SSEU, L. 371, 3 OCB2d 53 (BCB 2010)

(Arb.) (Docket No. BCB-2875-10) (A-13489-10)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that it failed to pay Grievant for accrued annual leave upon her termination because the Union failed to cite to specific contract language in the request for arbitration and could not establish the requisite nexus between the subject of the grievance and the parties' collective bargaining agreement. The City argues that the Board should not consider the sections of the Citywide Agreement first cited by the Union in its Answer. The Board found that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance, and that the timeliness of the notice of the basis for the grievance is a question for an arbitrator. 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 HUMAN RESOURCE ADMINISTRATION,

Petitioners,

-and-

THE SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondent.

DECISION AND ORDER

On July 2, 2010, the City of New York ("City") and the New York City Human Resources Administration ("HRA") filed a petition challenging the arbitrability of a grievance brought by the Social Service Employees Union, Local 371 ("Union"). On May 26, 2010, the Union filed a request for arbitration on behalf of Robin Wilson ("Grievant") alleging that the City violated the 2005-2008

Social Services and Related Titles Collective Bargaining Agreement ("SSRT Agreement") by failing to pay Grievant for accrued annual leave upon her leaving City service. The City challenges the request for arbitration based upon the Union's failure to cite to specific contract language in the request for arbitration and because the Union has not established the requisite nexus between the subject of the grievance and the provision of the SSRT Agreement cited in the earlier stages of the Step grievance procedure. The City further argues that the Board should not consider the sections of the Citywide Agreement first cited by the Union in its Answer. The Board finds that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance and that the timeliness of the notice given of the basis of the grievance is a question for an arbitrator. The petition is denied, and the request for arbitration granted.

BACKGROUND

Grievant was hired on May 13, 2007, in the civil service title of Caseworker at HRA. Her employment was terminated on October 30, 2007. At all times relevant to the instant petition, Grievant was covered by the SSRT Agreement and the Citywide Agreement. The City avers, and the Union denies, that Grievant was terminated for performance and attendance issues.[1] At the time of her discharge, Grievant was not paid for her remaining accrued annual leave of 52 hours and 20 minutes.

[1] The letter informing Grievant of her discharge does not specify the grounds for her termination. (Rep., Ex. A).

A grievance was filed concerning the failure to pay annual leave. It is undisputed that no Step I, II, or III hearings were held.[2] On the forms requesting the Step II and III hearings, Grievant asserted that Article III of the SSRT Agreement had been violated, misinterpreted, or misapplied. SSRT Agreement, Article III, is entitled "Salaries" and provides the salary ranges and adjustments for all covered titles. It does not address annual leave or payments upon termination. On the Step II hearing request, the Union described the nature of the dispute as follows: "Ms. Wilson left HRA 10/29/07. M[anagement] paid salary but not A[nnual]/L[eave]. Ms. Wilson requests the agency pay leave balance of 52.20 min." (Pet., Ex. E). On the Step III hearing request, the nature of the dispute was described as: "No response from Step II." (Pet., Ex. F).

On May 11, 2010, HRA denied Grievant's Step III grievance, finding it untimely and not grievable under Article III of the SSRT Agreement.[3] On May 26, 2010, the Union filed the instant request for arbitration, which did not cite any contractual provision, but attached copies of the Step II and III grievance forms and the SSRT Agreement's grievance provisions. The request for arbitration described the subject of the grievance as the City's "[f]ail[ure] to pay correct salary when leaving [C]ity service" and sought "[p]ayment of all monies owed upon leaving [C]ity service." (Pet., Ex. B).

In its Answer, in addition to Article III of the SSRT Agreement, the Union cites to Article V, § 2(c), and Article IX, § 23, of the Citywide Agreement. Article V, § 2(c), reads in full:

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[2] The City avers that HRA did not receive the request for a Step I hearing. The Union states that it duly grieved the termination at all Step levels. The Step III determination states that the grievance was filed in March 2010. The parties have not explained why a Step grievance for an employee terminated in October 2007 was submitted in March 2010.

[3] SSRT Agreement, Article VI, § 2, states that a Step I grievance is to be filed "no later than 120 days after the date on which the grievance arose." (Pet., Ex. A, pp. 49-50).

> Where an employee has an entitlement to accrued annual leave and/or compensatory time, and the City's fiscal condition requires employees who are terminated, laid off or who choose to retire in lieu of layoff, be removed from the payroll on or before a specific date because of budgetary considerations, the Employer shall provide the monetary value of accumulated and unused annual leave and/or compensatory time allowances standing to the employee's credit in a lump sum. Such payments shall be in accordance with the provisions of Executive Order 30, dated June 24, 1975, and the FLSA.

(Ans., Ex. B). Article IX, § 23, of the Citywide Agreement reads in full:

> Employees who have retired or left employment for other reasons shall be paid negotiated increases, premium pay, shift differential, overtime, and any other monies due them as soon as possible.

(*Id.*).[4]

POSITION OF THE PARTIES

City's Position

The City argues that the request for arbitration must be denied for the failure to cite a specific contractual provision that HRA allegedly violated as required by § 1-07(b)(2)(iii) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[5] Here, the Union has not stated a source of the alleged right in its request for arbitration. That the City participated in the earlier Steps does not estop it from challenging arbitrability now, for if that were so, it would discourage the City from participating in the Step process.

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[4] The term "other monies" is not defined in Article IX of the Citywide Agreement, nor does it specify any reasons for leaving City employment.

[5] OCB Rules § 1-07(b)(2) requires that appended to a request for arbitration be: "(i) The written grievance, if any; (ii) The Step II and Step III decisions, if any; [and] (iii) The contract provision and/or the rule or regulation that was allegedly violated."

The City further argues that no nexus exists between Article III of the SSRT Agreement, the contractual provision cited at Steps II and III, and the underlying dispute, the failure to pay accrued annual leave upon termination. Article III of the SSRT Agreement provides salary ranges and adjustments. Nothing in it contains, or could reasonably be construed to contain, a provision obligating the City to provide a terminated employee the remainder of their annual leave. Thus, there is no substantive connection between the Union's claim and the contractual provisions upon which the Union relies. Board precedent recognizes that there are specific limits on what can be addressed under salary provisions such as Article III of the SSRT Agreement. For example, the Board granted the City's challenge to a request for arbitration that cited a similar salary provision where the union sought to grieve a new policy requiring employees to buy parking permits because the cited salary provision did not address parking benefits. The Board also has found that a provision regarding the assignment of shifts cannot support an arbitration grieving the relieving an employee from duty. Thus, Article III, the salary provision of SSRT Agreement, cannot support arbitrating a grievance concerning the failure to pay accrued annual leave upon termination.

Regarding the provisions of the Citywide Agreement that the Union raised for the first time in its Answer, the City argues that such are new claims that the Board should not consider. Board precedent has long held that parties are not allowed to introduce a novel claim after the filing of a request for arbitration as such deprives the parties of the beneficial effect of the earlier steps of grievance process and forecloses the possibility of voluntary settlement. At no point prior to the Answer did the Union allege a violation of the Citywide Agreement. Thus, the Board should not consider whether either Article V, § 2(c), or IX, § (23), of the Citywide Agreement provides a basis for arbitration.

Should the Board nevertheless consider the Citywide Agreement, the City argues that neither cited provision provides the requisite nexus. Article V, § 2(c), applies only where an employee loses their job due to fiscal conditions of the City. It is inapplicable to the instant case, where the Union has not alleged that Grievant's discharge was due to budgetary concerns and Grievant was terminated for performance-related reasons. The two arbitration awards cited by the Union are not Board rulings as to arbitrability and are of no precedential value. That the City chose not to challenge the arbitrability of those grievances is not dispositive of the arbitrability of the instant grievance.

Union's Position

The Union argues that there is a nexus between the grievance and the SSRT and Citywide Agreements. Article III of the SSRT Agreement specifies salaries and requires the payment of the same. The Union contends that Grievant's accrued annual leave was based upon work performed prior to termination, and therefore constitutes part of her earned salary required to be paid her under Article III of the SSRT Agreement. Article V, §2(c), of the Citywide Agreement requires an employee receive the monetary value of accrued annual leave upon termination. Article IX, §23, of the Citywide Agreement similarly requires any monies owed an employee be paid upon termination. The Union submitted two arbitration awards in which accrued annual leave was sought in support of its position that the instant grievance is arbitrable.

DISCUSSION

At the outset, we reject the City's argument that the Union's failure to cite to specific contract language in the request for arbitration renders the Union's claim not arbitrable. *See DEA*, 43 OCB 73, at 6 (BCB 1989). We recently reiterated what we have long held: we will "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." *NYSNA*, 2 OCB 2d 32, 11 (BCB 2009) (citing *CWA*, 51 OCB 27, at 14 (BCB 1993), *affd*, *City of New York v. MacDonald*, No. 405350/93 (Sup. Ct. N.Y. Co. Sept. 29, 1994), *affd*, 223 A.D.2d 485 (1st Dept. 1996)). Thus, "if the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." *CWA*, 51 OCB 27, at 14 (City's challenge to arbitrability denied even though the union failed to cite to the pertinent contract language until it submitted its Answer).[6]

In *DEA*, only in its Answer to the challenge to arbitrability did the union cite the pertinent contract language. We explicitly "reject[ed] the [C]ity's argument that because the [u]nion failed specifically to cite [the pertinent] Article VI of the Agreement in its request, the [u]nion's request for arbitration cannot be construed to include a claimed violation of rights arising under Article VI." 43 OCB 73, at 6. We found that the union had clearly stated the nature of the grievance. Thus, the City had "not shown that the omission in the request for arbitration has impaired its ability to respond to the request or otherwise to prepare for arbitration." *Id.* Similarly, in *Local 1549, DC 37*, 69 OCB 3 (BCB 2002), the union cited an inapplicable written policy during the lower steps of the grievance process and in its request for arbitration. Only in its Answer did the union cite the pertinent contract language. We held that "since the Department, from the outset, knew the nature

[6] *CWA* involved a grievance challenging out-of-title work, and the union clearly identified at the Step levels that the issue was whether its members were being assigned out-of-title duties. Thus, the City had clear notice of the claim.

of the [u]nion's grievance, [its] belated identification of . . . the provision that was violated does not preclude arbitration of its claim." *Id.* at 6-7. *See also CEA*, 3 OCB2d 3, at 14 (BCB 2010) (additional grounds raised for the first time in the Answer considered); *SSEU, L. 371*, 77 OCB 4, at 8 (BCB 2006) (same).

In the instant case, as in *DEA*, *CWA*, and *Local 1549, DC 37*, the City had clear notice of the nature of the Union's grievance, expressed in the Step II hearing request as the failure of management to pay Grievant her annual leave balance of 52 hours and 20 minutes upon her termination. Since the City had clear notice of the nature of the grievance, the request for arbitration will not be denied based upon the Union's failure to cite specific contract language therein. The City's argument that it lacked timely notice that the Union's claims were based upon the Citywide Agreement, as it was not raised prior to the Answer, is an argument for the arbitrator to consider, not the Board. *See NYSNA*, 69 OCB 21, at 5-6 (BCB 2002) ("We now hold that this Board will no longer determine whether a respondent raised a belated claim and that the parties here should proceed to arbitration, at which point Petitioner may raise the issue of notice before an arbitrator."); *Local 1549, DC 37*, 69 OCB 3, at 7. Therefore, we hold here, as we have long held, that the failure to cite the relevant contract provisions in a request for arbitration does not prevent the matter from proceeding to arbitration if the other party had notice of the nature of the grievance.

We now address the question of substantive arbitrability of the grievance in the instant matter. This Board's statutory directive is "to promote and encourage impartial arbitration as the selected means for the resolution of grievances." NYCCBL § 12-302; *see also NYSNA*, 69 OCB 21 (discussing Board's role in public sector arbitration). The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See*

CEA, 79 OCB 17, at 10 (BCB 2007); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002). In determinating if a matter is arbitrable, 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 [Agreement].

OSA, 79 OCB 22, at 10 (BCB 2007) (citations and internal quotation marks omitted); *see also NYSNA*, 69 OCB 21, at 7-8; *SSEU*, 3 OCB 2, at 2 (BCB 1969). It is undisputed that the parties are contractually obligated to arbitrate disputes as defined by the SSRT Agreement; thus, the first prong is satisfied.

As for the second prong, the particular controversy presented by the Union is the failure of the City to pay Grievant her accrued annual leave upon her termination. The Union has cited to three contract provisions: Article III of the SSRT Agreement and Articles V, §2(c), and IX, §23, of the Citywide Agreement. Article III of the SSRT Agreement, entitled "Salaries," contains specified salaries, salary adjustments, and salary ranges for covered titles. Nowhere within it does it address annual leave. Article V, §2(c), of the Citywide Agreement applies only to situations where City employment ends due to the fiscal condition of the City. Nothing in the letter of dismissal indicates the reasons for the termination of Grievant. Thus, it is unclear if either SSRT Agreement, Article III, or Citywide Agreement, Article V, §2(c), provide an arguable nexus.

However, Article IX, § 23, of the Citywide Agreement does provide the requisite nexus. It provides that an employee who has left City employment for unspecified "other reasons shall be paid

. . . any other monies due them as soon as possible." (Ans., Ex. B). It is undisputed that Grievant has left City employment, and it is undisputed that she has not been paid for her accrued annual leave. Whether Grievant's termination qualifies as an "other reason," and whether accrued annual leave constitutes "other monies," under the Citywide Agreement, Article IX, § 23, are questions of contract interpretation for an arbitrator to decide. As a reasonable nexus exists between the grievance and the general subject matter of the Citywide Agreement, this matter may properly proceed to arbitration. Thus, the petition is 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, that the petition challenging arbitrability filed by the City of New York and the New York City Human Resources Administration, docketed as No. BCB-2875-10, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371, docketed as A-13489-10, hereby is granted.

Dated: November 29, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER