Municipal Labor Committee, **4 OCB2d 51 (BCB 2011)**
(Arb.) (Docket No. BCB-2948-11) (A-13787-11).

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that its plan to withdraw monies from a jointly administered health insurance fund to comply with a federal mandate violated the parties' agreement. The City asserted that the Municipal Labor Committee failed to establish the requisite nexus between the subject of the grievance and the parties' agreement. The Municipal Labor Committee argued that the City's petition must be denied because it has established the requisite nexus. The Board found that the Municipal Labor Committee established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. The Petition Challenging Arbitrability was accordingly denied, and the Request For Arbitration was granted. ***(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 OFFICE OF LABOR RELATIONS,

Petitioners,

-and-

THE MUNICIPAL LABOR COMMITTEE,

Respondent.

DECISION AND ORDER

On April 12, 2011, the City of New York ("City") and the New York City Office of Labor Relations ("OLR") filed a Petition challenging the arbitrability of a grievance brought by the Municipal Labor Committee ("MLC"). On February 24, 2011, the MLC filed a Request For Arbitration alleging that the City's stated intention to withdraw monies from the Health Insurance Stabilization Fund ("SRA" or "Fund") to cover funding obligations created by federal law violated

the parties' 2001 Health Benefit Agreement ("2001 Agreement").[1] The City contends that the MLC has not established the requisite nexus between the subject of the grievance and the 2001 Agreement. The City further contends that, by requesting arbitration, the MLC is seeking to modify the 2001 Agreement's terms. The MLC asserts that it has established the requisite nexus and that, in its petition, the City improperly seeks to address the merits of the underlying grievance. The Board finds that the MLC established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. Accordingly, the Board denies the Petition Challenging Arbitrability and grants the Request For Arbitration.

BACKGROUND

The MLC is an association of certified labor organizations representing City employees that was established in 1966 pursuant to a memorandum between the City and municipal unions.[2] The MLC has historically negotiated on behalf of municipal unions and entered into agreements with the City concerning health insurance benefits for all City employees covered by the New York City Employees Health Benefits Program.

[1] SRA stands for "Stabilization and Reserve Account," and is the acronym presently used by the parties to refer to the Fund.

[2] *See* NYCCBL § 12-303(k).

In 1986, the City and the MLC entered into a Health Benefit Agreement ("1986 Agreement"), which established the SRA. The SRA is a jointly administered fund which was established to pay any amounts due to health insurance carriers that exceed an agreed-upon "equalization" rate, "including the cost of increases in the benefits described in paragraph 5 . . . if sufficient funds are available." (Pet. Ex. 5). Paragraph 5 references a "new schedule of benefits," but does not provide a description of them.[3] *Id.* The terms of the 1986 Agreement provide that the monies comprising the SRA are to be placed in a trust account administered by the City. The MLC is provided with periodic statements detailing Fund activity and usage, among other data.

On January 11, 2001, the City and the MLC executed the 2001 Agreement, which continued the terms of the SRA established in the 1986 Agreement, with some modifications. One change to the 1986 Agreement was the addition of a section addressing new benefits to be funded solely from the SRA and a City trust and account fund. That section, § 12 of the 2001 Agreement, is entitled "Health Benefit Improvements," and states, in pertinent part:

> c) Effective July 1, 2001, the HIP-HMO non-Medicare program shall provide:
>
> i) In-patient Alcohol and Substance Abuse Rehabilitation treatments for up to 30 days. There shall be no co-pay.
>
> ii) The Out-Patient Mental Health Program shall increase the visit limit from 20 to 60. The co-payment for each visit shall be increased from five dollars ($5.00) to ten dollars ($10.00).

(Pet. Ex. 2). The City and the MLC executed successor agreements to the 2001 Agreement in

[3] The 1986 Agreement indicates that a description of the new schedule of benefits is annexed as an appendix; however, the copies provided to the OCB do not include such a document.

2004, 2005, and 2009. Section 12 (c)(i) and (ii) remained in effect for the duration of those agreements, and continued in effect through the date of the filing of the instant petition.

Section 17 of the 2001 Agreement, entitled "Dispute Resolution," provides:

> The parties hereby incorporate the dispute resolution mechanism set forth in paragraph 16 of the 1995 MCMEA, that is any dispute controversy or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this Health Benefits Agreement shall be submitted to arbitration upon written notice therefore by any of the parties to this Health Benefits Agreement to the party with whom such dispute or controversy exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining pursuant to Title 61 of the Rules of the City of New York. Any award in such arbitration shall be final and binding and shall be enforceable pursuant to Article 75 of the CPLR.

(Pet. Ex. 2).

In 2008, Congress enacted the Mental Health Parity and Addiction Equity Act ("Parity Act"). The Parity Act requires group health insurance plans offering mental health and substance abuse benefits to ensure that "the financial requirements applicable to such mental health or substance use disorder benefits are no more restrictive than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the plan." (Pet. Ex. 7). The Parity Act amended the Public Health Service Act, which applies solely to public employee benefits plans, and, therefore, applies to employee health insurance plans administered by the City. *See* 42 U.S.C. §300gg-5.

The Parity Act became applicable to the City's employee health insurance plans on July 1, 2010. At that time, the medical and surgical benefits in the plans available to City employees contained no time limitation for length of treatment. Consequently, the Parity Act effectively mandated that the City offer unlimited alcohol and substance abuse and mental health treatment

benefits. The effect of the legislation on the City employee health insurance plans was to require coverage for in-patient substance abuse rehabilitation treatment and out-patient mental health treatment beyond the limits set forth in the 2001 Agreement.

The Parity Act does not direct any specific source of funding for the extension of substance abuse and mental health coverage requirements. Moreover, the City and the MLC did not amend the 2001 Agreement to authorize funding from the SRA to cover the benefits required by the Parity Act.[4]

In a December 21, 2010 letter to OLR Commissioner James Hanley, the MLC stated that it had been informed that "the City has withdrawn approximately $3.6 million from the SRA to fund the HIP Mental Health Subsidy. The MLC was further informed that the City is intending to withdraw additional funds from the SRA for this Mental Health subsidy totaling $10 million. . . . These withdrawals were not mutually agreed upon."[5] (Ans. Ex. 4). By letter dated January 3, 2011, OLR responded:

> [a]lthough no monies have actually been withdrawn from the Stabilization Fund at this time, there is no question that the City is permitted to make such withdrawals inasmuch as the parties agreed in Section 12. c) ii) of the 2001 Health Benefits Agreement . . . to provide the mental health coverage and fund its constituent cost solely from the Stabilization Fund and the Trust and Agency Account Fund. Therefore, the City of New York will continue to charge the Stabilization Fund for this on-going benefit, and the City will make withdrawals from the Stabilization Fund in the prescribed amounts.

(Ans. Ex. 5).

By letter dated January 11, 2011, the MLC notified OLR that it intended to seek arbitration.

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[4] Commencing with the initial plan year on July 1, 2010, the City incurred the additional premium cost associated with the extension of benefits mandated by the Act.

[5] The record does not indicate how or from what source the MLC obtained its information.

Its letter states:

> We have been informed that the City intends to withdraw $10 million annually from the SRA to fund unlimited days and visits for the Mental Health Premium required by the Federal Mental Health Parity Act.
>
> It is the MLC's position that to withdraw any funds for the unlimited days and visits required by federal law was not agreed upon and such withdrawal violates our agreement.

(Ans. Ex. 6).

By letter dated February 23, 2011, the MLC filed a Request For Arbitration, referencing the City's alleged violation of the 2001 Agreement, set forth in its January 11, 2011 letter to OLR, as the basis for its request. (Ans. Ex. 5). The following day, OLR responded to the MLC's Request For Arbitration, restating the contractual basis for its authority to withdraw monies from the SRA but noting the City's position that no violation of the 2001 Agreement had actually occurred.[6] (Ans. Ex. 7).

[6] OLR asserts that it did not receive the January 11, 2011 letter until it came attached to the MLC's February 23, 2011 Request For Arbitration.

POSITIONS OF THE PARTIES

City's Position

The City contends that the MLC has failed to establish the requisite nexus between the dispute resolution provision of the 2001 Agreement and the Parity Act's requirements. The City asserts that neither the dispute resolution provision in the 2001 Agreement nor the parallel provision in its predecessor, the 1995 Municipal Coalition Memorandum of Economic Agreement ("MCMEA"), contemplates arbitration over federal statutes that "may or may not affect the regulatory framework relating to group health insurance." (Pet. ¶ 37). Because the subject of federal statutes is not "explicitly enumerated" in the 2001 Agreement's dispute resolution provision and the MLC's claim does not arise out of the "execution, application, interpretation or performance of any of the terms or conditions" of the 2001 Agreement, the MLC has failed to establish the requisite nexus. (Pet. ¶ 38).

The City analogizes the MLC's grievance to two grievances that were the subjects of arbitrability cases before the Board. In both cases, the respondent alleged a violation of state or federal law. In *DEA*, 57 OCB 4 (BCB 1996), the respondent filed a grievance alleging a dispute pertaining to a provision of the Fair Labor Standards Act. In *COBA*, 35 OCB 28 (BCB 1985), the respondent filed a grievance alleging a violation of the parties' collective bargaining agreement as well as applicable State law. The City asserts that, in both cases, the Board granted the petitioner's challenge to arbitrability on the ground that disputes based upon allegations of violations of state or federal law are not arbitrable where such disputes are not specifically encompassed within the scope of matters the parties agreed to arbitrate.

Similarly, the City contends, the 2001 Agreement does not declare "disputes based on

Federal statutes" as arbitrable. (Pet. ¶ 44). It notes that the definition of a grievance in the 2001 Agreement is analogous to those in the contracts in the referenced *DEA* and *COBA* cases. Therefore, the City claims that the Board should rule in accordance with those cases and find that, in the absence of any reference to the enforcement of federal statutes in the 2001 Agreement, the instant dispute is not arbitrable.

The City also argues that, by seeking arbitration, the MLC is attempting to circumvent the bargaining process by unilaterally altering the terms and conditions of the 2001 Agreement. The City emphasizes that the parties agreed that the cost of outpatient mental health benefits for up to sixty visits and in-patient substance abuse treatment for up to thirty days would be funded by the SRA, and also agreed on the scope of their dispute resolution procedure.[7] The MLC's Request For Arbitration is an attempt to shift the cost of these negotiated benefits to the City and modify the terms and conditions negotiated by the parties.

MLC's Position

The MLC argues that a nexus exists between the 2001 Agreement and the underlying grievance, warranting arbitration on the issue of whether § 12(c)(i) and (ii) permits the City to withdraw funds for other than the stated purpose. The MLC maintains that, when considering a Petition Challenging Arbitrability, the Board first looks to whether there is an agreement between the parties to submit their disputes to arbitration. It then considers whether the scope of the obligation to arbitrate is broad enough to encompass the particular controversy presented.

[7] In contrast to the MLC's assertion, the City asserts that SRA funds are not being applied to fund "unlimited" mental health benefits; rather, they are applied only to the particular benefit explicitly identified in the 2001 Agreement. (Pet. ¶ 48).

The MLC asserts that it is undisputed that the plain language of the 2001 Agreement encompasses "any dispute, controversy, or claim concerning or arising out of the execution, application, interpretation or performance" of any of its terms or conditions. (Ans. ¶ 59). The subject of the parties' dispute clearly falls within the 2001 Agreement's dispute resolution clause. Section 12(c)(i) and (ii) permits the City to withdraw monies from the SRA to fund a specific benefit, namely thirty days of in-patient alcohol and substance abuse rehabilitation and sixty visits to out-patient mental health programs. The MLC asserts that it filed a Request For Arbitration seeking a determination of whether the City's withdrawal from the SRA to fund benefits other than the ones specifically identified in § 12(c)(i) and (ii) violates the parties' 2001 Agreement. This claim clearly encompasses a dispute about the "interpretation" of the City's "performance of" that section of the 2001 Agreement.

The MLC contends that the City's claim that it seeks to arbitrate provisions of the Parity Act lacks merit because there is simply no allegation in the grievance of any statutory violation. The MLC emphasizes that, merely because the Parity Act mandates that the City provide unlimited benefits "does not transform the MLC's present underlying issues, which were submitted to arbitration, into issues of statutory interpretation or an allegation of statutory violation." (Ans. ¶ 72). Distinguishing the Board's decisions in *DEA*, 57 OCB 4, and *COBA*, 35 OCB 28, the MLC argues that neither case supports the City's attempt to classify the instant dispute as an issue of federal statutory interpretation. Unlike in *DEA*, the MLC does not attempt to argue that the statutory language in the instant case presents a contract interpretation issue and is not based on a violation of a federal statute. The City's reliance on *COBA* is similarly misplaced. In that case, one of the claims grieved a violation of State law, which the Board denied as not arbitrable.

Finally, the MLC argues that the City improperly addresses the merits of the grievance.

The City's assertion that the MLC is seeking to change the terms and conditions of the 2001 Agreement is not a valid basis upon which to challenge a Request for Arbitration, but rather is a defense to the merits of the grievance. The legal merits of the underlying claims and defenses are questions for an arbitrator, and therefore the Board should not consider them in making its determination. Moreover, there is nothing in the record to support the City's assertion. The MLC requests that the Board dismiss the Petition Challenging Arbitration.

