elimination is misplaced. The City never categorized these eliminations as shift reductions.

The MOA only limits the right of DOC to reduce certain Correction Captain posts that have a particular amount of inmate contact and supervision. But a substantial portion of duties performed by EHO Captains at issue here are administrative in nature and do not involve any direct inmate contact. Further, these posts did not even exist at the time CCA filed the grievance that led to the Riegel hearings, and the Food Services post was not even part of the grievance before Arbitrator Riegel.

Regarding the Riegel Award, the Union may only seek enforcement or clarification of an arbitration award pursuant to CPLR Article 75. Arbitration awards are final and binding and subject to confirmation in the courts only. The Union may not seek to enforce an arbitration award through the grievance process outlined in the MOA. Neither the MOA nor the CBA permit grievants to use arbitration to confirm or enforce a prior arbitration award. To the extent the Union is arguing that DOC has failed to follow the Riegel Award by shift reducing EHO posts, that argument cannot be raised by filing a new grievance.

Finally, there is nothing in the MOA or Riegel Award to indicate a limit on the ability of DOC to permanently eliminate Captain shifts in response to operational needs.

Union's Position

The Union asserts that the parties' MOA calls for arbitration and the underlying grievance falls within the scope of that agreement. Thus, the Board should dismiss the City's petition. The Union is not asking the Board to force the City to abide by the arbitration award; rather the Union is grieving new violations, which are reasonably related to the MOA, and therefore subject to binding arbitration. Further, in large part, the City's contentions do not concern the question of arbitrability but address the merits of the grievance itself.

Both parties signed the MOA, which requires that the parties arbitrate their disputes pertaining to the shift reduction of certain posts. By signing the MOA, each party waived its rights to challenge arbitrability of disputes arising under its terms. The MOA expressly limits DOC's ability to shift-reduce certain posts such as Food Services. Further, the MOA provides for the potential prohibition of shift reduction for other posts that have similar levels of inmate supervision and contact. As the Riegel Award stated, EHOs are such a post. Yet, the City shift-reduced those very posts. The City's decision to close these posts establishes the nexus between the subject matter of the dispute and the subject matter of the MOA.

The parties agreed that disputes regarding whether EHO (and other unnamed posts) were eligible for shift reduction would be directly submitted to arbitration, per the MOA. Though the City argues that the Food Services posts were to be permanently eliminated, not simply shift-reduced, there is no distinction between shift reduction and the elimination of positions because both actions by DOC have the same effect on the facilities and on CCA members. Removing a post from the table of organization or shift-reducing a post does not change the fact that the functions performed by Captains in that post must still be performed. The parties' disagreement over the difference between post elimination and shift reduction is one for an arbitrator.

Further, DOC notified the Union of its proposed changes in the end of January 2010. Therefore, by closing certain posts the EHO posts and Food Services post on February 1, 2010, the City failed to give the proper seven-day notice pursuant to the MOA.

Finally, the non-existence of certain posts at the time the MOA was entered, and the alleged temporary nature of some of the EHO posts and Food Services posts do not justify the City's failure to comply with the express terms of the MOA. These claims are irrelevant and go to the merits of

the CCA's underlying grievance which have no bearing on arbitrability. Even if some of the EHO posts at issue in this case were not in existence at the time of the MOA, those posts are still covered by the MOA.

DISCUSSION

NYCCBL § 12-302 states that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes. While "doubtful issues of arbitrability are resolved in favor of arbitration . . . 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. New York City District Council of Carpenters, UBCJA, 3 OCB2d 9, at 11 (BCB 2010) (internal quotations omitted).

Where the arbitrability of a grievance is challenged, this Board uses the following test to determine whether a matter is arbitrable:

> (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.

Id. (citations and internal quotation marks omitted).

Both parties acknowledge that they are obligated to arbitrate certain disputes, pursuant to the MOA and the CBA. The City argues that, to the extent that the Union's request for arbitration concerns the City's actions affecting EHOs, its sole avenue for enforcement is a proceeding pursuant to Article 75 because the Riegel Award, and not the MOA itself, is the source of the alleged rights asserted in the request for arbitration. However, we are unconvinced by the City's argument.

Our review of the record reveals two separate issues: first, whether EHO posts are eligible for shift reduction, which Arbitrator Riegel addressed in his Award; and second, whether the City's decision to permanently close certain EHO and Food Services posts on February 1, 2010, resulted in shift reduction in violation of the MOA.[1]

The construct of the MOA identified posts that could be shift-reduced such as Food Services, others that could not be shift-reduced, and a third group, the eligibility for shift reduction the parties agreed to determine at a later time, potentially through arbitration. After holding a hearing, Arbitrator Riegel found that EHO posts could not be shift-reduced, thereby resolving that issue in his award. Arbitrator Riegel's award moved the EHO posts from the third category of the MOA, which were to be determined, to the first category, those Correction Captains that could not be shift-reduced.

The Union's current request for arbitration presents a question not before Arbitrator Riegel. The issue is not whether EHO posts may be shift-reduced, but instead, whether the City's actions, taken well after Arbitrator Riegel issued his award, constitute shift reduction. We are aware that the Union, in its request for arbitration, complained that the City failed to comply with the Riegel Award, and that arbitration awards are not arbitrable. However, as we have stated where a "[u]nion's statement of its grievance, on its face, complains of an alleged failure by the City to comply with [arbitration] awards, a dispute which clearly is not arbitrable, this does not negate the fact that an otherwise arbitrable claim has been stated." *UPOA,* 43 OCB 55, at 8 (BCB 1989). This Board will not foreclose arbitration of a claim because the facts underlying a matter previously

[1] We note that the Wittenberg Award contains a definition of shift reduction, which either intentionally or not, the parties did not include in the MOA. It is not for us to determine the parties' intentions.

arbitrated relate to the current claim. "The weight to be accorded [an arbitration award] is, like the merits of [a] controversy, a determination left to the judgment of the arbitrator." Id. at 9. Therefore, Article 75 does not preclude arbitration.

We find that the single issue the Union seeks to submit to arbitration is whether the February 10, 2010 action taken by the City falls within the definition of shift reduction in the MOA. The MOA does not expressly define the term "shift reduction"; therefore, the parties' disagreement over the meaning of this term is a matter of contract interpretation, over which the Board lacks jurisdiction. *Colella*, 79 OCB 27 (BCB 2007). The City asserts that its actions constituted shift "elimination," which is not covered by the MOA; the Union asserts that there is no distinction between shift reduction and elimination. We find that the parties' arguments on this issue concern the merits of the grievance and not its arbitrability. "[I]t is well established that the Board in deciding questions of arbitrability will not inquire into the merits of a dispute"; as such, we will not address these arguments, which concern the merits and not the matter of arbitrability. *PBA,* 79 OCB 16, at 16 (BCB 2007) (quoting *Local 371, SSEU*, 29 OCB 31, at 13 (BCB 1982)).

The City also argues that the Food Services post at-issue in the grievance did not exist when the MOA was created nor at the time Union filed the grievance that led to the Riegel Award; thus, this post is outside the scope of the MOA. However, the MOA clearly contemplates disputes regarding "unnamed posts heretofore unidentified." (Pet., Ex. 1). Therefore, the fact that a particular post did not exist when the MOA was created does not necessarily exclude it from the scope of the MOA. "[T]he Board will not consider the merits of a case; it is for an arbitrator to decide whether the cited provision applies." DC 37, 63 OCB 47, at 9 (1999).

We find that the Union has demonstrated that its entire grievance is reasonably related to rights created by the § 10 of the MOA, which provides for the arbitration of disputes "any disputes that arise under the terms of this MOA or the CBA involving the terms in this MOA." (Pet., Ex.1 at 5). As a nexus exists between the grievance and the MOA, the petition challenging arbitrability is denied. Accordingly, the grievance shall proceed to arbitration to determine whether DOC's decision to permanently close the EHO Captain posts and the Food Services post at Anna M. Kross Center, effectuated on February 1, 2010, amounted to shift reduction in violation of the MOA.

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 the arbitrability docketed as BCB-2855-10 is hereby denied, and it is further

ORDERED, that the request for arbitration filed by the Correction Captains Association docketed as A-13451-10 hereby is granted.

Dated: September 22, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER