DC 37, 4 OCB2d 12 (BCB 2011)

(Arb) (Docket No. BCB-2860-10) (A-13472-10).

***Summary of Decision*:** The City filed a petition challenging the arbitrability of a grievance brought by District Council 37. The Union had filed a Request for Arbitration alleging that the City violated § 4 of the parties' 2008-2010 Memorandum of Agreement by failing and refusing to apply general increases provided for in § 4(a)(i) and (ii) to "additions to gross" as defined in that Agreement. The City argued that the dispute is not ripe for review. The Board found that the matter presented a dispute that is ripe for adjudication by an arbitrator and dismissed the petition challenging arbitrability. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On May 21, 2010, the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by District Council 37 ("Union"). The Union had filed a Request for Arbitration alleging that the City violated § 4 of the parties' 2008-2010 Memorandum of Agreement ("Agreement") by failing and refusing to apply general increases provided for in § 4(a)(i) and (ii) to "additions to gross" as defined therein. The City argues that the dispute is not ripe for review. The Board finds that the matter presents a dispute that is ripe for adjudication by an arbitrator and

dismisses the petition challenging arbitrability.

Under § 4 (c)(ii) of the Agreement, the general wage increases would be applied to the additions to gross on March 2, 2010. The City has not implemented the Union's costing, or indeed its own, claiming in a related improper practice petition, docketed as BCB-2864-10, and decided today as 4 OCB2d 10 (BCB 2011), that the Union's refusal to provide it with information to assist it in implementing the .10 % cutoff based on the City calculation of that amount, has frustrated its ability to do so.

BACKGROUND

Section 4 of the Agreement sets forth general wage increases for Union members as follows:

> a. The general wage increases, effective as indicated, shall be:
>
> i. Effective on the first day of the applicable *Successor Separate Unit Agreement*, Employees shall receive a general increase of 4%.
>
> ii. Effective on the first day of the thirteenth month of the applicable *Successor Separate Unit Agreement*, Employees shall receive an additional general increase of 4%.

(emphasis in original)

Section 4 (c) of the Agreement defines what are called "additions to gross," and provides that:

> ii. Effective on the last day of the *Successor Separate Unit Agreement*, the general increases provided for in subsections 4. (a)i) and 4. (a)(ii) shall be applied to "additions to gross." "Additions to gross" shall be defined to include uniform allowances, equipment allowances, transportation allowances, uniform maintenance allowance, assignment differentials, service increments, longevity differentials, longevity increments, advancement increases, assignment (level) increases, and experience, certification, educational, license, evening, or night shift differentials.
>
> ii. Notwithstanding Section 4. (c)(ii) above, the total cost of the increase set forth in 4. (c)(i) as it applies to "additions to gross"

> shall not exceed a cost of 0.10 percent of the December 31, 2007 payroll, including spinoffs and pensions. Recurring increment payments are excluded from this provision.

(Emphasis and underscoring in original).

On January 20, 2010 and March 26, 2010, City and Union representatives met to discuss the additions to gross costing methodology utilized by the City in determining the amount of money that comprises 0.10% of the December 31, 2007 payroll. At those two meetings, the City took the position that only the payroll for mayoral agencies and the Department of Education should be included in the calculations. The Union sought to include the cost of paying the additions to gross to all eligible titles of covered employers and, similarly, calculate the .10% of the payroll cost as of December 31, 2007 as a percentage of payroll of all covered employers including the New York City Health and Hospitals Corporation, the New York City Housing Authority, cultural institutions, and the public libraries.

At the March 26, 2010 meeting, the Union informed the City that it would seek resolution of the dispute by a third party. It then filed the instant Request for Arbitration on May 7, 2010.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Request for Arbitration must be denied, as the dispute is not ripe for review. The City argues that the Union has failed to inform the City of how it wishes to apply § 4 (c)(ii) of the Agreement, and it cannot unilaterally determine how to apply that section. The Union must decide which of their various additions to gross, as defined in § 4 (c)(ii), will be augmented up to a total cost of the December 31, 2007 payroll, as per § 4 (c)(iii) of the Agreement. Since the

Union has not shown that the City has taken any action even suggesting an intention of failing to comply with the Agreement, the conclusion is anticipatory, and, thus, not ripe for submission to arbitration.

Union's Position

The Union argues that the City's ripeness argument is unavailing. Not only does a legitimate and on-going dispute exist as to the payment of the additions to gross, the Union informed the City of that fact prior to filing its Request for Arbitration. The Union would not accept the City's "take it or leave it" methodology which would force the Union to select which additions to gross based upon an "artificially low pool of funds." (Ans., ¶ 22).

The Union contends that while the City is correct that it cannot unilaterally determine which additions to gross to pay, the dispute exists concerning the City's failure to pay the additions to gross in accordance with the Agreement. The City's failure to provide a costing has resulted in its failure to pay the additions to gross in violation of the Agreement. There are no conclusory, anticipatory, or speculative claims in the instant matter. The increases in the additions to gross were supposed to be paid on March 2, 2010, the last day of the contract, but they were not. The Agreement provides that the additions to gross shall not exceed 0.10% of the December 31, 2007 payroll, but the City has failed to produce a "legitimate" number in that regard. (Ans., ¶ 26). As such, this dispute could not be more ready for adjudication.

DISCUSSION

The City's sole basis for challenging the arbitrability of this matter is its claim that the instant dispute is not ripe for review by an arbitrator. Issues before this Board must be addressed in the

context of an actual controversy, and not in the abstract. *Local 1157, DC* 37, 2 OCB2d 10, at 16-17 (BCB 2009); *Doctors Council*, 49 OCB 28, at 18 (BCB 1992).

Here, the City and the Union agree that the governing source for rights is the Agreement, but disagree as to the meaning of certain contract language calling for increases in additions to gross. Those increases were to be paid by the City on March 2, 2010, and were not. Thus, the Union grieved the failure to pay and sought to arbitrate the grievance. However, the City claims that the Union's Request for Arbitration is both speculative and anticipatory since the Union has yet to precisely convey to the City how it wishes to apply § 4 (c)(ii) of the Agreement. We find that since the additions to gross were due to be paid on March 2, 2010, as prescribed by the Agreement, and were not, the dispute is actual and not abstract. As such, the matter is ripe for adjudication by an arbitrator. Accordingly, we dismiss the City's petition challenging arbitrability and grant the Union's Request for Arbitration.

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-2860-10 is hereby denied, and it is further

ORDERED, that the Request for Arbitration filed by District Council 37 docketed as A-13472-10 hereby is granted.

Dated: February 14, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER