ADA/DWA, 4 OCB2d 21 (BCB 2011)

(Arb) (Docket No. BCB-2903-10) (A-13647-10).

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the Department of Corrections violated the collective bargaining agreement by failing to follow safety directives, train staff in fire safety duties, and have proper working fire alarm systems in all facilities. The Union argued that such obligations are set forth in DOC-promulgated directives. The City argued that the Union failed to establish the requisite nexus between the subject of the grievance, fire safety training and proper working fire alarms, and the source of the alleged rights, the directives. The Board found no nexus, and, therefore, the Petition Challenging Arbitrability was granted, and the Request for Arbitration was 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 DEPARTMENT OF CORRECTIONS,

***Petitioners*,**

-and-

ASSISTANT DEPUTY WARDENS/DEPUTY WARDENS ASSOCIATION,

Respondent.

DECISION AND ORDER

On October 26, 2010, the City of New York ("City") and the New York City Department of Corrections ("DOC") filed a petition challenging the arbitrability of a grievance brought by the Assistant Deputy Wardens/Deputy Wardens Association ("Union"). On October 8, 2010, the Union filed a Request for Arbitration on behalf of all members of the bargaining unit ("Grievants"),

claiming that DOC violated Article XX, § 1(b), of the parties' 2008-2012 collective bargaining agreement ("Agreement") by failing to follow safety directives, train staff in fire safety duties, and have proper working fire alarm systems in all facilities. The Union alleges that such obligations are set forth in DOC-promulgated directives, which are arbitrable as "rules, regulations or procedures of the agency" within the meaning of Article XX, § 1(b). The City asserts that the Union has not established the requisite nexus between the subject of the grievance, fire safety training and proper working fire alarms, and the source of the Grievants' alleged rights, the directives. This Board finds no nexus, and, accordingly, we grant the City's Petition Challenging Arbitrability, and we deny the Union's Request for Arbitration.

BACKGROUND

DOC is an agency of the City whose mission is to provide for the care, custody, and control of inmates awaiting trial and persons accused of crimes or convicted and sentenced to one year or less of jail time. To manage its fifteen inmate facilities, DOC employs approximately 10,000 uniformed staff and 1,500 civilian staff. The Union is the duly certified collective bargaining representative for DOC employees in the civil service titles of Assistant Deputy Warden, Deputy Warden, and Deputy Warden-in-Command. The City and the Union are parties to the Agreement, which is effective for the period of March 1, 2008 to June 30, 2012. The Agreement contains a grievance and arbitration procedure.

On April 7, 2010, the Union filed a Step III grievance ("Grievance") pursuant to the grievance and arbitration procedure set forth in the Agreement. The Union based the Grievance on Article XX, § 1(b), of the Agreement, which defines the term "grievance" as encompassing "a

claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment . . . ." The Union alleged that such a violation or misinterpretation occurred based on DOC's "long-term failure to follow its own written procedures regarding training sufficient staff in fire-safety duties to adequately perform in the event of a life-threatening emergency in accordance with [DOC's] own clear written standards." (Step III Grievance, April 7, 2010). According to the Union, this failure "is compounded by a *'high-tech'* Fire Alarm system, which hasn't worked properly for several years." (*Id.*) (emphasis in original). The specific rules and regulations alleged to have been violated by DOC are Directive # 1240, entitled "Facility Fire Evacuation Response Team," and Directive # 1245, entitled "Self Contained Breathing Apparatus and Turn-Out Gear" (collectively, the "Directives"). The Directives were implemented on January 2, 1995.

The pertinent provisions of Directive # 1240 are quoted below.

> I. PURPOSE
>
> To establish policy and procedure for Facility Fire Evacuation Response Teams.
>
> II. POLICY
>
> A. Each facility shall operate a Facility Fire Evacuation Response Team which will respond to smoke/fire conditions to ensure all occupants within the affected area are safely evacuated.
>
> * * *
>
> C. Each facility will be responsible for ensuring that there is enough trained staff for a Facility Fire Evacuation Response Team scheduled on all three (3) tours, at all times.
>
> * * *

III. PROCEDURE

* * *

C. The facility shall be responsible for ensuring that each person assigned to a post identified as part of the Facility Fire Evacuation Response Team receives proper training as soon as possible, but no later than thirty (30) days.

D. Whenever personnel are assigned to a post identified as part of the Facility Fire Evacuation Response Team, the facility's personnel captain shall notify the appropriate facility person, and the Correction Academy of a personnel change and the need for training.

E. The Correction Academy shall be responsible for scheduling and administering the training.

1. Self-contained breaching apparatus, including search and rescue techniques and use of a Life Line.

2. Utilization of turn-out gear.

3. Facility Mobile Emergency Fire Evacuation Equipment.

F. Each Facility shall be responsible for providing the following training:

1. Emergency keys and use of a walkie-talkie.

2. All evacuation routes.

* * *

The pertinent provisions of Directive # 1245 are quoted below.

I. PURPOSE

To establish policy and procedure for the proper use of Self-Contained Breathing Apparatus (SCBA) by trained officers of N.Y.C. Department of Correction.

II. POLICY

* * *

B. Personnel selected by the facility to be responsible for responding with SCBA to facilitate evacuation of occupants shall be properly trained to know how and when to use a SCBA unit. This includes members of the Facility Fire Emergency Evacuation Team, and those employees assigned to a firewatch post.

* * *

III. PROCEDURE

* * *

E. A SCBA training schedule shall be established for each person designated as a SCBA wearer and part of the Facility Fire Emergency Evacuation Response Team. A schedule is required to ensure that retraining (refresher course) is provided at a minimum of every twelve (12) months.[1]

F. When personnel are awarded posts the facility has identified as SCBA wearers and part of the Facility Fire Emergency Evacuation Response Team, the facility shall schedule with the Correction Academy, the individual(s) within thirty (30) days for appropriate training.

G. Whenever personnel are assigned to a post identified as part of the Facility Fire Emergency Evacuation Response Team, the facility's Personnel Office Captain shall notify the appropriate facility person, and the Correction Academy of a personnel change and the need for training.

* * *

Assistant Deputy Wardens and Deputy Wardens are not among DOC personnel selected for using SCBA to facilitate the evacuation of occupants pursuant to Directive # 1245. The Grievants are not trained in the use of SCBA and Turn-Out Gear and they do not wear SCBA or Turn-Out

[1] This provision was amended on April 28, 2009. Previously, Directive # 1245 required that the refresher course be provided every six (6) months.

Gear. Furthermore, they are not members of the Facility Fire Emergency Evacuation Team and they are not among those employees assigned to a fire-watch post. Rather, Assistant Deputy Wardens and Deputy Wardens supervise employees serving in other titles, such as Correction Officers and Captains, who are trained in the use of SCBA and Turn-Out Gear.

On October 8, 2010, the Union filed and served a Request for Arbitration along with the required waiver. The Request for Arbitration describes the issue to be arbitrated as "[DOC's] failure to follow its own Orders and Directives, ensuring a safe environment for staff and inmates alike, regarding its failure to train staff in fire safety duties and its failure to have proper working fire alarm systems in all facilities." (Pet., Ex. B). The Union is seeking the following remedies:

> To adequately train Correction Officers, Captains, and Assistant Deputy Wardens in all equipment involving fire safety; to initiate remedial measures to ensure properly-working Fire Alarm systems through-out [DOC] facilities; to direct agency Wardens to denote on the employee schedule fire-trained for easy identification in the event of an emergency; [and] to produce data to the unions on the percentage of trained fire-fighting staff receiving the six (6) Month refresher courses as delineated within [DOC] Directive 1245.

(*Id.*).

POSITIONS OF THE PARTIES

City's Position

First, the City contends that the Union only has standing to represent the interests of its own members–Assistant Deputy Wardens, Deputy Wardens, and Deputy Wardens-in-Command–and that the Agreement's grievance and arbitration procedure applies only to these titles. Accordingly, the Union does not have legal standing to bring the Grievance on behalf of Captains and Correction Officers and any attempt by the Union to represent their interests in the Grievance must be denied.

To the extent that the Union seeks to bring the Grievance on behalf of other DOC staff and prison inmates, the City maintains that the Union, similarly, does not have standing to bring such a claim.

Second, the City maintains that the Union failed to establish a nexus between the Directives and its claim that DOC is required to adequately train Assistant Deputy Wardens and Deputy Wardens in all equipment involving fire safety. Directive # 1245 does not set forth guidelines for training all DOC staff in all equipment involving fire safety; rather, it establishes a policy and procedure for the proper use of SCBA and Turn-Out Gear by trained officers of DOC. Thus, it pertains only to employees who are selected for training in the use of SCBA and Turn-Out Gear. The Grievants are not among the selected employees. Furthermore, they are not members of the Facility Fire Emergency Evacuation Team and they are not assigned to a fire-watch post. The Union has conceded these facts. Accordingly, the City asserts that the Union is attempting to expand the scope of Directive # 1245 by applying it to the Grievants and requesting, as a remedy, that DOC adequately train them with respect to fire safety.

The City argues that the Union also has failed to demonstrate a nexus between the Directives and the Union's assertion that the Grievants should receive appropriate training in their role as fire chiefs. Regardless of whether they should be trained in fire safety, as the Union contends, no nexus exists between the Directives and the training of Assistant Deputy Wardens and Deputy Wardens. The City maintains that the Union's contention that DOC violated Directive # 1245 by failing to provide fire safety training to Assistant Deputy Wardens and Deputy Wardens is not a plausible interpretation of the Directives because the Directives do not require training for these titles.

Third, the City argues that the Union failed to establish the requisite nexus between the Directives and the claim that DOC does not have working fire alarms. The Directives do not address

any requirement that DOC have working fire alarms; accordingly, such an obligation cannot reasonably be construed to be set forth in the Directives. The City alleges that "the Union attempts to paint in broad strokes an argument that anything and everything related to fire safety falls under the Directives and, as such, any dispute or claim arguably related to fire safety or fire safety procedures meets the requisite nexus[.]" (Rep. ¶ 16). In order for the Union to grieve DOC's alleged failure to have working fire alarms, the Directives must state such a responsibility on the part of DOC. Here, the purpose of Directive # 1245 is to establish policy and procedure for the proper use of SCBA; it does not concern the maintenance of fire alarms.

Lastly, the City argues that the Union failed to establish the requisite nexus between Directive # 1245 and the Union's claim that DOC has a responsibility to produce data to the Union regarding the percentage of trained fire-fighting staff receiving the refresher course. The City notes that while Directive # 1245, as amended, states that employees designated as SCBA wearers should receive a refresher course every twelve months, it does not state a requirement or responsibility on the part of DOC to report to the Union the percentage of trained fire-fighting staff receiving the course. Furthermore, the City maintains that the Union does not have standing to assert this claim because its members do not serve on DOC's fire response teams.

Union's Position

First, the Union claims that it is not bringing the Grievance on behalf of Captains, Correction Officers, other DOC staff, or prison inmates. The Union maintains, however, that it has an obligation to protect the health and safety of its membership and those employees whom its members supervise. Thus, the Union asserts that it has standing to submit this dispute to arbitration because Assistant Deputy Wardens and Deputy Wardens are responsible for the safety and welfare of their

subordinates in the workplace. The Union maintains that a violation of the Directives is arbitrable pursuant to Article XX, § 1(b), of the Agreement. The Union argues that there is a reasonable relationship between the Directives and "[t]he protection of the safety and welfare of [their] subordinates during emergencies and the adequate training of members responding to those emergencies" because the Directives dictate training and procedures for fire safety emergencies. (Ans. ¶ 32).

Second, the Union argues that it has established the requisite nexus between the Directives and Assistant Deputy Wardens and Deputy Wardens because they supervise employees who are trained in equipment involving fire safety. Thus, the fact that only selected Correction Officers and Captains are formally trained in the use of SCBA and Turn-Out Gear does not mean that Directive # 1245 has no applicability to Assistant Deputy Wardens and Deputy Wardens. The scope of Directive # 1245 encompasses the Grievants because they must oversee and supervise these employees who are selected for such training. Therefore, the manner in which the Directives are implemented affects the rights of Assistant Deputy Wardens and Deputy Wardens and a reasonable relationship exists between the Directives and the issue to be arbitrated. The Union further contends that, because Assistant Deputy Wardens are the designated fire chiefs during any fire emergency, they should receive appropriate training for that role.

Third, the Union argues that it has established the requisite nexus between the Directives and its claim that DOC does not have proper working fire alarms because the manner in which DOC has implemented its fire safety procedures violates the Directives. As such, the Union asserts that it has alleged a "misinterpretation of the Rules and Regulations of the DOC," which is a grievable matter pursuant to Article XX, § 1(b), of the Agreement. (Ans. ¶ 9).

