Local 621, SEIU, 4 OCB2d 36 (BCB 2011)

(Arb) (Docket No. BCB-2934-11) (A-13759-11).

Summary of Decision: The City challenged the arbitrability of a grievance claiming that the NYPD violated contractual disciplinary procedures by suspending the grievant without pay prior to serving him with disciplinary charges. The City argued that the Union failed to establish a nexus between the grievant's suspension and the cited contractual provisions. Additionally, the City asserted that the NYPD had an independent statutory right to suspend the grievant for thirty days prior to issuing charges. The Union alleged that the contract prohibited disciplinary action prior to the service of written charges. To the extent that a statutory right to suspend the grievant without service of written charges may have existed, the Union contended that the contract language in question effectively waived any such right. The Board found that the requisite nexus had been established, and, accordingly, denied the petition challenging arbitrability and granted the request for arbitration. ***(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-

LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondent.

DECISION AND ORDER

On February 28, 2011, the City of New York ("City") and the New York City Police Department ("NYPD") filed a verified petition challenging the arbitrability of a grievance brought by Local 621, Service Employees International Union ("Union"). On January 28, 2011, the Union

filed a request for arbitration on behalf of Michael Calise ("Grievant"), claiming that the NYPD violated Article V, §§ 1(e), 1(f), and 5, of the Local 621 Collective Bargaining Agreement ("Agreement") by suspending the Grievant without pay and benefits prior to serving him with disciplinary charges. The City argues that the Union has failed to establish a nexus between the act complained of and the source of the alleged right because the Grievant is challenging his pre-disciplinary suspension and the cited contractual provisions address the discipline of an employee upon whom the NYPD has served written charges or has failed to serve written charges. Additionally, the City argues that the NYPD had an independent statutory right to suspend the Grievant for thirty days prior to issuing charges. The Union argues that the pre-disciplinary suspension violated the Agreement because the contract provides that no disciplinary action can be taken prior to the service of written charges. To the extent that a statutory right to suspend the grievant without service of written charges may have existed, the Union contends that the contract language in question effectively waived any such right. This Board finds that the requisite nexus has been established. Accordingly, we deny the City's petition challenging arbitrability and grant the Union's request for arbitration.

BACKGROUND

The Union is the certified collective bargaining representative for all City employees holding the Supervisor of Mechanics (Mechanical Equipment) ("SMME") competitive civil service title. The Grievant is a SMME and has been employed by the NYPD since June 4, 1981. The City and the Union are parties to the Agreement, which terminated on March 12, 2010, and currently remains in *status quo*.

As the contractual basis for the grievance, the Union cites Article V, § 1(e) & (f), of the Agreement, which provide the following definitions of a grievance subject to arbitration:

> e. A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.
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> f. Failure to serve written charges as required by Section 75 of the Civil Service Law . . . upon a permanent employee covered by Section 75(1) of the Civil Service Law . . . where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.

(Pet., Ex. 2) (emphasis omitted). The Union also cites Article V, § 5, of the Agreement, which sets forth a contractual disciplinary procedure for employees subject to § 75 of the New York State Civil Service Law ("CSL"). It provides, in relevant part:

> In any case involving a grievance under Section 1(e) of this Article, the following procedure shall govern upon service of written charges of incompetence or misconduct:
>
> STEP A - Following the service of written charges, a conference with such employee shall be held with respect to such charges by the person designated by the agency head to review a grievance at STEP I of the Grievance Procedure set forth in this Agreement. The employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a determination in writing by the end of the fifth day following the date of the conference.
> If the employee is satisfied with the determination in STEP A above, the employee may choose to accept such determination as an alternative to and in lieu of a determination made pursuant to the procedures provided for in Section 75 of the Civil Service Law . . . . As a condition of accepting such determination, the employee shall sign a waiver of the employee's right to the procedures available to him or her under Sections 75 and 76 of the Civil Service Law . . . .

> STEP B(i) - If the employee is not satisfied with the determination at STEP A above then the Employer shall proceed in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law . . . . As an alternative, the Union with the consent of the employee may choose to proceed in accordance with the Grievance Procedure set forth in this Agreement, including the right to proceed to binding arbitration pursuant to STEP IV of such Grievance Procedure. As a condition for submitting the matter to the Grievance Procedure the employee and the Union shall file a written waiver of the right to utilize the procedures available to the employee pursuant to Sections 75 and 76 of the Civil Service Law . . . or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitrator's award, if any. *Notwithstanding such waiver, the period of an employee's suspension without pay pending hearing and determination of charges shall not exceed thirty (30) days.*

(*Id*.) (emphasis added).

CSL § 75 provides that a person permanently appointed to a competitive civil service position "shall not be removed or otherwise subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing upon stated charges . . . ." (Pet., Ex. 4). However, "[p]ending the hearing and determination of charges of incompetency or misconduct, the officer or employee *against whom such charges have been preferred* may be suspended without pay for a period not exceeding thirty days." (*Id*.) (emphasis added). If, ultimately, the employee "is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period." (*Id*.).

On or about October 14, 2009, following the Grievant's arrest for alleged criminal off-duty conduct, the Grievant was suspended without pay or benefits for engaging in "conduct prejudicial to the good order, efficiency or discipline" of the NYPD. (Pet., Ex. 7). He was restored to his position on or about November 18, 2009. There is a factual dispute as to when the initial set of disciplinary charges was preferred against the Greivant. The City maintains that the charges were

preferred on November 8, 2009; however, the Union alleges that the charges were preferred on December 8, 2009.[1]

On January 5, 2010, the Union filed a Step I grievance, asserting that the NYPD's suspension of the Grievant prior to the service of charges did not comply with the Agreement's disciplinary procedures. The Union requested that the Grievant receive full retroactive pay and benefits to make him whole for any pay or benefits lost during the period of the suspension. It is undisputed that the Step I grievance relates solely to the procedures followed by the NYPD when it suspended the Grievant and not the merits of the disciplinary charges themselves.

On January 13, 2010, the Union requested that the NYPD schedule a Step II hearing because the NYPD allegedly did not respond to the Step I grievance.[2] On January 27, 2010, the NYPD denied the Union's request because the NYPD's disciplinary case against the Grievant was still ongoing. The NYPD stated, "When the disciplinary charges and specifications are finally adjudicated, this request will be addressed." (Pet., Ex. 6).

On February 17, 2010, the Union appealed the grievance to Step III. On March 12, 2010, the Office of Labor Relations ("OLR") Chief Review Officer remanded the Union's claim to the NYPD for appropriate action because there had not been a final disposition at Step II and the cited contractual provision did not address the wrongful disciplinary matter asserted by the Union. In response, on March 17, 2010, the Union supplemented and amended its appeal letter to correct a

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[1] On January 28, 2011, the NYPD amended the charges against the Grievant and preferred three additional specifications. The amended charges were served upon the Grievant on February 10, 2011.

[2] The City "aver[s] that [the Union] filed a Step II grievance before the NYPD could provide a response to the Step I filing." (Rep. ¶ 7).

typographical error regarding the contractual provisions alleged to have been violated. The Union explained that its Step III request should have referred to Article V, §§ 1(e), 1(f), and 5, of the Agreement. A Step III conference was held on August 27, 2010. On January 18, 2011, an OLR Review Officer denied the grievance in a written decision, which stated, in part:

> A review of the record in its entirety confirms that the Union's grievance that challenges the Agency's authority to discipline an employee prior to the service of disciplinary charges is not grievable. Moreover, to the extent the Union wishes to challenge any disciplinary action taken by the agency in connection with the underlying disciplinary matter against Grievant, this matter must be remanded until charges against Grievant are fully adjudicated by the Agency.

(Pet., Ex. 6).

On January 28, 2011, the Union filed a request for arbitration in accordance with the Agreement's grievance procedure and pursuant to § 12-312 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") and § 1-06 of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter1) ("OCB Rules"). The request for arbitration included the requisite waiver and set forth the following statement of the issue to be arbitrated:

> Whether the [NY]PD violated the disciplinary procedures set forth in Article V, Sections 1(e), 1(f), and 5 of the Local 621 Contract . . . when without prior service of disciplinary charges, it suspended Local 621 union member Michael Calise, Supervisor of Mechanics, without pay and benefits, on or about October 14, 2009, and continuing until on or about November 14, 2009.[3]

(Pet., Ex. 1). The Union is seeking "[f]ull retroactive pay and benefits to make Mr. Calise whole for

[3] In its Answer, the Union states that the Grievant was suspended until on or about November 18, 2009.

any pay or benefits lost during the period of the improper suspension." (*Id*.).

POSITIONS OF THE PARTIES

City's Position

As a preliminary matter, the City argues that the Grievant has not executed a waiver of his CSL § 75 rights, which is a requirement for proceeding with the Agreement's grievance procedure for disciplinary matters.[4] Although the City acknowledges that the Grievant only challenges the NYPD's pre-disciplinary suspension and not the adjudication of the disciplinary charges themselves, the City argues that the Grievant cannot avail himself of the grievance procedure set forth in Article V of the Agreement unless and until he signs a waiver. Thus, unless and until the Grievant signs the requisite waiver, the City maintains that the NYPD must proceed with the procedure set forth in CSL § 75, which allows for a pre-disciplinary suspension period.[5]

The City argues that the grievance is not arbitrable because the Union has failed to establish a nexus between the subject of the grievance and the cited contractual provisions. The City maintains that Article V, § 1(e), is not applicable to the grievance because it addresses the wrongful discipline of an employee "upon whom the agency head has served written charges of incompetence

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[4] At the time the City filed the petition challenging arbitrability, the Grievant had not executed a waiver related to the disciplinary case. As is explained in the Union's Position, the Grievant has since executed this waiver.

[5] The City also argues that the NYCCBL and the OCB Rules mandate, as a prerequisite to arbitration, that a grievant waive his or her right to submit the underlying dispute to any other forum. We note that the statutory waiver required by NYCCBL § 312(d) is separate and apart from the waiver of CSL § 75 rights discussed in the text above. A grievant's waiver of CSL § 75 rights is set forth in Article V, § V, Step B(i) of the Agreement and, essentially, is an election to proceed in accordance with the Agreement's grievance procedure instead of the statutory disciplinary process provided by CSL § 75.

or misconduct." (Pet., Ex. 2). Here, the Grievant is not grieving the service of written charges, but, rather, is grieving the pre-disciplinary suspension prior to the service of charges. Pursuant to CSL § 75, the NYPD has the right, independent of the Agreement, to impose a pre-disciplinary suspension. The City maintains that the Grievant will have a right, upon executing the requisite waiver, to challenge the discipline pursuant to Article V, § 1(e). However, the grievance only pertains to the pre-disciplinary suspension, and, therefore, the Union has failed to establish a nexus between the alleged right and Article V, § 1(e).

The City argues that Article V, § 5, of the Agreement similarly does not apply. This provision sets forth the disciplinary procedure to be followed, "upon service of charges of incompetence and misconduct," when a grievance is filed pursuant to Article V, § 1(e), of the Agreement. The City maintains that the grievance only pertains to the NYPD's right to impose a pre-disciplinary suspension and Article V, § 5, of the Agreement does not apply unless and until the Grievant challenges the adjudication of the disciplinary charges. While the City acknowledges that, after the instant request for arbitration was filed, the Grievant executed a waiver of his rights under the CSL, the City alleges that thereafter the Grievant has not filed a request for arbitration related to the adjudication of the disciplinary charges. The City argues that the grievance must be dismissed because the Union has no right under the Agreement "to bifurcate the pre-disciplinary suspension from the case involving the disciplinary charges." (Rep. ¶ 15). Therefore, the City contends that the Union has failed to establish a nexus between the alleged right and Article V, § 5, of the Agreement.

The City argues that Article V, § 1(f), of the Agreement also does not apply to the grievance because this provision concerns the failure to serve written charges and, here, the Grievant was served with charges. The Grievant acknowledged the service of disciplinary charges on or about

November 8, 2009, and the NYPD had the right, pursuant to CSL § 75(3), to impose the pre-disciplinary suspension. Because the City did, in fact, serve the Grievant with disciplinary charges, the City's suspension of him "without prior service of charges" does not constitute a "failure to serve charges" as contemplated by this contractual provision. Therefore, the City maintains that there is no nexus between the alleged right and Article V, § 1(f), of the Agreement.

Notwithstanding the fact that the Agreement does not provide a contractual right to grieve a pre-disciplinary suspension, the City argues that the NYPD has an independent statutory right, pursuant to CSL § 75, to suspend the Grievant without pay for thirty days prior to the issuance of charges. The City maintains that the Agreement does not alter or supercede this statutory provision, and, thus, does not limit the NYPD's statutory right to suspend the Grievant without pay pending the hearing and determination of charges. If the statutory right to impose a pre-disciplinary suspension had been waived, the parties would have had to agree to do so clearly and unmistakably in the Agreement. The City asserts that the Agreement does not contain any limitations on this statutory right, and, therefore, the NYPD had the right, independent from the Agreement, to impose the pre-disciplinary suspension upon the Grievant.

Union's Position

The Union argues that the City erroneously attempts to characterize the grievance as a disciplinary grievance. The Union maintains, however, that it is not challenging the disciplinary charges preferred against the Grievant. Rather, the Union is challenging his suspension, without pay or benefits, prior to being served with charges.[6] The Union argues that the suspension violated the

[6] The Union alleges that the NYPD has treated other arrested SMMEs similarly, suspending them without pay or benefits for at least thirty days prior to the service of disciplinary charges.

disciplinary process set forth in Article V, §§ 1(e), 1(f), and 5, of the Agreement, and, therefore, the grievance concerns a contractual issue.

The Union asserts that the City has "confused the requirements for this contractual grievance with the procedures followed in a disciplinary grievance." (Ans. ¶ 40). Accordingly, the Union argues that the City erred in contending that the Grievant was required to execute a waiver as a precondition to "utilize the grievance procedure . . . to resolve the disciplinary matter." (Pet. ¶ 40). Because the grievance is not a disciplinary grievance, the Union asserts that the waiver required by the disciplinary procedure set forth in Article V, § 5, of the Agreement is inapplicable. The Union maintains that the Grievant only was required to execute the waiver mandated by NYCCBL § 12-312(d). The Union filed this waiver along with its request for arbitration.

Moreover, the waiver referred to by the City is neither required nor appropriate until after a Step A conference is held. The Union alleges that it could not pursue a disciplinary grievance until the NYPD held a Step A conference and recommended a penalty. Because the NYPD did not hold a Step A conference on the disciplinary charges until March 15, 2011, no disciplinary grievance procedure was available to the Grievant until that date, and, thus, there was no prior occasion for the Grievant to execute a waiver of his rights under the CSL. In any event, the Union maintains that the pending disciplinary proceeding will not resolve the contractual issue presented in the grievance because the disciplinary procedure does not contemplate the resolution of contractual grievances.[7]

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[7] On March 15, 2011, at the Step A conference, the Grievant declined to accept the NYPD's recommended penalty of a 36 day suspension without pay and the loss of nine vacation days. The Grievant chose to avail himself of the disciplinary grievance procedure by executing a waiver pursuant to Article 5, § 5, Step B(i) of the Agreement. The Union maintains that the NYPD's "belated commencement of the disciplinary process does not absolve them of responsibility for their failure to adhere to the disciplinary procedure in 2009, when it suspended [the Grievant] without serving him with written disciplinary charges." (Ans. ¶ 94).

The Union argues that the grievance is arbitrable because there is a nexus between Article V, §§ 1(e), 1(f), and 5, of the Agreement and the NYPD's suspension of the Grievant for 36 days prior to serving him with written disciplinary charges.[8] The Union argues that, "[b]y its own terms," the cited contractual provisions "clearly and unequivocally" require service of written disciplinary charges before any disciplinary penalty can be imposed. (Ans. ¶ 98, 101). Specifically, the Union alleges that "on its face Article V, Section 1(e) provides unambiguously that the [NY]PD must serve written charges upon an employee before imposing any disciplinary penalty . . . ." (Ans. ¶ 59). Similarly, the Union argues that Article V, § 1(f), provides that no penalty can be imposed upon a permanent employee without first serving him or her with written charges.

Based on the above, the Union contends that it is "obvious" that there is a reasonable relationship between the NYPD's suspension of the Grievant prior to serving him with disciplinary charges and Article V of the Agreement. The Union maintains that it is undisputed that the Grievant was a permanent employee covered by CSL § 75 and that the NYPD suspended him prior to serving him with disciplinary charges. In fact, the Union alleges that the Grievant was not served with disciplinary charges until December 8, 2009, twenty days after his suspension.

The Union contends that, even if CSL § 75(3) permits the NYPD to suspend a permanent employee prior to serving him or her with disciplinary charges, the NYPD did not have the authority to impose such a suspension upon the Grievant. The Union argues that the "clear and unequivocal" language of the Agreement demonstrates that the NYPD bargained away any right it otherwise may have had to suspend the Grievant prior to serving him with written charges. (Ans. ¶ 103).

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[8] The Union contends that the Grievant's suspension also violated CSL § 75 because, even in the absence of the Agreement, this statutory provision would "bar" a pre-disciplinary suspension in excess of 30 days. (Ans. ¶ 21).

The Union argues that the City's reliance on case law is misplaced because the cases cited by the City support the Union's position. In those cases, the negotiated language clearly and unquivocally showed that the parties preserved the statutory right to impose a pre-disciplinary suspension. Here, however, the cited contractual provisions clearly and unequivocally show that the NYPD waived its rights under CSL § 75(3) because the parties agreed that SMMEs would be served with disciplinary charges prior to receiving disciplinary penalties.

DISCUSSION

The NYCCBL provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes.[9] *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *NYSNA*, 69 OCB 21, at 6 (BCB 2002). 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* NYCCBL § 12-309(a)(3).[10] 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

[9] 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."

[10] 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 . . . ."

(citation omitted); *Local 924, DC 37*, 1 OCB2d 3, at 8 (BCB 2008).

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).

In short, we inquire whether there is a "relationship between the act complained of and the source of the alleged right" to arbitration. *CEA*, 3 OCB2d 3, at 13 (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. *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. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).

When the City challenges the arbitrability of a grievance based on a lack of nexus, "[t]he burden is on the Union to establish an arguable relationship between the City's acts 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); *PBA*, 43 OCB 40, at 4 (BCB 1989); *Local 371*, 17 OCB 1, at 11. If the Union's "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. The issue the Union raises in its request for arbitration is "[w]hether the [NY]PD violated the disciplinary procedures set forth in Article V, Sections 1(e), 1(f), and 5 of the Local 621 Contract . . . when without prior service of disciplinary charges, it suspended Local 621 union member Michael Calise, Supervisor of Mechanics, without pay and benefits, on or about October 14, 2009, and continuing until on or about November 14, 2009." (Pet., Ex. 1). For this grievance to be arbitrable, there must be a reasonable relationship between the cited contractual provisions and the NYPD's imposition of the suspension prior to the service of written disciplinary charges. For the reasons set forth below, we find that the requisite nexus has been established.

Article V, § 1(f), of the Agreement provides that an arbitrable grievance includes a "[f]ailure to serve written charges as required by Section 75 of the Civil Service Law . . . where any of the penalties . . . set forth in Section 75(3) of the Civil Service Law have been imposed." (Pet., Ex. 2). Such penalties include a suspension without pay.[11] Here, the NYPD imposed such a penalty upon the Grievant by suspending him without pay for at least twenty six days prior to serving him with written charges.[12] Thus, a determination of whether an arbitrable claim has been stated under this

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[11] CSL § 75(3) provides that "the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service . . . ."

[12] As stated above, the City maintains that the initial set of disciplinary charges were preferred on November 8, 2009, while the Union alleges that the charges were preferred on

contractual provision requires that it be read in conjunction with CSL § 75, which is incorporated by reference.

CSL § 75(3) states that "[p]ending the hearing and determination of charges of incompetency or misconduct, the officer or employee *against whom such charges have been preferred* may be suspended without pay for a period not exceeding thirty days." (emphasis added). The City argues that CSL § 75(3) provides the NYPD with the unfettered right to suspend an employee for thirty days prior to issuing charges. While it may be that with some regularity employees are suspended without pay prior to the issuance of charges, it is not clear, based on the plain language of CSL § 75(3), that an employer has the statutory right to suspend an employee without service of charges. Indeed, there is some precedent to support the conclusion that CSL § 75(3) requires the employer to prefer charges upon a covered employee prior to imposing a suspension without pay.[13] Therefore, because it is plausible that the City was required to serve charges upon the Grievant prior to suspending him, there is a reasonable relationship between the Grievant's suspension and Article V, § 1(f), of the Agreement. Accordingly, the Union has presented an arbitrable grievance and it is for an arbitrator is to construe Article V, § 1(f), of the Agreement to determine whether it was violated when the Grievant was suspended without pay prior to being served with written charges.

December 8, 2009.

[13] *See Figueroa v. N.Y. Thruway Auth.*, 251 A.D.2d 773, 775 (3d Dept. 1998) (explaining that CSL § 75(3) "permits a 30-day suspension without pay, pending a hearing, whenever disciplinary charges are leveled against an employee"); *Fegert v. Mulroy*, 80 Misc.2d 236 (Sup. Ct. Onondaga Co. 1974) (explaining that the proscribed procedural due process mandates of CSL § 75(2) include "giving written notice of the charges to the accused prior to his suspension"); *Haskins v. Warner*, 47 N.Y.S.2d 793, 794-95 (Sup. Ct. Ostego Co. 1944) (explaining that prior to the CSL being amended in 1941 "employees had frequently been suspended by their superiors who [] did not prefer charges" and that the "amendment was evidently made to correct such practice").

We find unpersuasive the City's argument that Article V, § 1(f), of the Agreement is inapplicable because, ultimately, the NYPD served the Grievant with charges and this contractual provision concerns the failure to serve charges. Significantly, the NYPD did not serve charges upon the Grievant prior to suspending him, and it is arguable that such inaction or delayed action constitutes a "failure" within the meaning of the contractual provision. Therefore, the Union's claim presents a substantive question of contract interpretation for an arbitrator to decide. Similarly, the parties' opposing positions concerning whether the Agreement fully incorporates CSL § 75(3) or modifies the rights or obligations thereunder concern an issue of contract interpretation that is properly placed before an arbitrator.

Based on the foregoing, the Board finds a nexus between the subject matter of the grievance, the suspension of the Grievant without pay and benefits prior to serving him with disciplinary charges, and the source of the alleged right, Article V, § 1(f), of the Agreement.[14] Accordingly, we deny the City's petition challenging arbitrability and grant the Union's request for arbitration.

[14] Because we find that there is a nexus between the grievance and Article V, § 1(f), of the Agreement, we do not reach the issue of whether there is a nexus between the grievance and the other cited contractual provisions, Article V, §§ 1(e) and 5, of the Agreement.

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 Police Department, docketed as BCB-2934-11, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Local 621, Service Employees International Union, docketed as A-13759-11, hereby is granted.

Dated: June 29, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER