DC 37, Local 1157, 4 OCB2d 18 (BCB 2011)

(Arb.) (Docket No. BCB-2919-10) (A-13666-10).

Summary of Decision*:** The City challenged the arbitrability of a grievance brought by the Union that claimed that DOT violated a Mayoral Directive and the Citywide Agreement by assigning overtime to employees not in the Area Supervisor title. The City contended that there was no nexus between the provisions cited by the Union and DOT's inclusion of Supervisor Highway Repairers in the overtime rotation for Area Supervisors. The Union argued that a nexus existed because including the Supervisor Highway Repairers in the overtime rotation resulted in an inequitable distribution of overtime. The Board found that there was no nexus between the grievance and the Citywide Agreement or the Mayoral Directive. Accordingly, the Board granted 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 and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1157, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On December 16, 2010, the City of New York ("City") and the New York City Department of Transportation ("DOT") filed a petition challenging the arbitrability of a request for arbitration filed by District Council 37, Local 1157, AFSCME, AFL-CIO ("Union"). The Union's grievance claims that DOT violated a Mayoral Directive and the Citywide Agreement by assigning overtime to employees not in the Area Supervisor title. The City contends that no nexus exists between the

provisions cited by the Union and DOT's inclusion of Supervisor Highway Repairers in the overtime rotation for Area Supervisors. The Union argued that a nexus exists because including the Supervisor Highway Repairers in the overtime rotation results in an inequitable distribution of overtime. The Board finds that there is no nexus between the grievance and the Citywide Agreement or the Mayoral Directive. Accordingly, the Board grants the petition challenging arbitrability.

BACKGROUND

DOT employs various employees including those in the titles Area Supervisor Level I and Supervisor Highway Repairer. The Union is the bargaining representative of employees in various titles, including the Area Supervisor, Level I. Area Supervisors and Supervisor Highway Repairers belong to different bargaining units; however, both titles are represented by the Union. Area Supervisors are covered by the Blue Collar Agreement and the Citywide Agreement. Supervisor Highway Repairers are subject to the New York State Labor Law § 220, and are not covered by the Citywide Agreement.

The Blue Collar Agreement defines "grievance" at Article VI, § 1(b) as:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment . . . .

(Pet., Ex. 1).

Area Supervisors are also subject to the Citywide Agreement, § 3, which concerns ordered involuntary overtime, and which states:

> a. Ordered involuntary overtime which results in an employee working in excess of forty (40) hours in any calendar week shall be compensated in cash at time and one half (1-½ times).

> b. For those employees whose normal work week is less than forty (40) hours, any such ordered involuntary overtime worked between the maximum of that work week and forty (40) hours in any calendar week, shall be compensated in cash at straight time (1x). For employees granted a shortened work day under Section 18 of Article V, compensatory time for work performed between thirty (30) and thirty-five (35) hours a week when such shortened schedule is in effect shall be granted at the rate of straight time (1 time), but such work shall not be considered overtime.
> c. Upon the written approval of an employee's request by the agency head or designee, an employee who works ordered involuntary overtime shall have the option of being compensated in time off at the applicable rates provided in Section 3(a) and 3(b) provided that the exercise of such option does not violate the provisions of [FLSA].
> d. There shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation. Any work performed on a scheduled day off shall be covered by this Article.
> e. Employees who are paid in cash or are compensated in time at the rate of time and one-half (1-½X) for overtime pursuant to subsection c of this section or the [FLSA] may not credit such time for meal allowance.

(Pet., Ex. 2).

Mayoral Directive 94-3, dated September 14, 1994, which is directed to Agency Heads, is entitled "Overtime Reporting and Monitoring," and states in pertinent part:

> Section 8. Review of Top Overtime Earners. Agency Heads shall personally review the top overtime earners in their agency, at least quarterly, to ensure that overtime is being distributed equitably and to avoid potential abuse . . . .

(Pet., Ex. 3).

According to the Union, in 2009, DOT began assigning Area Supervisor Level I duties to two Supervisor Highway Repairers and began including these two employees in the rotation for Area Supervisor Level I overtime assignments. It is undisputed that at all times relevant herein neither Supervisor Highway Repairer was appointed to the Area Supervisor Level I title, either permanently

or provisionally, in accordance with the New York State Civil Service Law or the Rules and Regulations of the City Personnel Director. The City asserts that it distributes overtime equally among employees performing the work of Area Supervisors Level I, including employees in another title such as Supervisor Highway Repairer that are working as "acting" Area Supervisors. (Pet. ¶ 15).

On November 5, 2010, the Union filed a Request for Arbitration on behalf of Frank Centrone, who is employed by DOT as an Area Supervisor Level I. The Union alleges that the City violated Article VI, § 1(b) of the Blue Collar Agreement; Article IV, § 3 of the Citywide Agreement; and Mayoral Directive 94-3, § 8. The Union articulated the nature of its grievance as follows:

> Whether [DOT] violated its own written rules and regulations regarding [equalization] of overtime by including an employee not in the Area Supervisor title in the overtime rotation for that title, resulting in the grievant being bypassed for overtime, and if so, what shall the remedy be?

(Pet., Ex. 4).

POSITIONS OF THE PARTIES

City's Position

The City requests that the Board dismiss the Union's Request for Arbitration, asserting that the Union did not establish a nexus between its grievance and the cited Mayoral Directive or contractual provisions. While the Union challenges DOT's assignment of overtime to employees serving as "acting Area Supervisors," it does not allege that the Grievant receives less overtime than other Area Supervisors or "acting Area Supervisors." Further, there is no nexus between the provisions cited by the Union and the management right to assign overtime.

The City does not dispute that a claimed violation of Mayoral Directive 94-3 would fall within the scope of a "grievance" as defined in Article VI, § 1(b) of the Blue Collar Agreement. However, the Union has not established a nexus between the assignment of overtime to "acting Area Supervisors" and Mayoral Directive 94-3, which concerns equitable distribution of overtime and is intended to prevent an employee from receiving a disproportionate amount of overtime. The Union does not allege that among those employees performing Area Supervisor work, any employee is receiving disproportionate overtime. Instead, the Union claims that DOT should not assign overtime to employees serving as "acting Area Supervisors." However, Mayoral Directive 94-3 does not address selection of overtime recipients, which clearly fall within management's rights.

The Union also did not establish a nexus between its grievance and Article IV, § 3 of the Citywide Agreement that provides procedures for compensation and the computation of involuntary overtime and prohibits rescheduling an employee's days off to avoid overtime payment.[1]

Union's Position

The Union brings its Request for Arbitration pursuant to Article VI, Section 1(b) of the Blue Collar Agreement, which provides for the arbitration of a "claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer." Specifically, the Union asserts that DOT violated Article IV, § 3 of the Citywide Agreement, which concerns involuntary overtime. The Union also asserts that DOT violated Mayoral Directive 94-3, which dictates that overtime be distributed equitably.

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[1] The City also describes the Union's case as a reverse out-of-title claim, which is not arbitrable under the parties' grievance procedure. The Blue Collar Agreement does not address reverse out-of-title claims.

The Union argues that DOT is not distributing overtime equitably for employees in the Area Supervisor Level I title because two employees in the Supervisor Highway Repairer title are being included in the overtime rotation, and are being paid at the Supervisor Highway Repairer rate. Although the City contends that these employees are "acting Area Supervisors Level I," they retain their Supervisor Highway Repairer title and, therefore, should not be included in the overtime rotation. By including the Supervisor Highway Repairers in the overtime rotation, DOT is improperly distributing overtime to employees in the Area Supervisor Level I title.

Moreover, DOT did not follow the procedures set forth in the New York State Civil Service Law to appoint a public employee to a competitive class title, such as Area Supervisor Level I. Further, the fact that the City is assigning out-of-title work to the two Supervisor Highway Repairers violates New York State Civil Service Law § 61(2), which prohibits out-of-title work. The Union asserts that using an overtime rotation that relies on violations of the New York State Civil Service Law is not an equitable distribution of overtime and thereby violates Mayoral Directive 94-3.

DISCUSSION

It is the policy of the NYCCBL to encourage the use of arbitration to resolve grievances. Accordingly, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 2627,* 3 OCB2d 45, at 7 (BCB 2010) (internal citations omitted); *CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968).[2] However,

[2] 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

"[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *DC 37, L. 768 and SSEU L. 371*, 3 OCB2d 7, at 15 (BCB 2010); *COBA*, 53 OCB 14, at 5 (BCB 1994).

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "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."[3] We employ a two-pronged 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.

SBA, 3 OCB 2d 54, at 7 (BCB 2010) (citations and internal quotation marks omitted); see also SSEU, 3 OCB 2, at 2 (BCB 1969). Our inquiry is focused upon whether there exists a "relationship between the act [or omission] complained of and the source of the alleged right" to warrant arbitration. *CEA*, 3 OCB2d 3, at 13 (BCB 2010) (citations omitted); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371*, 17 OCB 1, at 11 (BCB 1976). The Board does not make a final determination of the rights of the parties because it lacks jurisdiction over matters of contract interpretation and is not empowered to interpret the source of the rights. *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations

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> 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.

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

omitted); *see also NYSNA*, 69 OCB 21, at 7-9 (BCB 2002). Thus, the Board will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981) (citations omitted).

In making the requisite showing, "[t]he burden is on the Union to establish an arguable relationship between the City's acts [or omissions] and the contract provisions it claims have been breached. If the Union cannot show such a nexus, the grievance will not proceed to arbitration." *DEA*, 57 OCB 4, at 9 (citations omitted); *see also COBA*, 45 OCB 52, at 12 (BCB 1990) ("*COBA I*"); *Local 371*, 17 OCB 1, at 11. If, however, the Union does demonstrate such a nexus, then the grievance will proceed to arbitration because, where "[e]ach interpretation is plausible[,] the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW*, 45 OCB 49, at 11 (BCB 1990) (citations omitted); *see also PBA*, 3 OCB2d 1, at 11 (BCB 2010).

Addressing the first prong of the arbitrability test, there is no dispute that the City and the Union are parties to the Blue Collar Agreement, which obligates them to arbitrate covered disputes. The City does not articulate any reason to exclude this matter from arbitration under public policy or under a statutory or constitutional restriction. However, the City contends that there is no nexus between DOT's assignment of overtime to Supervisor Highway Repairers and any of the sources of right named by the Union. We agree.

The Union alleges a violation of Article IV, § 3 of the Citywide Agreement, which concerns ordered involuntary overtime. In this instance, the Union does not claim that its members were required to perform involuntary overtime. Thus, we find no plausible relationship between the Union's claim and Article IV, § 3 of the Citywide Agreement.

Likewise, no nexus exists between the grievance concerning DOT's assignment of overtime to employees not in the Area Supervisor Level I title and Mayoral Directive 94-3, which directs that agency heads review records of the top overtime earners. As the Union correctly notes, the Mayoral Directive requires that agency heads "ensure that overtime is being distributed equitably." However, the clear thrust of Mayoral Directive 94-3 is aimed at reviewing "top overtime earners" within each agency and it is to this context that the equitable distribution language refers. The record is devoid of evidence to suggest that DOT has failed to fulfill its responsibilities set forth in Mayoral Directive 94-3. *Compare Local 924, DC 37*, 1 OCB2d 3, at 12 (BCB 2008) (Board found arbitrable a grievance alleging violation of Mayoral Directive 94-3 when the grievant was not assigned overtime while others were). Thus, we are unable to find any relation between Mayoral Directive 94-3 and the factual circumstances of this case.

After examining the claims in this case, we find that there is no basis upon which to find that this dispute is arbitrable. Accordingly, the City's petition challenging arbitrability is granted.

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 Department of Transportation, docketed as BCB-2919-10, and the same hereby is, granted; and it is further

ORDERED, that the Request for Arbitration filed by District Council 37, Local 1157, AFSCME, AFL-CIO, docketed as A-13666-10, hereby is denied.

Dated: April 28, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER