CEU, L. 237, 4 OCB2d 52 (BCB 2011)

(Arb.) (Docket No. BCB-2940-11) (A-13786-11).

Summary of Decision: The New York City Housing Authority challenged the arbitrability of a group grievance alleging that NYCHA had unilaterally changed a practice of permitting Union members extended meal periods on paydays. The Union based its grievance on what it contended was a long-standing NYCHA practice of permitting employees extra lunch-hour time to cash their paychecks. NYCHA denied any such practice. The Board found that neither the Agreement's provisions regarding meal breaks nor the claimed practice affords a tenable basis for a nexus. Accordingly, the Board granted the petition challenging arbitrability and denied the request for arbitration of these claims. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

CITY EMPLOYEES UNION, LOCAL 237, IBT

Respondent.

DECISION AND ORDER

On February 23, 2011, the City Employees Union, Local 237, International Brotherhood of Teamsters, ("Union" or "CEU") filed a request for arbitration on behalf of all unit members in 29 New York City Housing Authority ("NYCHA") titles represented by the Union. The group grievance and the request for arbitration alleged that NYCHA had unilaterally changed a practice of extending Union members' lunch period by half an hour on paydays to allow employees to cash their paychecks. On March 23, 2011, NYCHA filed the instant petition challenging arbitrability of the group grievance, contending that the Union failed to articulate a reasonable

relationship between the alleged practice of an extended lunch break and the parties' collective bargaining agreement ("Agreement"), which defines the meal periods applicable to each title and does not include past practices within its definition of a grievance.[1] The Board found that neither the Agreement's provisions regarding meal breaks nor the claimed practice affords a tenable basis for a nexus. Accordingly, the Board granted the petition challenging arbitrability and denied the request for arbitration of these claims.

BACKGROUND

The Union is the exclusive bargaining representative for employees at NYCHA whose terms and conditions of employment are covered in the Agreement. Article 14 of the Agreement, entitled "Work Schedules," provides, in pertinent part, that "[t]he work schedules for employees in the titles specified below shall generally begin, terminate and include the meal period" specified for that title. (Agreement, Art 14(a)). The meal period specified for employees in titles designated "Group i" and Group "iii" as being "½ hour." (*Id*.). The meal period for employees in titles designated as "Group ii" is specified as being "1 hour." (*Id*.). Article 14(d) provides that for "Employees assigned to development management offices. . . . . [t]he length of

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[1] The applicable Agreement, effective October 26, 2005, as subsequently amended, is currently in *status quo*, pursuant to the applicable provisions of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-311(d), which provides, in relevant part, as follows:

> During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . .

the meal period shall be one (1) hour." (Agreement, Art 14(c)).

Article 44 of the Agreement defines a "grievance" as:

> (i) A dispute concerning the application and interpretation of the terms of this Agreement and written rules or regulations.
> (ii) A claimed violation, misinterpretation or misapplication of the rules or regulations of the Authority affecting the terms and conditions of employment.
> (iii) A claimed assignment of employees to duties substantially different from those stated in their job classifications.
> (iv) Any dispute expressly agreed to in writing by the Authority and the Union.

(Article 44 (b); Pet. Ex. 2, p. 48).

On July 19, 2010, NYCHA's Director of Human Resources circulated Memorandum # 32-10 ("Memo #32-10"), entitled "Assigned Work Area and Duration of Breaks," to all NYCHA employees.[2] (Pet. Ex. 3, p. 2). Memo #32-10 states, in pertinent part, as follows:

> Generally, lunch breaks are for a one-hour period of time except for employees in certain titles who have a scheduled ½ hour lunch break. At some locations, employees may be permitted by their supervisors to take one or two scheduled breaks of up to 15 minutes in duration each workday. Please be advised that employees who are out of their assigned area or location for unauthorized periods of time or who take more frequent or longer breaks or longer lunch breaks than permitted by their

[2] NYCHA asserts that, in substance, the contents of this memo had been circulated annually to NYCHA employees since 2004. (Pet. ¶18). The Union denies that such a memo was circulated annually.

> supervisors may be subject to disciplinary action.
>
> Employees should plan to address personal business such as shopping, banking, or personal appointments during their lunch break, since these activities usually take more than the allotted break time. To maintain adequate staff coverage at all times, breaks when permitted, should be taken separately from the lunch break and never used to extend the length of an employee's lunch break. . . .

(*Id.*)

On September 30, 2010, NYCHA's Deputy General Manager for Operations circulated a memorandum designated as "DGM # 20100040," entitled "Extra Half Hour – Pay Day," to All Operations Staff.[3] (Pet. Ex. 3, p.). Memo #32-10 was attached. DGM # 20100040 states, *in toto*, as follows:

> All employees are expected to be familiar with the rules related to breaks, which are summarized in the attached [Memo #32-10]. As noted in [Memo #32-10], depending upon an employee's title, meal period[s] are usually either one-hour or on half-hour (½ hr), except where a contract requires an employee to work through the meal period.
>
> There is no law, rule, regulation, or contract provision applicable to [NYCHA] that entitles employees to an extended meal period on pay day or any other day. Any employee who extends their [*sic*] meal period without first receiving approved leave, whether on a pay day or any other day, may be subject to loss of pay for the additional period during which they were absent from work and could be subject to disciplinary action.
>
> If you have any questions, please discuss it with

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[3] The pleadings do not indicate which titles are covered by the designation "All Operations Staff."

your immediate supervisor.

(Pet. Ex. 3, p.1).

In its Answer, the Union submitted three affidavits from Union officials, each of whom has held supervisory positions. One was previously employed as Housing Manager for NYCHA and two were former Residential Buildings Superintendents for NYCHA. The affidavits each testify that the employees "consistently took thirty more minutes of break time on paydays than on days other than paydays for the purpose of cashing or depositing their paychecks." (Affidavit of Remilda Ferguson, Ans., Ex. 1 at ¶ 14; Affidavit of Ruben Torres, Ans. Ex. 2, at ¶ 9; Affidavit of James Giocastro, Ans. Ex. 3 at ¶ 10). The three affiants further testify that they "never" disciplined any NYCHA employee for taking an extra thirty minutes of break time on a payday, that they were never directed by NYCHA management to issue discipline to an employee for doing so, nor were they aware of any NYCHA employee who were so disciplined, either during their tenure or since.[4] (Ans, Ex. 1, at ¶ 15¶; Ans, Ex. 2 at ¶ 10; Ans. Ex. at ¶ 11).

By letter dated October 4, 2010, the Union protested what it called NYCHA's "decision – taken without prior consultation of the [U]nion – to rescind extended payday meal periods." (Pet. Ex. 4). The letter asked for a meeting with NYCHA representatives to discuss what the Union characterized as a cessation of a long-standing practice, and it further asserted that "[t]his decision reverses literally decades of consistent past practice" by NYCHA. (*Id.*)

Representatives of both parties met on October 27, 2010, in what NYCHA asserts was a Step I grievance meeting. At the meeting, NYCHA asked for Union clarification as to which NYCHA rule or regulation or provision of the Agreement was the basis for the Union's claim of

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[4] NYCHA generally denies all allegations in all affidavits produced by the Union.

entitlement to an extended lunch break on payday for all unit members in the 29 titles represented by the Union. (Pet. ¶ 24). NYCHA asserts that Union Trustee Ed Kane stated that there was "no piece of paper" that attested to the Union's assertion that bargaining unit members were entitled to an extra half-hour lunch break on payday. (Pet. ¶ 26). The Union denies that Kane made this statement. (Ans. Ex. 1, ¶ 24). The matter remained unresolved and proceeded through the step process.

By letter dated November 4, 2010, the Union filed a Step II grievance "on the rescinding of the past practice of allowing a ½ hour bank break every payday Thursday," further asserting that "[t]his practice has existed since the NYCHA's founding, and [NYCHA] cannot change it without negotiating such change with the Union." (Pet. Ex. 5). The Union filed a Step III grievance on November 19, 2010; no Step III decision was issued. By letter dated December 3, 2010, NYCHA's Deputy Director of Human Resources ("Deputy Director") issued a Step II decision denying the grievance on several grounds, including the lack of a citation to a NYCHA rule or regulation or to a provision in the Agreement entitling employees to an extra half-hour break on payday. (Pet. Ex. 6).

On February 23, 2011, the Union filed the request for arbitration stating the grievance as:

> Has the New York City Housing Authority violated its agreement with City Employee[s] Union, Local 237, affiliated with the I.B.T., by unilaterally ceasing its practice of allowing bargaining unit employees an extra ½ hour break on each payday Thursday? If so, what shall be the remedy?

(Pet. Ex. 1).

POSITIONS OF THE PARTIES

City's Position

NYCHA argues that the Union failed to base this grievance on any provision of the Agreement or any NYCHA rule or regulation. NYCHA contends as well that the parties have not expressly agreed in any writing separate from the Agreement to permit the grievance or arbitration of the instant dispute. Thus, no nexus has been stated between the meal period claim and the Agreement providing a right to arbitration. NYCHA argues that no duty to arbitrate can be found where none has been created, as here.

Additionally, NYCHA argues that the language of the Agreement does not contemplate arbitration of any past practice and so the Union's contention that unit members were given extended meal periods on payday for decades finds no support in the grievance-arbitration process which the parties themselves have negotiated to agreement. Accordingly, NYCHA maintains that the petition should be granted, and the RFA denied.

Union's Position

The Union contends that the question at issue relates to the way Article 14, about work schedules, was applied and interpreted before the September 30, 2010, NYCHA memo. Before the memo, at least some unit members were allowed to extend their meal periods on payday to conduct banking and other personal business related thereto. Upon issuance of the memo, those employees were subject to discipline for extending their meal period. The requisite nexus is thus articulated.

The Union contends that the post September 30, 2010, directive constituted a "change" in practice which had been in use "for several years" before that date. (Ans. ¶ 83). Accordingly, the Union contends that this dispute falls within the contractual definition of a grievance and the

matter should be heard at arbitration.

DISCUSSION

As we have often stated, "[t]he policy of the NYCCBL is to encourage the use of arbitration to resolve grievances."[5] *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011). Accordingly, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *Id.* (quoting *DC 37, L. 2627,* 3 OCB2d 45, at 7 (BCB 2010); citing (internal citations omitted); *CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968)). However, "[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *DC 37, L. 768*, 3 OCB2d 7, at 15 (BCB 2010); *COBA*, 53 OCB 14, at 5 (BCB 1994).

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter."[6] We employ a two-pronged test to determine whether a matter is arbitrable:

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[5] Section 12-302 of the NYCCBL provides:

> Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on 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.

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

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

SBA, 3 OCB 2d 54, at 7 (BCB 2010) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). The Board does not make a final determination of the rights of the parties because it lacks jurisdiction over matters of contract interpretation and is not empowered to interpret the source of the rights. *SSEU L. 371*, 4 OCB2d 38, at 8 (citing *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010); *NYSNA*, 69 OCB 21, at 7-9 (BCB 2002)).

Where challenged to do so, "[t]he burden is on the Union to establish an arguable relationship between the [employer's] acts or omissions and the contract provisions it claims have been breached. If the Union cannot show such a nexus, the grievance will not proceed to arbitration." *SSEU, L. 371,* 4 OCB2d 38, at 8 (quoting *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000) (editing marks omitted)); *DC 37,* 61 OCB 50, at 7 (BCB 1998); *DEA*, 57 OCB 4, at 9 (BCB 1996).

It is undisputed here that the parties have agreed to arbitrate certain disputes. Thus, we turn to the question of whether an arguable relationship has been established between the change to the alleged practice of affording employees an extra half hour meal break on paydays and the provisions of the Agreement claimed to be the source of a right to that benefit. Neither of the two potential sources of the right, the Agreement's provisions regarding meal breaks, nor the claimed practice, affords a tenable basis for a nexus. Article 14's provisions explicitly define the meal period as being either an hour or a half hour, depending on the category or "Group" of the

employee, without any further qualification, exception, or elaboration. As a result, this provision cannot provide the requisite nexus for the Union's claim for an additional half hour on paydays. *See SSEU, L. 371*, 4 OCB2d 38, at 8- 9.

Nor does the claim of a long-standing practice provide a basis for arbitrability. As we recently reaffirmed, "[b]efore we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation of past practice is within the scope of the definition of the term 'grievance' which is set forth in the parties' collective bargaining agreement." *SBA*, 3 OCB2d 54, at 9-10 (BCB 2010), *affd., Matter of Sergeants' Benev. Assn v. City of New York*., Index No. 100183/2011 (Sup. Ct. N.Y. Co. July 18, 2011) (Lobis, J.) (quoting *Dist No. 1, MEBA*, 49 OCB 24, at 16 (BCB 1992)); *see also NYSNA*, 67 OCB 42, at 5 (BCB 2001) (citing cases).

Here, as in *SBA,* and in *NYSNA* and *MEBA*, "the definitional section does not include claimed violations of past practice," and thus no grievance remedy is available. *SBA*, 3 OCB2d 54, at 9-10; *NYSNA*, 67 OCB 42, at 5; *MEBA*, 49 OCB 24, at 16; *see also SBA*, 79 OCB 15, at 7-8 (BCB 2007). Thus, we find no reasonable relationship between the Agreement and the Union's claim that NYCHA's issuance of the September 30, 2010, memo violated the work schedule provision and a long-standing practice. Accordingly, the petition challenging arbitrability is granted in its entirety, and the request for arbitration is 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 petition challenging arbitrability filed by the City of New York and the New York City Police Department, docketed as No. BCB-2940-11, hereby is granted in its entirety; and it is further

ORDERED, that the request for arbitration filed by City Employees Union, Local 237, I.B.T., docketed as A-13786-11, hereby is denied in its entirety.

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

I DISSENT. CHARLES G. MOERDLER
MEMBER

I DISSENT. PETER PEPPER
MEMBER

Dissenting Opinion of Charles G. Moerdler

I dissent. It is undisputed that as a matter of policy and practice the NYCHA has for many years allowed employees a brief extension of the lunch hour period on paydays to permit them to attend to their banking and related needs. Unlike some who occupy privileged positions and have other sources for dealing with such issues, these working folk must have an opportunity to deal with these issues promptly and personally. Yet, despite the fact that this practice is firmly embedded in the fabric of the job, the Deputy General Manager for Operations imperiously decided to revoke it. The majority today holds that this is not subject to arbitration review. I disagree. Time and again the Courts have held that arbitration is a preferred method for resolution of disputes. To deny that arbitral right based upon a notion that there is no nexus between the employer's acts and the basic contract of employment of which this simple act of consideration and civility has become a firmly embedded part is to elevate form over substance and technicality over justice. Indeed, it persuades me that the entire nexus notion is fundamentally flawed and bears judicial review.

Dissenting Opinion of Peter Pepper

I dissent. To allow NYCHA, through the actions of its Deputy General Manager for Operations, to unilaterally eliminate this practice without the use of the negotiations process or arbitration is disturbing. The majority holds that this action is not subject to arbitration review since the parties' collective bargaining agreement "explicitly defines the meal period as being an hour or a half hour, depending on the category or 'Group' of the employee, without any qualification, exception or elaboration." I respectfully must disagree. It is difficult to comprehend how a longstanding NYCHA practice allowing employees this additional time on paydays to facilitate access to their much needed paychecks is not subject to arbitration review and process. It is clear the parties have had multiple opportunities to negotiate any changes in this policy over the years, and it is also clear that they have not done so. In this view, this practice has become part of the parties' employment relationship and any changes to it must come through the aforementioned procedures that this relationship typically utilizes, not through unilateral action.