UFOA, 4 OCB2d 5 (BCB 2011)

(Arb.) (Docket Nos. BCB-2825-10 &BCB-2856-10) (A-13339-09 & A-13454-10).

Summary of Decision*:** The City asserted that the Union's requests for arbitration should be denied because the Union has not established a nexus between the grieved actions and a contractual provision but instead claimed rights under another union's contract. The Union asserted that the City violated an existing policy covered by the parties' agreement. The Union also asserted that a policy existed, but that the City would not provide the information necessary to establish it. The Board found that a reasonable nexus existed between the grievance and the parties' agreement. Accordingly, the petition challenging arbitrability 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 FIRE DEPARTMENT,

Petitioners,

-and-

UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO,

Respondent.

DECISION AND ORDER

On January 8, 2010, the City of New York ("City") and the New York City Fire Department ("FDNY") filed a petition challenging the arbitrability of a request for arbitration docketed as A-13339-09, filed by the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO ("Union"). On May 4, 2010, the City filed a petition challenging the arbitrability of another request for arbitration filed by the Union, A-13454-10. These matters were consolidated at the Board's

discretion on July 7, 2010 because they concerned related issues and facts. The City asserts that the Union's requests for arbitration should be denied because the Union has not established a nexus between the challenged action and a source of right in a contract to which it is a party. The City argues that the Union's claim is based upon a right contained in another union's contract. The Union asserts a violation of an existing policy and that such violations are covered by the parties' contract. The Union also asserts that a policy exists, but that the City would not provide the information necessary to establish it. The Board finds a nexus between the grievances and the parties' agreement. Accordingly, the petitions challenging arbitrability are denied.

BACKGROUND

The Union represents members employed by the FDNY, including Lieutenants, Captains, Battalion Chiefs, and Deputy Chiefs. On December 12, 2006, the parties executed a collective bargaining agreement covering the period from January 1, 2003 to March 19, 2007, and a side letter to that agreement, which states that "[i]f another uniform collective bargaining unit has an adjustment made to their salary schedule outside of the collective bargaining or arbitration process during the term of this agreement, then the parties shall reopen this agreement for the purposes of discussing that issue."

On July 18, 2007, the parties signed a memorandum of agreement ("MOA") covering the period from March 20, 2007, to March 19, 2011, and a side letter, which provided "[a]n assignment differential payable over three years (four steps) to Lieutenants, Captains, and Battalion Chiefs, assigned or long term detailed to 'special assignments' in [various] companies." (Pet., Ex. 4). On June 25, 2009, the parties executed a collective bargaining agreement ("Agreement") covering the

period from March 20, 2007, to March 19, 2011, which incorporated the terms of the MOA. Article V of the Agreement sets the salary rates for Union members. Article XVIII, § 1, of the Agreement defines a grievance as "a complaint arising out of a claimed violation, misinterpretation, or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment." (Pet., Ex. 2).

On December 11, 2007, the City and the Uniformed Firefighters Association ("UFA") executed a collective bargaining agreement covering the period from August 1, 2006, to July 31, 2008.

On May 19, 2008, a New York State Public Employment Relations Board ("PERB") arbitration panel issued an award setting forth salary rate increases for members of the Patrolmen's Benevolent Association ("PBA Award"). As a result of the PBA Award, on July 3, 2008, the parties reopened bargaining and executed a memorandum of understanding covering March 20, 2005, to March 19, 2007, which set forth salary adjustments, increasing the maximum salary rates, while leaving the minimum rates unchanged. Similarly, on October 14, 2008, the City and the UFA executed a reopener memorandum, which gave UFA members retroactive base salary increases for 2006 to 2007.

The Union alleges, and the City denies, that the FDNY has maintained a longstanding policy, which the Union deems the "Promotional Pay Policy," through which FDNY employees promoted to a higher rank received an automatic salary increase. According to the Union, FDNY's "payroll [d]epartment would automatically 'slot' the promoted individual into the next available salary step." (Ans. ¶ 47). The Union alleges that the City's Office of Labor Relations ("OLR") directed the FDNY payroll department not to increase the salaries of Union members that were promoted. The

Union further alleges that the payroll department "needed to take affirmative steps to override its own computer programs which were designed to ensure the Promotional Pay Policy." (Ans. ¶ 50). In an email to the City's attorney, the Union's attorney requested various documents that "will establish the details of the Promotional Pay Practice." (Ans. ¶ 53). Specifically, the Union requested:

> 1. All policies, procedures and/or directives of the FDNY in effect during the last five years relating to payment of salary increases to members of the UFOA bargaining unit on promotion (including, in this and subsequent requests, promotion to Lieutenant);
> 2. All communications, written or oral, during the last five years from the New York City Office of Labor Relations or superiors in the FDNY to employees assigned to implement payroll changes at the FDNY relating to payments of salary increases to members of the UFOA bargaining unit on promotion;
> 3. All computer programs or other data systems used by the FDNY during the last five years to implement salary increases to members of the UFOA bargaining unit on promotion;
> 4. All documents reflecting the salary rate received upon promotion by all Fire Marshals promoted to Lieutenant during the last five years.

(Ans., Ex. A).

In an email sent on March 26, 2010, the City's attorney responded to the Union's request for pertinent FDNY policies, procedures and directives, "please be advised that no such documents exist." The City refused the Union's request for FDNY computer programs used to implement salary increases for Union members. It also refused the Union's request for communications between OLR and FDNY, stating that the request was "overly broad, vague, and unduly burdensome," and that such communications might also be privileged. (Ans., Ex. A).

A-13339-09

On September 23, 2009, the Union filed a grievance at Step III alleging that the FDNY violated Article XVIII, § 1 of the Agreement and the "existing policy of the Department." The Step III grievance was denied. On December 23, 2009, the Union filed its request for arbitration. The Union described the nature of its grievance as "improper failure and refusal of the Department to pay recently promoted Lieutenants the appropriate higher salary upon promotion." (Pet., Ex. 1). The Union requested the remedy of "[p]ayment of newly promoted Lieutenants at the proper salary rates, prospectively and retroactively with interest; and such other relief as may be appropriate." (Pet., Ex. 1). This grievance concerns the two seven-month periods, from August 1, 2006, to March 19, 2007, and August 1, 2007 to March 19, 2008, during which the Union claims that promotees did not get pay increases consistent with the Promotional Pay Policy.

A-13454-10

On October 30, 2009, the Union filed a grievance at Step III alleging that the FDNY violated Article XVIII, § 1, of the Agreement and the "existing policy of the Department." (Pet., Ex. 1). The Step III grievance was denied. On April 20, 2010, the Union filed its request for arbitration. The Union described the nature of its grievance as "improper failure and refusal of the Department to pay recently promoted Captains, Battalion Chiefs and Deputy Chiefs who received an assignment differential prior to promotion the appropriate higher salary upon promotion." (Pet., Ex. 1). The Union requested the remedy of "[p]ayment of newly promoted Fire Officers at the proper salary rates, prospectively and retroactively with interest; and such other relief as may be appropriate," as these employees received an assignment differential that was not incorporated into their promotional base salary. (Pet., Ex. 1).

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's requests for arbitration should be denied because the Union has not established a nexus between the grieved action and a source of right. The Union seeks to arbitrate the terms of a third-party agreement, which is impermissible. The City contends it has no duty to arbitrate under an agreement to which the Union is not a party. The City also argues that the only collective bargaining provision that the Union cites in its requests for arbitration is its grievance procedure; it does not cite an allegedly violated provision in its own contract. Instead, the Union bases its demands on the agreement with the UFA.

The City also argues that the Union's requests should be denied because the Union attempts to grieve the occurrence of an event or condition. The Union has not cited any contractual source of right. The Union reopened negotiations for the period from March 20, 2005 to March 19, 2007 in order to renegotiate the salaries of its members, among other things. The City thereafter applied those negotiated salary rates. Now, the Union alleges that the City's applications of those rates was somehow grievable. However, the Agreement does not provide a right to arbitrate an event or condition and does not provide the right to arbitrate the violation of a policy without referencing the rule or regulation alleged to be violated.

Finally, the Agreement does not include a provision similar to Article IX, § 12, of the Citywide Agreement, which states that "[n]o employee shall receive a lower basic salary rate following promotion than the basic salary rate received preceding the promotion." Therefore, the Union is unable to file a grievance regarding the negotiated salary rates of the bargaining unit from which its members were promoted.

Union's Position

The Union asserts that the parties have an agreement to arbitrate disputes and that the dispute at issue here is reasonably related to the general subject matter of the Agreement. The Union has shown "some source" of right to arbitrate, which is the Union's only burden. (Ans. ¶ 57) (citing *CEA*, 3 OCB2d 3, at 13 (BCB 2010). Specifically, the Union points to the Agreement's "broad definition of a grievance, which includes a claimed violation . . . of existing policy or regulations of the Fire Department affecting terms and conditions of employment." (Ans. ¶ 59). The Union determined through investigation that the Promotional Pay Policy exists and submitted a supporting affidavit from its vice president affirming communications he had with a FDNY representative, which supports the Union's assertions. Therefore, the Union has provided sufficient information to proceed to arbitration.

Further, the Union contends that the Board does not limit arbitration to written policies or require written evidence of a policy, requiring only that the dispute involve an existing policy. The Union asserts that this dispute involve's the Promotional Pay Policy. The Union also argues that issues of fact are generally left for an arbitrator; therefore, the Board should not require that the Union supply additional evidence regarding the Promotional Pay Policy at this "threshold stage." (Ans. ¶ 63). Further, under the New York City Collective Bargaining Lw ("NYCCBL"), the question of whether an employer's failure to provide an employee with pay or benefits violates a contract or a policy is a question for an arbitrator. This matter is a straightforward wage dispute and is arbitrable.

In response to the City's assertion that the Union has not presented "tangible evidence" of the Promotional Pay Policy, the Union argues that despite its requests, the City has refused to

provide the documents and information that would establish the particulars of the Promotional Pay Policy. Accordingly, the Union cannot produce evidence to the Board demonstrating the policy. Nevertheless, the Union has identified the policy it wishes to arbitrate; evidence of that policy should be established before an arbitrator. If the Board requires more evidence before proceeding to arbitration, the Board should hold a hearing with proper discovery so that the Union receives due process.

Therefore, in keeping with the NYCCBL's stated policy favoring arbitration of disputes, and given that the Union has demonstrated an arguable case that the dispute is arbitrable, the matter should proceed to arbitration.

DISCUSSION

In accordance with NYCCBL § 12-302, we favor arbitration to resolve disputes.[1] While "doubtful issues of arbitrability are resolved in favor of arbitration . . . the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties. L. 924, DC 37, 1 OCB2d 3, at 8 (BCB 2008).

This Board has established the following two-pronged test to determine whether a matter is arbitrable:

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[1] NYCCBL § 12-302 provides that**:**

> 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 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.

> (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.

New York City District Council of Carpenters, UBCJA, 3 OCB2d 9, at 11 (BCB 2010) (citations and internal quotation marks omitted).

It is undisputed that the parties agreed to arbitrate certain disputes, specifically as stated in Article XVIII, § 1, of the Agreement, those complaints "arising out of a claimed violation, misinterpretation, or inequitable application of the provisions of [their] contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment." (Pet., Ex. 2). We find that the Union has presented a controversy encompassed by this definition.

The Union contends that, under an existing FDNY policy, employees promoted to a higher rank received a salary increase. The City denies the existence of such a policy and asserts that the Union has not adequately pleaded its existence. However, as we have held repeatedly in matters where the contractual definition of a grievance includes claimed violations of "existing policy," whether or not a policy exists is a question of fact which is for the arbitrator, not the Board, to determine. UFA, 63 OCB 25, at 10 (BCB 1999) (noting that "where the contractual definition of a grievance encompasses a claimed violation, misinterpretation or misapplication of 'existing policy' . . . a change by the employer in its past practice may be grievable"); UFOA, 43 OCB 27, at 9 (BCB 1989), see also UFOA, 41 OCB 36, at 8-10 (BCB 1988) (issue of whether there is a claimed policy, and, if so, whether it is an "existing policy" within the meaning of the contract, is for an arbitrator to determine).

The Promotional Pay Policy that the Union alleges exists is directly related to the grievances, thereby creating a nexus. Considering whether the City's actions alleged by the Union amount to an "existing policy" would reach the merits of the claim and, therefore, are beyond our purview.

We recently decided several arbitrability cases that similarly concerned grievances related to salary and promotional pay, in which we found that the grievances did not present arbitrable questions. *See CEA*, 79 OCB 17 (BCB 2007); *SBA*, 2 OCB2d 41 (BCB 2009); *CEA*, 3 OCB2d 3 (BCB 2010). On their face, these cases might seem in tension with our decision here. In fact, the matters are distinguishable as the Union points to language in the Agreement providing for arbitration of an existing policy. In those other cases, the grievances could not proceed to arbitration because the pertinent agreements did not contain a similar source of right. Instead, other potential sources were alleged, such as salary schedules or past practice. Therefore, we do not find those cases applicable to the instant claims. Compare CIR, 61 OCB 39, at 5 (BCB 1998) *with Doctors Council*, 61 OCB 40 (BCB 1998).

In 1998, we simultaneously decided *CIR* and *Doctors Council.* In those cases, each union grieved the Health and Hospitals Corporation's suspension of free parking for its respective members. We found that the grievance brought by the Committee of Interns and Residents was arbitrable, based upon a contract that permitted the grievance of an "existing policy." In contrast, we found that the grievance of the Doctors' Council could not proceed to arbitration because it was based upon a contract that did not contain the "existing policy" language, but instead permitted grievances of violations of "written policy," and no written policy existed. Like the contract in CIR, 61 OCB 39 (BCB 1998), the language of the contract in this matter provides for arbitration of an "existing policy."

Accordingly, we find that the Union has demonstrated that its grievances are reasonably related rights created by the Agreement. Accordingly, the City's petitions challenging arbitrability are denied.

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 petitions challenging arbitrability docketed as BCB-2825-10 and BCB-2856-10, and the same hereby are, denied.

Dated: January 5, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA A. SILVERBLATT
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