DISCUSSION

In accordance with NYCCBL § 12-302, it is the policy of the NYCCBL to favor the use of arbitration to resolve disputes or grievances.[8] *See, e.g.*, *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011); *Local 621, SEIU*, 4 OCB2d 36, at 12 (BCB 2011); *DC 37, Local 1157*, 4 OCB2d 18, at 6 (BCB 2011). 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).[9] The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *Local 621, SEIU*, 4 OCB2d 36, at 12 (BCB 2011) (quoting *UFOA*, 15 OCB 2, at 7 (BCB 1975)). While "doubtful issues of arbitrability are

[8] NYCCBL § 12-302 provides:

> 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.

[9] 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. . . ."

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:

> (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 Dist.Council of Carpenters, UBCJA, 3 OCB2d 9, at 11 (BCB 2010) (citations and internal quotation marks omitted).

When a party challenges the arbitrability of a grievance based on a lack of nexus, the burden is on the party seeking arbitration to establish an arguable relationship between the disputed act and the contract provision it claims has been breached. *See Local 621, SEIU*, 4 OCB2d 36, at 13; *DEA*, 57 OCB 4, at 9. If the interpretation of the party seeking arbitration 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).

Here, it is undisputed that the parties agreed to the grievance procedure set forth in § 17, the dispute resolution provision of the 2001 Agreement. They are consequently obligated to arbitrate all controversies encompassed by it. The MLC seeks arbitration over whether the City will violate the 2001 Agreement by withdrawing SRA funds to comply with the Parity Act. For the grievance to be arbitrable, there must be a reasonable relationship between this dispute and § 17 of the 2001 Agreement.

We find that the requisite nexus has been established. The dispute resolution clause of the 2001 Agreement is broadly drafted to encompass any "dispute, controversy or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions." There is no requirement that every dispute encompassed by this provision be explicitly identified or listed. The MLC contends that § 12(c)(i) and (ii) of the 2001 Agreement permits the City to withdraw monies from the SRA to fund only a specified number of days for in-patient alcohol and substance abuse rehabilitation and visits for out-patient mental health programs. It seeks a determination as to whether City's withdrawal of additional SRA funds to cover the unlimited days for these treatments required by the Parity Act would violate § 12(c)(i) and (ii). Any resolution of this grievance necessitates an interpretation and/or an application of that contractual provision. As such, it bears a reasonable relationship to the dispute resolution provision of the 2001 Agreement.

Moreover, it is clear that the grievance does not derive from a dispute over statutory interpretation or an allegation of a statutory violation. Neither party disputes the meaning or validity of the Parity Act nor that it is applicable to City employee health insurance plans. We have found no evidence to suggest that the MLC is seeking an interpretation of the Parity Act or asserting a violation thereof. Simply, the issue is whether, in seeking to comply with the federal statute, the City has properly interpreted the contractual language of § 12(c)(i) and (ii) of the 2001 Agreement to require the SRA to fund the substance abuse and mental health coverage mandated by the Parity Act.

For these reasons, we find that the cases relied upon by the City are not relevant to the dispute herein. *See DEA*, 57 OCB 4 (Board rejected union's claim requiring interpretation of the Fair Labor Standards Act); *COBA*, 35 OCB 28 (Board denied an arbitration request to the extent it

asserted a state law violation). Both cases are distinguishable from the instant matter because the MLC is not seeking an interpretation of the Parity Act nor is it alleging a violation thereof. In short, we find no merit to the argument that the MLC seeks to arbitrate the meaning or interpretation of federal statutory provisions.

We further find no evidence to support the City's argument that the MLC's Request For Arbitration seeks to alter the terms and conditions of the parties' contract and circumvent its bargaining obligation. While it is not clear from the pleadings, this argument may go to the merits of the dispute and may be raised at an arbitration.

For all of the above reasons, the instant Petition Challenging Arbitrability is denied and the Request For Arbitration is granted. However, in the event that the arbitration proceeds under the OCB Rules, as set forth in the 2001 Agreement, since the instant petition has been submitted to the Board, including the three impartial Board members, for determination, said members will recuse themselves from hearing the underlying arbitration of this matter.

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 Office of Labor Relations, docketed as No. BCB-2948-11, hereby is denied; and it is further

ORDERED, that the Request For Arbitration filed by the Municipal Labor Committee, docketed as A-13787-11, hereby is granted.

Dated: October 6, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER