SBA, 3 OCB 2d 54 (BCB 2010)

(Arb) (Docket No. BCB-2837-10) (A-13359-10).

Summary of Decision: The City filed a petition challenging the arbitrability of a group grievance filed by the Union alleging that NYPD violated the parties' collective bargaining agreement by failing to follow an alleged past practice when it reduced grievant's salary upon promotion from Third Grade Detective to Sergeant. The City contended that this grievance is not subject to arbitration because the Union failed to establish a nexus between the action with respect to wages and the parties' collective bargaining agreement, as amended, and further that the Union failed to support its claim that past practice warranted arbitration of the claim. The Board found that no reasonable relationship existed between the action with respect to wages and the violation and/or misapplication of the applicable rate of pay set forth in the parties' collective bargaining agreement, as amended. Accordingly, the petition is granted and the request for arbitration is denied. ***(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-

SERGEANTS BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On March 2, 2010, 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 Sergeants Benevolent Association ("Union" or "SBA") on behalf of Sergeant Jure Olic and "similarly affected

[S]ergeants who were former [D]etectives and [who] are now being paid improperly" ("grievants").[1] The grievance, filed on October 2, 2009, at Step III, asserts that the NYPD violated the parties' collective bargaining agreement when it placed Olic into "improper pay steps" with the effect that "his overall annual salary was decreased from the overall annual salary he had as a Detective immediately before his promotion." The Union asserts that, although the parties' collective bargaining agreement does not explicitly so provide, the NYPD has "a prior consistent practice of properly placing a newly promoted [S]ergeant in a salary step that insured that upon promotion, the [S]ergeant would receive annual compensation that will be higher than what they [*sic*] would have received in their [*sic*] pre-promotion position." The City contends that this grievance is not subject to arbitration because SBA cannot establish a nexus between the past practice asserted, or past practices generally, and a provision of the collective bargaining agreement between the SBA and the City ("SBA Agreement"). We find no reasonable relationship between the right asserted, the alleged past practice of placing newly promoted Sergeants at a step high enough to ensure a wage increase upon promotion, and the collective bargaining agreement, which does not include past practices within the definition of grievances. Accordingly, the petition is granted, and the instant Request for Arbitration ("RFA") is denied.

BACKGROUND

SBA 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 the NYPD in the title of Sergeant. The

[1] The grievance was filed as a group grievance but Olic is the only named individual.

Detectives Endowment Association ("DEA") is also an employee organization under NYCCBL § 12-303(l) and is the sole and exclusive bargaining representative for employees within NYPD in the title of Police Officers who are designated First Grade Detectives, Second Grade Detectives, and Third Grade Detectives, as well as Police Officers designated as Detective Specialist. The issue in this case concerns a grievant, or grievants, promoted to Sergeant from Detective positions.

Relevant Contractual Information

On May 7, 2007, the NYPD entered into a collective bargaining agreements with the DEA covering the period from February 15, 2004, through March 31, 2008 ("2004-2008 DEA Agreement"). The 2004-2008 DEA Agreement set forth a multi-step pay plan, as well as dates on which employees in the Detective titles would receive wage increases. On January 15, 2010, NYPD entered into a collective bargaining agreement with the SBA covering the period from June 1, 2005, through August 29, 2011 ("2005-2011 SBA Agreement"). The 2005-2011 SBA Agreement also set forth a multi-step pay plan and dates on which employees in the title of Sergeant would receive wage increases. Both the DEA Agreement and the SBA Agreement were later modified with respect to wages for members in the respective titles.[2]

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[2] The 2004-2008 DEA Agreement was modified by a Memorandum of Understanding dated September 27, 2007 covering the period from April 1, 2008, through March 31, 2012 ("2008-2012 DEA MOU"). The 2008-2012 DEA MOU modified the 2004-2008 DEA Agreement as to wages, among other things. Further wage modifications were reached by agreement on March 31, 2009, and made effective as of a year earlier, that is, on March 31, 2008. That agreement, entitled Notice of Amended Pay Authorization for Detectives ("Pay Authorization") raised the salary for, among others, Third Grade Detectives to $77,589.00.

The 2005-2011 SBA Agreement was modified by a Memorandum of Understanding dated June 9, 2007, covering the period from June 1, 2006, through July 31, 2011 ("2005-2011 SBA MOU"). The 2005-2011 SBA MOU modified the 2005-2011 SBA Agreement as to wages, among other things. Further wage modification was reached by agreement on July 9, 2008 ("2005-2007 SBA Reopener MOU") as well as on April 3, 2009 ("2005-2011 Extension MOU").