Lastly, the Union argues that it has demonstrated the requisite nexus between Directive # 1245 and DOC's responsibility to produce data to the Union concerning the percentage of trained fire-fighting staff receiving the refresher courses. The Union alleges that DOC did not comply with the training mandate and is "simply ignoring" its responsibility to ensure fire safety. The Union notes that related failures have been investigated and reported in the media. (Ans. ¶ 11).

DISCUSSION

The New York City Collective Bargaining Law ("NYCCBL") provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010) (citing NYCCBL § 12-302); *NYSNA*, 69 OCB 21, at 6 (BCB 2002).[2] To carry out this policy, the "Board is charged with the task of making threshold determinations of substantive arbitrability." *DEA*, 57 OCB 4, at 9-10 (BCB 1996); *see also* NYCCBL § 12-309(a)(3).[3] The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). "[T]he presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). However, the Board cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (citation omitted); *Local 924, DC 37*, 1 OCB2d 3, at 8 (BCB 2008); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

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[2] NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

[3] NYCCBL § 12-309(a)(3) grants the Board the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure . . . ."

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which considers:

> (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.

UFOA, 4 OCB2d 5, at 8-9 (BCB 2011) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). Thus, in short, we inquire whether there is a "relationship between the act [or omission] complained of and the source of the alleged right" to 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). This inquiry does not require a final determination of the rights of the parties because the Board lacks jurisdiction over matters of contract interpretation and is not empowered to interpret the source of the rights, which here is the Agreement and the Directives. *See NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9 (BCB 2002). Accordingly, the Board generally will not inquire into the merits of the dispute. *DC 37*, 27 OCB 9, at 5 (BCB 1981) (citations omitted).

"The 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." *DEA*, 57 OCB 4, at 9 (citations omitted); *see also COBA*, 45 OCB 52, at 12 (BCB 1990); *Local 371*, 17 OCB 1, at 11. If a nexus cannot be demonstrated, then the grievance will not proceed to arbitration. On the contrary, if a nexus is demonstrated, 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).

Here, it is undisputed that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance and arbitration procedure, which provides for final and binding arbitration of specified matters. Arbitrable grievances include "a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment . . . ." (Pet., Ex. A). The issue the Union raises in its Request for Arbitration is whether DOC failed "to follow its own Orders and Directives, ensuring a safe environment for staff and inmates alike, regarding its failure to train staff in fire safety duties and its failure to have proper working fire alarm systems in all facilities." (Pet., Ex. B). For this Grievance to be arbitrable, there must be a reasonable relationship between the Directives and DOC's alleged failure to train staff in fire safety duties and to have proper working fire alarms. For the reasons set forth below, we find that the requisite nexus has not been established.

Assistant Deputy Wardens and Deputy Wardens are not subject to the procedures or responsibilities set forth in the Directives.[4] The Directives do not set forth an obligation on the part of DOC to train Assistant Deputy Wardens and Deputy Wardens in fire safety duties. Directive # 1245 pertains only to employees who are selected for training in the use of SCBA and Turn-Out

[4] It is undisputed that the Union does not have standing to bring the Grievance on behalf of prison inmates and all DOC staff, as is suggested by the language of the Grievance. The Agreement applies only to Assistant Deputy Wardens, Deputy Wardens, and Deputy Wardens-in-Command, and it is undisputed that the Union represents only these civil service titles. Accordingly, the Union may bring the Grievance only on behalf of Assistant Deputy Wardens, Deputy Wardens, and Deputy Wardens-in-Command. *See PBA*, 25 OCB 28, at 5-6 (BCB 1980) (granting the City's challenge to arbitrability on the ground that the PBA had "no legal standing to challenge the [City's] use of civilians as supervisors" because its membership did not include the Sergeants whose work had been assigned to civilians).

Gear. Assistant Deputy Wardens and Deputy Wardens do not wear SCBA or Turn-Out Gear and they do not receive training as to the use of SCBA and Turn-Out Gear. Furthermore, Directive # 1240 does not pertain to Assistant Deputy Wardens and Deputy Wardens because they are not members of any Facility Fire Evacuation Response Team and they are not assigned to any fire-watch post.

