Doctors Council, SEIU, 4 OCB2d 1 (BCB 2011)

(Arb.) (Docket No. BCB-2871-10) (A-13496-10)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that it failed to pay hourly physicians for two days when their workplaces were closed due to inclement weather. The City asserted that the Union did not establish the requisite nexus between the subject of the grievance and the parties' collective bargaining agreement. The Union argued that the City's petition must be denied as untimely and that it had established the requisite nexus. The Board found that the petition challenging arbitrability was untimely and that the Union established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. The petition was denied, and the request for arbitration granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Petitioners,

-and-

DOCTORS COUNCIL, SEIU,

Respondent.

DECISION AND ORDER

On July 24, 2010, the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH") filed a petition challenging the arbitrability of a grievance brought by the Doctors Council, SEIU ("Union"). On June 9, 2010, the Union filed a request for arbitration on behalf of hourly physicians ("Grievants") alleging that the City violated the 2008-2010 Clinicians Agreement ("Clinicians Agreement") by failing to pay Grievants when their workplaces

were closed for two days in February 2010 due to inclement weather.[1] The City asserts that the Union has not established the requisite nexus between the subject of the grievance and the Clinicians Agreement. The Union argues that the City's petition must be denied as untimely and that it has established the requisite nexus. The Board finds that the petition challenging arbitrability was untimely and that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. Accordingly, the petition was denied and the request for arbitration granted.

BACKGROUND

The Union represents hourly physicians employed by DOHMH's Office of School Health ("OSH") who are covered by the Clinicians Agreement. On February 9, 2010, the Mayor announced that, due to a forecasted 14 inches of snow, City public schools would be closed on February 10, but City government offices would remain open, and City employees would be expected to work. OSH employees assigned to public schools who were not reassigned to other locations and did not work on February 10 had to use accrued leave in order to be paid for February 10. On February 26, City public schools were again closed due to inclement weather, and the parties agree that some Union members assigned to City public schools were not reassigned to other locations, did not work, and had to use accrued leave in order to be paid for February 26.

On March 11, 2010, the Union filed a group Step III grievance in accordance with the

[1] The grievance at issue was filed on behalf of 45 employees in the titles of City Medical Specialist, Medical Specialist, Senior Medical Specialist, and City Clinician.

grievance provisions of the Clinicians Agreement.[2] The Step III grievance alleged that DOHMH violated Article III of the Clinicians Agreement by not paying Grievants for February 10 and 26 when their workplaces were closed. Article III is entitled "Salaries" and provides the salary ranges and adjustments for all covered titles, including hourly and per tour rates. The Step III grievance was denied on May 19 on the grounds that Article III does not address payment for snow days.

On June 9, 2010, the Union filed and served the instant request for arbitration along with the required waiver. The request for arbitration describes the issue to be arbitrated as "[t]he failure and refusal of [DOHMH] to pay employees when their workplaces were closed on February 10 and February 26, 2010." (Pet., Ex. 1). The request for arbitration sought "[p]ayment for the days in question, with interest and benefits; restoration of leave accruals reduced as a result of [DOHMH's] actions; and such other relief as may be appropriate." (*Id.*).

The City filed the instant petition challenging arbitrability eleven business days later, on June 24, 2010. The City admits that it did not request an extension from either the Union or the Office of Collective Bargaining to file the instant petition. The City has not provided any explanation as to why it did not file the instant petition within ten business days of service of the request for arbitration and the waiver as required by § 1.06(c)(1) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[3]

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[2] Article VIII, § 1, of the Clinicians Agreement defines a grievance, in pertinent part, as a "dispute concerning the application or interpretation of the terms of this Agreement."

[3] OCB Rule § 1.06(c) is entitled "Service and filing of petition challenging arbitrability" and § 1 thereof reads, in full:

> A petition for a final determination by the Board as to whether the grievance is a proper subject for arbitration shall be served and filed within 10 business days after service of the request for arbitration and

POSITION OF THE PARTIES

City's Position

The City claims that the instant petition should not be dismissed as untimely, relying on the Board's longstanding policy of "eschewing overly technical application of the rules of pleading." (Rep. ¶ 17) (quoting *DEA*, 41 OCB 73, at 1 n.1 (BCB 1988)). The City filed the petition less than a full day late, and the Union was not prejudiced by the late filing. The City acknowledges that it did not seek an extension but notes that it consented to the Union's request for a three-week extension to file its responsive pleading to the City's petition challenging arbitrability. The City cites two Board decisions where the Board refused to dismiss pleadings for being late and asks that the Board recognize the City's late filing as harmless error and proceed to the merits of the petition.

The City argues that no nexus exists between the contractual provision cited, Article III of the Clinicians Agreement, and the underlying dispute, the failure to pay Grievants for snow days. Article III does not contain any right to be paid for days when the workplace is closed due to snow. Thus, the Union has failed to establish an arguable relationship between the failure to pay for a snow day and the Clinicians Agreement. The definition of grievance in the Clinicians Agreement does not include a claim based upon an event or condition, such as inclement weather, that affects a term or condition of employment. The Union has failed to set forth any facts to suggest that DOHMH acted improperly by failing to pay employees for February 10 and 26. The City, quoting § 12-307(b) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), argues that management has a presumptive right to "relieve its employees

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> the waiver upon the other party to the grievance, or the party so served shall be precluded thereafter from contesting in any forum the arbitrability of the grievance.

from duty because of lack of work or for other legitimate reasons." (Pet. ¶ 30).[4]

The City disputes the Union's argument that all issues concerning compensation are automatically arbitrable. A nexus must still be shown. The City acknowledges that precedent exists for finding a nexus between a grievance concerning earned wages and a salary provision of a collective bargaining agreement. However, the instant case concerns unearned wages. It is undisputed that none of the Grievants worked a single hour on the days in question. The Union has not cited any cases creating a right to payment in lieu of performance. Further, cases cited by the Union concerning arbitrating how or in what form payments are to be made are not relevant, as such presupposes a right to payment. The Board has twice rejected these same arguments raised by this Union because simply characterizing an issue as having an impact upon salaries or wages as arbitrable is vague, conclusory, and insufficient to establish the requisite nexus. *See Doctors Council*, 61 OCB 52 (BCB 1998) (Board granted challenge to arbitrability of a grievance concerning an employer's failure to pay for a medical course required by the employer because Article III is devoid of any reference to medical courses); *Doctors Council*, 61 OCB 40 (BCB 1998) (Board granted challenge to arbitrability of a grievance concerning the employer's failure to pay for parking

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[4] NYCCBL § 12-307(b) reads, in pertinent part:

> It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . ; relieve its employees from duty because of lack of work or for other legitimate reasons; . . .; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city . . . on those matters are not within the scope of collective bargaining, but, . . . , questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, . . ., are within the scope of collective bargaining.

because Article III is devoid of any reference to parking).

Union's Position

At the outset, the Union argues that the instant petition must be dismissed as untimely. OCB Rules require that any petition challenging arbitrability be filed within ten business days of the request for arbitration and waiver being served. Failure to do so is fatal to the petition challenging arbitrability. The request for arbitration and waiver were served June 9, 2010; the instant petition was not filed until June 24, which is eleven business days after service. Thus, the petition is time-barred and must be dismissed with prejudice.

The Union states it is grieving the City's refusal to pay hourly physicians the compensation contractually required to be paid under Article III of the Clinicians Agreement for February 10 and 26, 2010. The Union's members were scheduled, ready, willing, and able to work. They were prevented from working their regularly scheduled shift solely due to the City's cancellation of these school days because of inclement weather.

The Union argues that it is only obligated to show a connection between the grievance and some source of right. The Board does not interpret the parties' collective bargaining agreement, and issues concerning compensation are arbitrable, even where the contract does not contain a provision indicating the manner or timing of such payment. Board precedent holds that the failure to pay a grievant certain wages is a violation of a contract's wage scale. Board precedent further holds that when a grievant alleges, as the Union does here, that a compensation provision has been violated, such creates an arguable dispute as to whether the compensation provision has been applied correctly. Article III of the Clinicians Agreement guarantees hourly physicians certain compensation. The question in the instant grievance is whether Article III was violated when the City failed to pay

for days that were cancelled by the City. This is a question of contract interpretation for an arbitrator. The Union notes that the City does not dispute that *per annum* physicians are entitled to compensation for a day that is canceled by an employer. Any argument that hourly physicians do not share this entitlement requires an interpretation of the Clinicians Agreement and is arbitrable.

DISCUSSION

As a threshold matter, we address the Union's claims that the instant petition is untimely. *See UFA*, 3 OCB2d 38, at 6 (BCB 2010); *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009). Our Rules require that a petition challenging arbitration be filed and served within ten business days after service of the request for arbitration and waiver "or the party so served *shall be precluded* thereafter from contesting in any forum the arbitrability of the grievance." OCB Rule § 1.06(c) (emphasis added); *see also D'Onofrio*, 79 OCB 28, at 8 (BCB 2007) (untimely petition challenging arbitrability denied); *DC 37*, 15 OCB 13 (BCB 1975) (same, under earlier version of OCB Rules).

The City admits that it was served the request for arbitration and waiver on June 9, 2010, and that it did not file the instant challenge to arbitration until June 24, which is eleven business days later. The City further admits that it did not request an extension of time in which to file. The City has not argued that its filing was, or should be considered, timely; nor has it provided any explanation for its late filing. Instead, the City argues that the late filing constitutes harmless error and that the Board should "eschew[] overly technical application of the rules of pleading." (Rep. ¶ 17) (quoting *DEA*, 41 OCB 73, at 1 n.1).[5]

[5] The quoted language from *DEA* concerned the filing of additional material by the Union after the City had filed its Reply, even though the OCB Rules did not provide for the filing of

Filing deadlines, however, are not mere technicalities that the parties can ignore. OCB Rule § 1.06(c) explicitly states that a petition challenging arbitrability "*shall* be served and filed within 10 business days." (emphasis added). Untimely filings are not properly before the Board and will not be considered. *See D'Onofrio*, 79 OCB 28, at 8; *DC 37*, 15 OCB 13; *see also Nardiello*, 2 OCB2d 5, at 28 (in the context of improper practice filings); *Castro*, 63 OCB 44, at 6 (BCB 1999) (same). The revision of the OCB Rules in 2004 regularized the practice and extended the time in which to file a challenge to arbitrability. OCB Rule § 1.06 (c) replaced Rule 6.4, which had conditioned the ten day filing period upon the filing of a notice of preclusion with the request for arbitration and counted calender, not business, days.[6] OCB Rule § 1.06(c), as it stands today, does not allow for a filing of a notice of preclusion, and the time limit to challenge arbitrability is ten business days from receipt of the request for arbitration and waiver. As OCB Rule § 1.06(c) specifies ten business days, Saturdays, Sundays, and legal holidays are not included in the computation of the ten business day period. Thus, under the current OCB Rule § 1.06(c), the parties always have at least two extra calendar days from the accrual date to file and serve their pleadings

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pleadings subsequent to the Reply. We noted that the City had not objected to our considering the additional material and then stated that considering it would be "consistent with our policy of eschewing an overly technical application of rules of pleading." *Id.*, 41 OCB 73, at 1 n.1.

[6] The old OCB Rule was denoted Rule 6.4 and was quoted in full in *DEA*:

> **Ten Day Notice - Preclusion of Objection.** A request for arbitration may contain a notice that a petition for final determination by the Board, as to whether the grievance is a proper subject for arbitration, must be served and filed within ten (10) days or the party served with the notice shall be precluded thereafter from contesting in any forum the arbitrability of the grievance.

41 OCB 73, at 7, n.7 (emphasis in original).

than they had under the prior OCB Rule 6.4.[7] In light of the language of the revised rule and the extended time period to which to file a challenge to arbitrability, we are disinclined to accept pleadings filed outside of the time frame set by OCB Rule § 1.06(c) absent consent of all parties. We note that, in the context of interest arbitration, the Public Employment Relation Board ("PERB") similarly dismisses as untimely challenges to arbitrability not filed within its ten business day time limit. *See City of Elmira*, 25 PERB ¶ 3072 (1992).[8] The City's reliance on *DEA*, 41 OCB 73, and *UFA*, 49 OCB 8 (BCB 1992), is misplaced, as those cases were filed under old Rule 6.4 and are, thus, distinguishable.[9] Further, in *DEA* and *UFA*, the filing deadlines were not ignored; the failure to comply with the deadline was either disputed or explained.[10] We recognize that some delays may be excusable, and we reserve the right to accept late filings in exceptional circumstances. However, in this case, no explanation for the late filing has been provided, let alone any excuse, and we therefore find that the City's challenge to arbitrability is untimely and must be dismissed. *See*

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[7] The old provisions for computation of time were found in old OCB Rule 13.4.

[8] In *City of Elmira*, the initial challenge to arbitrability was timely filed within 10 business days, but an additional charge filed a few days later was found to be untimely. PERB held that "[n]otwithstanding the alleged lack of prejudice to the [union], [PERB's] Rules as written and applied require that the charge be dismissed as untimely filed." 25 PERB ¶ 3072, at 3072. *See also Fulton Firefighters Assn., L. 3063, IAFF, AFL-CIO,* 29 PERB ¶ 6501, at 6503 (1996); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 42 PERB ¶ 4591 (ALJ 2009); *City of Middletown*, 40 PERB ¶ 4602, at 4791 (ALJ 2007).

[9] We note that subsequent to *DEA* and *UFA*, the City has argued that the Board should not consider late filings. *See District No. 1 - PCD, MEBA*, 63 OCB 14 (BCB 1999) (City argued that an Answer should be stricken as untimely when it was filed more than 10 business days after the City filed its challenge to arbitration).

[10] In *DEA*, it was not clear "whether the City's request for an extension . . . was made in a timely manner, or was made one day late." 41 OCB 73, at 11. In *UFA*, the Union filed its Answer three days late, arguing "that its [A]nswer was delayed due to its late receipt of the City's petition." 49 OCB 8, at 8.

D'Onofrio, 79 OCB 28; *DC 37*, 15 OCB 13.

Were we to reach the merits, we would find a nexus.[11] The particular controversy presented by the Union is the failure of the City to pay Grievants for two days that they were scheduled to work but did not work due to inclement weather. We have previously held that grievances alleging that an employee is ready, willing, and able to return to work, but was prevented from working by the employer, are arbitrable under a general salary provision such as Article III of the Clinicians Agreement. *See Local 371, SSEU*, 41 OCB 14 (BCB 1988); *CIR*, 37 OCB 30 (BCB 1986).[12] The City argues that the instant case is distinguishable from these cases as it allegedly concerns unearned wages. However, "the question whether [a] [g]rievant was entitled to his wages involves the merits of the dispute, and is not for the Board to decide." *Local 30, IUOE*, 77 OCB 7, at 15 (BCB 2006), *affd*, *Matter of City of New York v. NYC Bd. of Certification*, Index No. 404461/06 (Sup. Ct. N.Y.Co. Sept. 19, 2007) (Wetzel, J.); *see also CIR*, 37 OCB 30, at 8.

The Union alleges that the Grievants were ready, willing, and able to work on days that they were scheduled to work but were prevented from doing so by the City. Such a claim is a demand for wages and has the requisite nexus to the salary provision of Article III of the Clinicians

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[11] It is undisputed that the parties are contractually obligated to arbitrate disputes as defined by the Clinicians Agreement.

[12] In *Local 371, SSEU*, the union grieved, under a salary provision similar to Article III, that the "grievant was denied pay accrued pursuant to [the salary provision] for a period during which she was scheduled to resume working but allegedly was prevented by her employer from performing any duties." 41 OCB 14, at 6. We concluded that there was the required nexus to the salary provision. In *CIR*, the grievant alleged that his employer prevented him from returning to work after taking leave. The union grieved "the failure to pay the grievant the contractual wage." 37 OCB 30, at 8. We found the matter arbitrable under a salary provision similar to Article III.

Agreement.[13] Whether hourly physicians are entitled to compensation for a scheduled work day which is canceled by an employer due to inclement weather involves the merits of the dispute. Thus, this matter may properly proceed to arbitration. Accordingly, the City's challenge to arbitrability is denied, both as untimely and on its merits, and the Union's request for arbitration is granted.

[13] The City's reliance on *Doctors Council*, 61 OCB 52, and *Doctors Council*, 61 OCB 40, is misplaced as those case did not concern a demand for wages; rather, the Union argued that when the employer ceased paying for medical courses and parking, respectively, it denied grievants "a clear economic benefit." 61 OCB 52, at 3; 61 OCB 40, at 4. We denied the Union's request for arbitration because no nexus to the parties' salary provision had been shown. *See Id.*, 61 OCB 52, at 5; 61 OCB 40, at 6. In the instant case, the Union is alleging that the City has failed to pay wages owed. The City also cites to *CEA*, 3 OCB2d 3, at 10 (BCB 2010), quoting our holding that the "mere fact that the parties . . . bargain[ed] regarding wages does not mandate, absent a claimed violation of the agreement . . . , that the bargained-for arbitration remedy applies to any claim the union subsequently chooses to bring concerning remuneration." In the instant matter, the Union has made a claim of a violation of the agreement, the denial of wages owed under Article III, and thus our holding here finding this dispute arbitrable is consistent with *CEA*.

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 Department of Health and Mental Hygiene, docketed as No. BCB-2871-10, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Doctors Council, SEIU, docketed as A-13496-10, hereby is granted.

Dated: January 5, 2011
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

GABRIELLE SEMEL
MEMBER