Relevant Grievance History

On or about December 23, 2008, Jure Olic was promoted from the rank of Third Grade Detective to the rank of Sergeant. The Union asserts that Olic's pay as a Third Grade Detective immediately before his promotion to Sergeant was actually $74,500.[3] The City asserts that immediately before this promotion, Olic had reached the first step of the Third Grade Detective salary plan ($66,794), and was paid in accordance with the 2008-2012 DEA MOU. The City further asserts that, when Olic was promoted to Sergeant, he was paid ($73,000) in accordance with the 2005-2011 SBA MOU.

On or about October 2, 2009, the SBA filed a request for a Step III review of a grievance filed by the Union alleging that the NYPD had paid Olic, as well as other unnamed, similarly situated Sergeants, at the incorrect rate when calculating their pay retroactive to their promotion to Sergeant.[4] The grievance further alleged that, "[u]pon his promotion to [S]ergeant[,] [Olic] and others similarly situated were place[d] in improper pay steps with the effect that his overall annual salary was decreased from the overall annual salary he had as a Detective immediately before his promotion." (Petition, Ex. 3).

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[3] The City admits that after "implementation"of the Pay Authorization on March 31, 2009, the salary for Third Grade Detectives was raised (to $74,500) *retroactively* to October 31, 2008, for the period immediately prior to the grievant's promotion to Sergeant. Any discrepancy in the parties' position on the actual pay level is not germane to the arbitrability determination before us.

[4] In the RFA, the Union cites § 1(a), Article XX, of the 2005-2011 SBA Agreement which describes the grievance-arbitration procedure to be used for asserted violations of this Agreement. That section defines a "grievance,"in pertinent part, as:

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

The Step III grievance was denied by the NYPD's Deputy Commissioner of Labor Relations on October 9, 2009. On October 20, 2009, the Union appealed the Step III determination to Step IV, urging that the Department "place these [S]ergeants into the proper pay step, retroactive to their promotion date to [S]ergeant." *Id.* On November 19, 2009, the Police Commissioner denied the Step IV appeal stating, in pertinent part, that:

> There has been no violation, misapplication, or misrepresentation of the rules or procedures of this department, nor has there been any violation, misapplication, or misrepresentation of the current collective bargaining agreement.

Id.

On February 2, 2010, the Union filed a RFA with the Office of Collective Bargaining. The Union seeks to have Olic and similarly affected Sergeants who were Detectives prior to promotion, and who "are now being paid improperly," made whole "by placing them at their proper pay step retroactive to their promotion dates." *Id.* As the section(s) of the 2005-2011 SBA Agreement allegedly violated, the Union cites § 1(a), Article XX.

POSITIONS OF THE PARTIES

City's Position

The City argues that the instant claim bears no reasonable relationship to the parties collective bargaining agreement. The Union has failed to identify any contractual provision, NYPD rule, regulations, policy or procedure on which the grievance is based. The provisions of the 2005-2011 SBA Agreement which the Union cites are merely definitional and do not furnish an independent basis for a grievance alleging that a Sergeant, upon promotion, would receive annual compensation higher than that received prior to promotion. Nor has the Union pointed to any

provision in the 2005-2011 SBA Agreement supporting the arbitration of any asserted past practice of the parties. The City contends that the Union seeks an end run around the 2005-2011 SBA Agreement and subsequently bargained-for amendments which the Union now finds less than desirable. Thus, the instant grievance must be denied.

Union's Position

The Union contends that a nexus does exist between what the Grievant and similarly situated Sergeants are receiving in salaries post-promotion and the parties' past policy and practice as it relates to Police Officers promoted from Detective to Sergeant. The Union relies upon subsections (1) and (2) of § 1(a), Article XX, of the 2005-2011 SBA Agreement, the definition of "grievance."[5] As to the substantive grounds for arbitrability, the Union asserts that the 2005-2011 SBA Agreement provides for a multi-step pay plan for members of the Union after they are promoted to Sergeant. Moreover, the Union contends that the NYPD has a "long and consistently applied practice that employees will not suffer a decrease in their overall annual salary upon promotion." (Pet. Ex. 3). Further, the Union asserts that the members sought to be made whole by this grievance "have been adversely affected by the NYPD's departure from the prior consistent practice of properly placing a newly promoted [S]ergeant in a salary step that insured that upon promotion, the [S]ergeant would receive annual compensation that will be higher than what they would have received in their pre-promotion position." (Pet. Ex. 3). The NYPD deviated from past practice, the Union argues, by not placing Olic and other similarly situated Sergeants at what the Union contends is the proper Detective salary step prior to promotion which would ensure that they would be paid a Sergeant's salary no lower than what they would have received had they not been promoted. The Union asserts

[5] *See* n. 4, above.

that the SBA Agreement is entirely silent as to which level is the proper step in the 2005-2011 SBA Agreement for newly promoted Sergeants, and that that is the question the Union seeks to arbitrate.

DISCUSSION

No reasonable relationship has been demonstrated between the asserted right to placement at a salary step upon promotion such that the newly promoted Sergeant will receive an effective wage increase and any contractual provision giving rise to a right to arbitrate. Specifically, the 2005-2011 SBA Agreement, by its plain terms, does not include within the definition of "grievance" a violation of a past practice, and thus no relationship can be established between the SBA Agreement and the basis for the right asserted. Thus, we grant the City's petition in its entirety and dismiss the RFA.

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."[6] *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 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.

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

NYSNA, 2 OCB2d 6, at 7 (BCB 2009) (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 judicial standard applied in public employment arbitrability cases); *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 had shown "a prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." CEA, 3 OCB2d 3, at 13 (BCB 2010); Local 924, DC 37, 1 OCB2d 3 (BCB 2008); COBA, 45 OCB 41, at 12 (BCB 1990).

As we recently reaffirmed:

> 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.

CEA, 3 OCB2d 3, at 12 (BCB 2010); 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); CWA, Local 1180, 1 OCB 8, at 6 (BCB 1968)).[7]

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[7] 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.

In the instant case, there is no dispute that the parties herein are also parties to the 2005-2011 SBA Agreement, as amended. 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 the Union has not demonstrated a reasonable relationship between the alleged past practice and the parties' collective bargaining agreement. We agree.

The principle nexus asserted by the Union is its claim that the NYPD has had a past practice of placing newly promoted Sergeants at a level in the Sergeants' step pay plan that would guarantee that they received a wage increase upon promotion.[8] "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' collective bargaining agreement. *CEA*, 3 OCB2d 3, at 14-15 (BCB 2010), (quoting *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 *CEA*, the definition of "grievance" is limited to alleged violations, misinterpretations or misapplications of the Agreement itself or of "the rules, regulations or procedures of the Police Department affecting terms and conditions of employment." The definition does not include claimed violations of past practice, and thus, no nexus has been established between the Agreement and the alleged violations of past practice. *Id.* at 15; *NYSNA*, 67 OCB 42, at 5 (BCB 2001) (claims based on past practices not arbitrable when past practices not

[8] The Union has not cited any substantive provision in the Agreement, as amended, on which to base its RFA of the underlying grievance. The Union admits that there is no provision in the 2005-2011 SBA Agreement which governs the placement of a newly-promoted Sergeant at a particular step in the Sergeant's multi-step pay plan, and thus no nexus has been established between the Agreement and the right asserted. In essence, the Union's entire claim is based on what it asserts is the past practice of the NYPD.

included within contractual definition of grievance); *MEBA*, 49 OCB 24, at 16 (BCB 1992) (finding no support for grieving past practice, of applying seniority to bidding for assignments, in contractual procedure permitting grievance of written employer policies). *See also SBA*, 79 OCB 15, at 7-8 (BCB 2007) (finding alleged past practice not grievable wherein contract contains no provision for grieving alleged violation of agency rule, regulation or procedure).

To the extent that the Union claims that the placement of newly promoted Sergeants at a step high enough to ensure their promotion entails a salary increase constitutes a "policy" subject to arbitration, we have previously rejected an identical claim brought by the same Union. *SBA,* 79 OCB 15, at 7-8; *but cf. New York City Dist. Council of Carpenters, UBCJA*, 3 OCG2d 9, at 12 (BCB 2010) (finding grievable claimed violation of written policy, *i.e.*, agency personnel manual, explicitly providing for arbitration of disputes over agency rules and regulations affecting terms and conditions of employment). The present claim is likewise deficient, in that the definition of grievance does not encompass policies, and, in any event, no such written policy even arguably giving rise to a claim has been identified. *Id. See also CIR*, 61 OCB 39 (BCB 1998) (where contract provided for grievance of claimed violation of "existing policy," board permitted arbitration of question of whether policy concerning free parking for employees existed); *but cf. Doctors Council*, 61 OCB 40 (BCB 1998) (where contract provided for grievance of "written policy" but not "past practice," board rejected arbitration of question whether past practice concerning free parking for employees existed).[9]

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[9] Our dissenting colleague urges us to apply the parties' past practice as a means of finding a nexus here, arguing, based upon *Matter of Aeneas McDonald Police Benevolent Association v. City of Geneva*, 92 N.Y.2d 326 (1998),"[a] past practice can be an independent source of rights under certain circumstances." (Dissenting Opinion at 1). The dissent further argues that "past practice (continued...)

For these reasons, the grounds for arbitration asserted by the SBA in the RFA are insufficient. The petition challenging arbitrability is granted, and the RFA is denied.

[9](...continued)
can also be a tool for interpreting the proper application of existing contractual provisions." (*Id.*). With respect, that decision does not support the result contended for here. *City of Geneva* did not involve a question of arbitrability under the Taylor Law or the NYCCBL, but rather whether a unilateral change to a past practice applicable to retirees constituted either an improper practice under the Taylor Law or a breach of contract. 92 N.Y.2d at 331-332. In determining that the past practice did not create an enforceable contractual right, the Court acknowledged that resort to past practice by any body other than an arbitrator is limited. As the Court explained, "past practice, like any other form of parol evidence, is merely an interpretive tool and cannot be used to create a contractual right independent of some express source in the underlying agreement." *Id.* at 333. Here, the dissent would have us resort to parol evidence in order to create a nexus that is not grounded in the terms of the collective bargaining agreement, essentially applying what is alleged to be the spirit of the agreement. Such authority is denied to the judiciary, as the *City of Geneva* Court emphasized, let alone to this Board. *See* 92 N.Y.2d at 332-333; Civ. Serv. Law § 205.5(d); *see also CEA*, 3 OCB2d 3, at 14-15.

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-2837-10, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by the Sergeants Benevolent Association, docketed as A-13359-10, hereby is denied.

Dated: New York, New York
November 29, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

I dissent. PETER PEPPER
MEMBER

DISSENTING OPINION OF CHARLES G. MOERDLER

Matter of The City of NY and The NYC Police Department and Sergeants Benevolent Association

(Docket No. BCB-2837-10)

This proceeding arises out of the invocation by Respondent Sergeants Benevolent Association ("SBA") of arbitration to resolve a dispute in connection with its construction of contract terms applicable where a "promotion" has been awarded. Apparently, the City takes the position that "promotion" from Detective Third Grade to Sergeant can equal less pay, hardly a "promotion." The City opposes arbitration, maintaining that the only proper construction of the relevant contract terms are those which it gives the contract and, hence, arbitration is precluded. The City's argument is as lacking in logic as it is in merit.

The majority reasons that arbitration is inappropriate based on a misperception of the role of past practices proofs in the context here presented. Thus, the majority ignores the dual role that "past practice" plays in labor arbitration. *See, Matter of Aeneas McDonald Benevolent Association v. City of Geneva*, 92 N.Y. 2d 326, 331, 333 (1998). A past practice can be an independent source of rights under certain circumstances, as noted in cases cited in the majority opinion. However, past practice can also be a tool for interpreting the proper application of existing contractual provisions. The majority focuses solely on the former without consideration of the latter. That fundamental error fatally taints its holding.

Here, the underlying claim is that newly-promoted employees were placed in an improper salary step. There is no dispute that the salary ladder is part of the agreement at issue and thus misapplication of it would be arbitrable. See, e.g., Article XX, Section 1 (a) of 2001-2005 SBA

Agreement discussed at fn. 4 of the majority opinion. After all, the salary ladder is an essential contract term. The past practice of interpreting the contract and applying the salary ladder in such a way as to ensure that promotion carries with it greater, not lesser, compensation is evidence of how the steps should properly be applied. Indeed, Elkouri & Elkouri provides that using the "custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language ... [i]ndeed, use of the past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary." Elkouri & Elkouri, *How Arbitration Works* (6th Ed., 2008 Supplement) at 247 (omitting citations).

See, *Matter of Aeneas McDonald, supra*, 92 N.Y. 2d at 331,333 (1998). *See also, Rochester City School Dist. v. Teachers Assn.*, 41 NY2d 578, 583 (1977); *Orchard Park Teachers Association v. Board of Education Orchard Park Central School District,* 71 AD2d 1 (4th Dept. 1979); *cf.*, *Matter of Correction Officers Benevolent Association v. City of New York*, 160 AD2d 548 (1st Dept. 1990). Thus, a claim that the contractual salary ladder has been misapplied in light of its past applications bears a sufficient nexus to the salary ladder provision in the agreement as to grant it assuage to arbitration.[10]

Alternate Labor Member Peter Pepper joins in this dissenting opinion.

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[10] The Courts have consistently held that arbitration is to be favored. Thus, the Court of Appeals has stated, "This court has repeatedly held that arbitration is a favored method of dispute resolution in New York (*Matter of Weinrott [Carp]*. 32 NY2d 190,199; *see also, Sablosky v. Gordon Co*., 73 NY2d 133, 138) ...." The Court of Appeals has also held that "a past practice, independent of any contract term, may be relied upon by an arbitrator in resolving disputes which have been submitted under the grievance machinery of a collective bargaining agreement." *See, Aeneas McDonald*, *supra*, 92 NY 2d at 332-333. After all, the Court of Appeals has held that "Arbitrators may do justice...." *Id.* Finally, it merits mention that the obligations of good faith and fair dealing are inherent in any contract and are separately enforceable. *See, e.g.Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co.*, 30 N.Y.2d 34,45 (1972). Our function therefore is not, as the City would have it, to find ways of avoiding arbitration but, instead, to favor it under any view of the record that we may conclude is plausible.