The Union contends that Assistant Deputy Wardens should receive appropriate training because they are the designated fire chiefs during fire emergencies. The Directives, however, do not set forth any such training obligation. The Directives pertain only to specific training for specific civil service titles; they do not pertain to fire safety training for Assistant Deputy Wardens and Deputy Wardens. *See Local 1549, DC 37*, 69 OCB 29, at 6 (BCB 2002) (finding that a provision of a collective bargaining agreement on its face did not apply to the grievants because it pertained solely to employees in other titles). Because the Directives are limited to specific training for selected employees in civil service titles not held by the Grievants, there is no nexus between the Directives and DOC's alleged failure to train Assistant Deputy Wardens and Deputy Wardens in fire safety duties.

The Union also argues that the scope of Directive # 1245 encompasses Assistant Deputy Wardens and Deputy Wardens because they supervise employees–namely, Correction Officers and Captains–who are trained in the use of SCBA and Turn-Out Gear, and they are responsible for their subordinates' safety and welfare. However, there is no nexus between the Grievants' supervisory duties and the Directives. Additionally, to the extent that the Union argues that the Directives are intended to insure a level of training that protects Assistant Deputy Wardens and Deputy Wardens, this ground still does not provide a basis upon which the Union can grieve to enforce the Directives.

The Union's assertion that it has an obligation to protect the health and safety of its membership may be appropriate for bargaining or another forum; however, it is not dispositive as to whether the requisite nexus has been established.

While the Directives, at a minimum, bear a relationship to some form of training for some group of employees, the language of the Directives is devoid of any reference to fire alarms. The Union asserts that it has established a nexus between the Directives and DOC's failure to have proper working fire alarms "because it challenges the manner in which the DOC has implemented its fire safety procedures . . . ." (Ans. ¶ 9). The Directives, however, do not set forth any requirement that DOC have proper working fire alarms. There simply is no nexus between the Directives and the condition of fire alarms at DOC.

Here, the Union's claim is not dissimilar to claims that the Board has considered in prior matters. For example, we found no nexus between a grievance that complained of malfunctioning fire safety systems and equipment and a DOC rule that explicitly mentioned the condition of fire alarm systems. *See COBA*, 45 OCB 73, at 3-4, 9-10 (BCB 1990). In that matter, we also found no nexus between the subject of the grievance and two command level orders that bore a relationship to fire safety because they did not "have anything to do with the repair or operation of central fire safety systems and equipment." *Id.* at 10-11. Similarly, in another matter, we found no nexus between two DOC rules–one involving the handling of firearms and the other involving yard responsibilities–and DOC's alleged failure to repair a mechanical gate because the rules cited by the union were not "even remotely related to a procedure for achieving the repair of security gates." *COBA*, 45 OCB 52, at 11, 13.

As we stated in the two decisions discussed above, "our decision herein is not meant to signal

our approval of dangerously deficient equipment or working conditions." *COBA*, 45 OCB 73, at 11; *COBA*, 45 OCB 52, at 13. The Board acknowledges that the difficulty with these cases is that "without the necessary nexus, we cannot order a review of allegedly faulty fire systems via the grievance arbitration process."[5] *COBA*, 45 OCB 73, at 11.

Finally, we will not consider the parties' arguments concerning substantive arbitrability based on the Union's requested arbitral remedies. "[T]he propriety of a desired remedy is a matter for [an] arbitrator and not for this Board to decide" and, therefore, is not part of the Board's inquiry in determining whether a controversy is arbitrable. *CIR*, 19 OCB 6, at 7 (BCB 1977). Accordingly, to the extent that the Union seeks, as a remedy, data concerning the percentage of trained fire-fighting staff receiving refresher courses, this issue has not been placed properly before the Board, and, therefore, we do not reach it.[6]

Based on the foregoing, the Board finds no nexus between the subject matter of the Grievance, fire safety training and proper working fire alarms, and the source of the alleged right, the Directives. Accordingly, we grant the City's Petition Challenging Arbitrability, and we deny the Union's Request for Arbitration.

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[5] In making this finding, we have not considered the merits of the Union's claim that DOC does not have proper working fire alarm systems nor have we made any determination as to the parties' rights or obligations concerning bargaining over this issue. *See COBA*, 45 OCB 73, at 12.

[6] The Board's denial to consider this requested arbitral remedy is without prejudice to any right, pursuant to NYCCBL § 12-306(c)(4), that the Union may have to obtain this information.

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 Corrections, docketed as BCB-2903-10, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by the Assistant Deputy Wardens/Deputy Wardens Association, docketed as A-13647-10, 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