

**DEA, 4 OCB2d 63 (BCB 2011)**

(Arb.) (Docket No. BCB-2754-09) (A-13025-09).

**Summary of Decision:** The City filed a petition challenging the arbitrability of a grievance filed by the Union alleging that the NYPD violated the parties' collective bargaining agreement when it reduced certain Detectives' salaries upon promoting them from the rank of Police Officer to the rank of Detective. The City contended that this grievance is not subject to arbitration because the Union failed to establish the necessary nexus between the subject matter of the grievance, the reduction of these Detectives' salaries through promotion, and the source of the alleged rights, the parties' collective bargaining agreement. The Board found that no reasonable relationship exists between the act complained of and the contractual provision referenced therein. Accordingly, the petition was granted. (*Official decision follows.*)

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**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-*

**DETECTIVES' ENDOWMENT ASSOCIATION  
OF THE CITY OF NEW YORK,**

*Respondent.*

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**DECISION AND ORDER**

On March 20, 2009, the City of New York ("City") and the New York City Police Department ("NYPD") filed a petition challenging the arbitrability of a grievance brought by the Detectives' Endowment Association ("Union" or "DEA") on behalf of all employees in the rank of Detective who were promoted into that title after August 1, 2004, but prior to March 31, 2006, and

whose annual base salary fell below the annual base salary of a Police Officer at the top step of their pay plan as a result of an interest arbitration award affecting the Patrolmen's Benevolent Association ("PBA") and the City. The grievance, filed on August 8, 2008, at Step III, asserts that the NYPD violated the parties' collective bargaining agreement when it reduced the annual salaries of certain Detectives upon promoting them from the rank of Police Officer into the rank of Detective. The City contends that this grievance is not subject to arbitration because the DEA failed to establish the necessary nexus between the subject matter of the grievance, the reduction of these particular Detectives' salaries upon promotion, and the source of the alleged rights, Article VI of the parties' collective bargaining agreement. We find that the grievance is not arbitrable because the annual base salaries paid to these particular Detectives are consistent with the contractual provisions cited and/or referenced in DEA's grievance, and there is no nexus between the contractual provisions referenced in the instant grievance and DEA's claim that the annual base salaries of these particular Detectives were incorrect. Accordingly, the petition is granted, and the grievance is denied.

### **BACKGROUND**

The DEA is an employee organization under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-303(l) and is the sole and exclusive bargaining representative for employees within the NYPD in the ranks of First Grade Detectives, Second Grade Detectives, and Third Grade Detectives. Due to the nature of the classifications within this rank, a First Grade Detective is the highest, continuing to Second Grade Detective, and followed by the Third Grade Detective, which is the lowest classification within the rank of Detective. The PBA is also an employee organization under NYCCBL § 12-303(l) and is

the sole and exclusive bargaining representative for employees within NYPD in the rank of Police Officer.

**Relevant Contractual Information**

On May 7, 2007, the NYPD entered into a collective bargaining agreement with the DEA, which covered the period from February 15, 2004, to March 31, 2008, (“2004-2008 DEA Agreement”). This contract included a step pay plan. For Third Grade Detectives appointed on or before March 30, 2006, the step pay plan states:

	Effective Date 2/15/04	Effective Date 2/15/05	Effective Date 2/15/06	Effective Date 2/15/07
1 <sup>st</sup> Step	\$60,840	\$63,883	\$65,798	\$67,871
2 <sup>nd</sup> Step	\$60,986	\$64,035	\$65,956	\$68,034
3 <sup>rd</sup> Step	\$61,132	\$64,189	\$66,115	\$68,198
4 <sup>th</sup> Step	\$61,278	\$64,342	\$66,272	\$68,360
5 <sup>th</sup> Step	\$64,754	\$67,992	\$70,032	\$72,238

(Pet., Ex. 2, Article VI § 1).<sup>1</sup> For Third Grade Detectives appointed on or after March 31, 2006, the step pay plan provides:

	Effective Date 3/31/06	Effective Date 4/1/06	Effective Date 4/1/07
1 <sup>st</sup> Step	\$60,450	\$62,264	\$64,225
2 <sup>nd</sup> Step	\$60,625	\$62,444	\$64,441
3 <sup>rd</sup> Step	\$60,800	\$62,624	\$64,597
4 <sup>th</sup> Step	\$61,000	\$62,830	\$64,809

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<sup>1</sup> The City submitted the 2004-2008 DEA Agreement as Exhibit 2 of its Petition. For ease of reference and greater clarity, hereinafter this exhibit will be referred to by its previously defined term.

5 <sup>th</sup> Step	\$61,200	\$63,036	\$65,022
6 <sup>th</sup> Step	\$61,400	\$63,242	\$65,234
7 <sup>th</sup> Step	\$67,992	\$70,032	\$72,238

(2004-2008 DEA Agreement, Article VI § 1). In addition, this agreement provides a “General Wage Increase,” in pertinent part, as follows:

- (i) Effective February 15, 2004, incumbent Employees shall receive a general rate increase of 5%.
- (ii) Effective February 15, 2005, incumbent Employees shall receive a general rate increase of 5%.
- (iii) Effective April 1, 2006, incumbent Employees shall receive a general rate increase of 3%.
- (iv) Effective April 1, 2007, incumbent Employees shall receive a general rate increase of 3.15%.

(2004-2008 DEA Agreement, Article VI § 2(a)).

Also included in the 2004-2008 DEA Agreement was a re-opener clause which stated, in pertinent part: “If another uniformed 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.” (*Id.*, Article VI § 5).

On September 27, 2007, DEA and the City entered into a Memorandum of Understanding covering the period from April 1, 2008, to March 31, 2012, which set forth economic terms for employees in the rank of Detective including a step pay plan (“2008-2012 DEA MOU”). In addition, this agreement provides an increase in wages, in pertinent part, as follows:

- (a) Effective April 1, 2008, incumbent Employees shall receive a general rate increase of four percent (4%).
- (b) Effective April 1, 2009, incumbent Employees shall receive a general rate increase of four percent (4%).
- (c) Effective April 1, 2010, incumbent Employees shall receive a general rate

increase of four percent (4%).

(d) Effective April 1, 2011, incumbent Employees shall receive a general rate increase of four percent (4%).

(Pet., Ex. 3).<sup>2</sup>

Additionally, this contract provides for a “New Promotee Schedule,” which sets forth a revised step pay plan for Third Grade Detectives designated on or after March 31, 2006, as follows:

	Effective Date 4/1/08	Effective Date 4/1/09	Effective Date 5/1/09	Effective Date 4/1/10	Effective Date 4/1/11
Year 1	\$66,794	\$69,466	\$69,466	\$72,245	\$75,135
Year 2	\$66,989	\$69,666	\$69,666	\$72,453	\$75,351
Year 3	\$67,181	\$69,868	\$69,868	\$72,663	\$75,570
Year 4	\$67,401	\$70,097	\$70,097	\$72,901	\$75,817
Year 5	\$67,623	\$70,328	\$70,328	\$73,141	\$76,067
Year 6	\$67,843	\$70,557	\$78,133	\$81,258	\$84,508
Year 7	\$75,128	\$78,133			

(2008-2012 DEA MOU § 3).

On May 19, 2008, an interest arbitration award was issued in a matter involving the PBA and the City establishing the contractual terms for these parties covering the period from August 1, 2004, to July 31, 2006 (“PBA Award”). According to the Union and not denied by the City, prior to the issuance of the PBA Award, employees in the rank of Police Officer who were at the top step of their respective pay plan received an annual base salary of \$59,588 for the calendar year of 2004. The PBA Award provided that the “base annual salary rates of all bargaining unit employees [Police

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<sup>2</sup> The City submitted the 2008-2012 DEA MOU as Exhibit 3 of its Petition. For ease of reference and greater clarity, hereinafter this exhibit will be referred to by its previously defined term.

Officers] shall be increased by 4.5% effective August 1, 2004, and further increased by 5.0% (compounded) effective August 1, 2005.” (Pet., Ex. 4, ¶ 2).<sup>3</sup> Accordingly, the annual base salary for the employees in the rank of Police Officer was increased to \$62,269 for the period of August 1, 2004, to July 31, 2005, and to \$65,382 for the period of August 1, 2005, to July 31, 2006.

On August 21, 2008, the PBA and the City entered into a Memorandum of Understanding for the period from August 1, 2006, to July 31, 2010, addressing topics such as a “Longevity Schedule” and “Vacations” (“2006-2010 PBA MOU”). (Pet., Ex. 5).<sup>4</sup> In addition, the 2006-2010 PBA MOU provides a “General Wage Increase,” in pertinent part, as follows:

- (i) Effective August 1, 2006, Employees shall receive a general rate increase of four percent (4%).
- (ii) Effective August 1, 2007, Employees shall receive a general rate increase of four percent (4%).
- (iii) Effective August 1, 2008, Employees shall receive a general rate increase of four percent (4%).
- (iv) Effective August 1, 2009, Employees shall receive a general rate increase of four percent (4%).

(2006-2010 PBA MOU § 3).

Pursuant to Article VI § 5 of the 2004-2008 DEA Agreement, the City and the DEA entered into negotiations concerning the economic terms for employees in the rank of Detective. On October 28, 2008, the DEA and the City entered into a collective bargaining agreement covering the period from April 1, 2006, to March 31, 2012. (“2006-2012 DEA Agreement”). This agreement provides, *inter alia*, that the step pay plan set forth in the 2008-2012 DEA MOU “shall be adjusted to reflect

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<sup>3</sup> The City submitted the PBA Award as Exhibit 4 of its Petition. For ease of reference and greater clarity, hereinafter this exhibit will be referred to by its previously defined term.

<sup>4</sup> The City submitted the 2006-2010 PBA MOU as Exhibit 5 of its Petition. For ease of reference and greater clarity, hereinafter this exhibit will be referred to by its previously defined term.

the application of a general wage increase of 4.5% (in lieu of 3% [set forth in the 2004-2008 DEA Agreement]) and a general wage increase of 5% (in lieu of 3.15% [set forth in the 2004-2008 DEA Agreement]) on all steps.” (Pet., Ex. 6, § 3(b)).<sup>5</sup> In addition, the 2006-2012 DEA Agreement established a revised step pay plan, which included two additional steps, that are set forth below for employees designated into Detective Third Grade after October 31, 2008:

1 <sup>st</sup> Step	2 <sup>nd</sup> Step	3 <sup>rd</sup> Step	4 <sup>th</sup> Step	5 <sup>th</sup> Step	6 <sup>th</sup> Step	7 <sup>th</sup> Step	8 <sup>th</sup> Step	Basic Max[]
\$68,982	\$69,182	\$69,382	\$69,609	\$69,838	\$70,066	\$74,500	\$75,000	\$77,589

(*Id.* § 3(b)). The 2006-2012 DEA Agreement also sets forth that employees that are designated into the rank of “Detective Third Grade shall be placed on the salary schedule at the lowest step which would provide for an increase in salary from the designated Detective’s Police Officer salary.” (*Id.* § 3(b)). Additionally, “[e]ffective October 31, 2008, employees designated as Detective Third Grade on or after March 31, 2006 and before October 31, 2008 shall be placed on step 7 of the schedule referenced in [§ 3(b)], above.” (*Id.* § 3(c)).

### **Relevant Grievance History**

According to the Union, due to the raises received by Police Officers resulting from the PBA Award and the PBA 2006-2010 PBA MOU, Detectives promoted between August 1, 2004, and October 31, 2008, were paid at an annual salary that is lower than the annual base salary for Police Officers at the top step of their pay plan. According to the various contracts that address the relevant economic terms in the instant matter, Detectives who were promoted after August 1, 2004 but prior

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<sup>5</sup> The City submitted the 2006-2012 DEA Agreement as Exhibit 6 of its Petition. For ease of reference and greater clarity, hereinafter this exhibit will be referred to by its previously defined term.

to March 31, 2006 received an annual salary of \$60,840, \$63,883, or \$65,798, depending upon when those Detectives were promoted during the August 1, 2004, to March 31, 2006, time period, while Police Officers received an annual salary of \$62,269 or \$65,382 depending on their date of hire.<sup>6</sup> As a result of the different dates wage increases given to each rank, Detectives and then Police Officers receive their respective increases in annual salary four months apart. As such, certain Police Officers at the top step of their pay plan receive a greater base annual salary than certain Detectives for eight months of the year. This discrepancy in annual salaries between these Police Officers and these Detectives continues until members in each title reach their respective top steps.<sup>7</sup> According to the Union, this discrepancy cost each affected Detective approximately \$11,000.

The Union alleges that, although § 3(c) of the 2006-2012 DEA Agreement protected Detectives who had been promoted after March 31, 2006, against the discrepancy in annual salary rate by placing these Detectives in the 7<sup>th</sup> Step of the newly ratified step pay plan contained in this agreement, “those [D]etectives hired prior to March 31, 2006 were outside the scope of the negotiations and so no retroactive adjustment could be made in [their] behalf because there was no re-opener protecting [their] position.” (Ans ¶ 24).

Further, according to the Union, “there is a City-wide and police department-wide acknowledgment that promotees must receive an increase in salary after a promotion.” (Ans. ¶ 16).

It is alleged by the Union but denied by the City that the NYPD has long recognized:

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<sup>6</sup> According to the 2006-2010 PBA MOU, on August 1, 2006, Police Officers received an increase in their annual salary, up to \$67,997.

<sup>7</sup> Based upon a reading of the plain language contained in § 3(b) and (c) of the 2006-2012 DEA Agreement, we note that the discrepancy in annual base salaries for Detectives and Police Officers was addressed by this particular agreement with respect to Detectives who were promoted into that rank after March 31, 2006.



the need to provide a [D]etective designee with the same or an improvement over the salary they would have received if they remained as a [P]olice [O]fficer. When inequities occurred in the designation of new [D]etectives into the salary scale, the [NYPD] always improved the step placement of the new designee so they would receive an increase in compensation.

(Ans. ¶ 25). In an affidavit attached to the Union's submission, DEA President Michael Palladino stated that the reason for such a policy was to make promotion "attractive." (Ans., Ex 1). DEA President Palladino further stated that the City had been following this procedure since 1990 and has implemented this procedure on a New York City-wide basis.

According to DEA President Palladino, in furtherance of this procedure, the Union and the City agreed that Detectives who had been promoted between March 31, 2006, and October 31, 2008, would be placed into the 7<sup>th</sup> Step of the step pay plan contained in the 2006-2012 DEA Agreement "thereby paying them a new salary of \$74,500 which was substantially more than what they would have received in the [step pay plan] negotiated" in the contract that resulted from the re-opener provision.<sup>8</sup> (*Id.*). Accordingly, "the City recognized the fundamental need to provide the pay increase." (*Id.*). The fact that Police Officers did not receive increases for their annual salary for the period of August 1, 2004 to July 31, 2006 until May 2008 caused a 20 month lag that, when compounded with the 2006-2010 PBA MOU, resulted in certain Detectives being paid less than the lower ranking Police Officers until DEA and the City executed the 2006-2012 DEA Agreement.

However, the 2006-2012 DEA Agreement, which provided for increases to annual salaries for Detectives who had been promoted after March 31, 2006 to a salary level higher than that of a Police Officer at the top step of PBA's step pay plan, did not account for Detectives who had been

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<sup>8</sup> The City, in its Reply to the Union's Answer, offered a general denial of the contentions contained in DEA President Palladino's affidavit.

promoted between the period from August 1, 2004 to March 31, 2006. Furthermore, according to the Union but denied by the City, since the time frame to which the re-opener provision applied did not coincide with the time frame of the DEA's previous agreements, the Union could not address the needs of the Detectives who had been promoted during the period from August 1, 2004 to March 31, 2006.

On August 8, 2008, DEA filed a grievance at Step III, pursuant to 2006-2012 DEA Agreement, which incorporates by reference Article XX § 1(a)(1) and (2) of the 2004-2008 DEA Agreement on behalf of "all Detectives promoted after August 1, 2004." (Pet., Ex. 1).<sup>9</sup> This grievance alleged that:

Detectives promoted after [August 1, 2004] received a basic entry pay of \$60,840 on their promotion date while the basic maximum pay for [P]olice [O]fficers pursuant to the [PBA Award] was \$62,269. Additionally, [D]etectives promoted after 8/1/05 received an entry level pay of \$63,833 while the basic maximum pay for a [P]olice [O]fficer was \$65,382. This inequity follows through with each promotion to Detective from [August 1, 2004] to the present.

(*Id.*). On November 24, 2008, NYPD's Deputy Commissioner of Labor Relations, John P. Beirne, denied the Step III grievance.

On December 29, 2008, DEA filed a Step IV grievance alleging: "Detectives promoted after [August 1, 2004] received a basic entry pay of \$60,840 on their promotion date while the basic maximum pay for [P]olice [O]fficers pursuant to the [PBA Award] was \$62,269. This inequity

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<sup>9</sup> Article XX § 1(a)(1) and (2) of the 2004-2008 DEA Agreement, in pertinent part, states: For the purpose of this Agreement, the term "grievance" shall mean:

1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement
2. a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment . . . ;

follows through with each promotion to Detective from [August 1, 2004] to the present.” (*Id.*). On February 2, 2009, NYPD’s Commissioner denied the Step IV grievance because there had been no violation, misapplication or misinterpretation of the rules and procedures of the NYPD.

On March 3, 2009, the Union filed a Request for Arbitration in the instant matter alleging that, due to the sequence by which agreements concerning wages were reached and/or imposed between the NYPD and DEA and PBA, respectively, Detectives who were promoted prior to August 1, 2004, but prior to March 31, 2006, received a lower annual base salary from the one they previously enjoyed in the Police Officer rank. As a remedy, DEA requested “that each [D]etective designated after the issuance of the arbitration award be upgraded to a salary equal to the salary which they otherwise would have earned had they remained within the police rank.” (Pet., Ex. 1).

### **POSITIONS OF THE PARTIES**

#### **City’s Position**

The City argues that the Union failed to cite to and/or identify any contract provision, NYPD rule, regulation or procedure on which to base this grievance. The only citation of any such provision by the Union was in the Step III grievance alleging a violation, misinterpretation, or inequitable application of the provisions of the 2006-2012 DEA Agreement or a violation, misinterpretation, or misapplication of the NYPD’s rules, regulations or procedures affecting terms and conditions of employment. The DEA never cites to a provision that would allow them to arbitrate “an adverse affect to salaries of some DEA members” that was caused by the PBA Award. (Pet. ¶ 33).

Furthermore, the City argues that the DEA never cites to a provision that would allow the parties to negotiate over an alleged “inequity” in salaries that were contractually negotiated and ratified after the PBA Award was issued. (Pet. ¶ 34). In October 2008, after the PBA Award was issued and the 2006-2010 PBA MOU was executed, the DEA and the NYPD re-opened the negotiations concerning wages and other benefits for Detectives, which resulted in the 2006-2012 DEA Agreement. As such, the Union has no right to attempt to grieve a provision in a contract which it knowingly created and accepted.

The City also argues that the Union’s Request for Arbitration should be denied because the Union is attempting to grieve “an event or condition [and not] a contractually grievable violation, misinterpretation or inequitable application of contract provisions.” (Pet. ¶ 35). Based upon the foregoing arguments, the DEA fails to establish a nexus between the act complained of in the instant grievance, the annual salary discrepancy between Police Officers and certain Detectives, and the source of the alleged right, the 2004-2008 DEA Agreement. Therefore, the petition challenging arbitrability should be granted, and the Union’s Request for Arbitration should be denied.

**Union’s Position**

The Union contends that, although the City argues that the DEA failed to cite a contractual provision in the March 3, 2009 Request for Arbitration, the actual form does not contain a section for which a union can designate such a section. Rather, this form only requests a concise statement of the grievance. (*See* Pet., Ex. 1). Furthermore, the DEA annexed the Step III grievance and denial which cited Article XX of the 2004-2008 DEA Agreement as the source of the Union’s right to grieve the alleged violation and, in plain language, stated that this particular grievance dealt with the disparity in annual base salaries earned by Detectives who were promoted during a particular time

period and Police Officers. Moreover, the City relied upon and cited in the instant Petition the relevant step pay plans for both the DEA and the PBA, and thus was clearly on notice as to the basis of the DEA's grievance. As such, the City's argument that the DEA's instant request for arbitration should be dismissed as meritless.

Additionally, the DEA contends that a nexus does exist between the discrepancy in annual base salaries between Detectives promoted after August 1, 2004 and prior to March 31, 2006, and Police Officers, and the relevant portions of the 2004-2008 DEA Agreement. Specifically, Article XX of the 2004-2008 DEA Agreement, which is incorporated by reference into the 2006-2012 DEA Agreement, provides that a valid grievance is an inequitable application of the provisions of the parties' collective bargaining agreement. The DEA argues that "[i]ncorrect payment of salary to a new [D]etective lower than the [P]olice [O]fficer salary they were promoted from" is an inequitable application of § 3 of this agreement. (Ans. ¶ 29).

Furthermore, the DEA argues that, according to the grievance and arbitration provision of the 2004-2008 DEA Agreement, misinterpretations of rules, regulations, and procedures of the NYPD constitute grievable subjects. As such, the NYPD's recent misinterpretation of a NYPD "procedure" that provides that, when an employee in a lower rank is promoted, that employee is entitled to an annual base salary that is either equal to or higher than the annual base salary that the employee would have received had he or she remained in the lower rank, renders the instant matter arbitrable. (Ans. ¶ 30). Moreover, the City's agreement to provide such relief for all Detectives who had been promoted into the rank during the period from March 31, 2006 to October 31, 2008 indicates that the City intended to ensure compliance with this longstanding procedure. Therefore, the instant matter should proceed to arbitration as the Union has established a nexus between the act

complained of in a grievance and the contractual provisions cited.

### DISCUSSION

As a threshold matter, we reject the City's contention that arbitration should be denied on the ground that the Union failed to identify any contractual provision on which to base this grievance. As we have often held, "[t]his Board does not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." *CEA*, 79 OCB 17, at 9 (BCB 2007) (quoting *DEA*, 43 OCB 73, at 6 (BCB 1989); *see generally SSEU, L. 371*, 3 OCB2d 53, at 8 (citing *NYSNA*, 69 OCB 21, at 5-6 (BCB 2002)). In the *Detectives Endowment Association* case, we held that a grievance could proceed to arbitration, even though the union failed to specifically cite to an appropriate contractual provision, because the union clearly articulated from the outset the specific subject matter of the grievance. *Id.* at 6. Both parties were aware of the claim, and petitioner had ample opportunity to prepare and address this issue. *Id.*

Such is the case here. The Step III grievance stated that, pursuant to Article XX § 1(a)(1) and (2) of the 2004-2008 DEA Agreement, which was later incorporated by reference into the 2006-2012 DEA Agreement, the Union was grieving the discrepancy of annual base salaries between Police Officers and Detectives who had been promoted during a certain period of time. In addition, in the DEA's March 9, 2009 Request For Arbitration, the Union annexed a copy of Article VI of the 2004-2008 DEA Agreement as an exhibit. Furthermore, although the Union never cited to Article VI of the 2004-2008 DEA Agreement or § 3 of the 2006-2012 DEA Agreement, the City in the instant petition challenging arbitrability raised several arguments based upon these wage sections, relied upon those sections in its submissions before this Board, and even annexed those agreements as exhibits to its submissions. Based upon the foregoing, we are unpersuaded by the City's argument

that the instant request for arbitration should be denied due to the Union's failure to specifically cite to a contractual provision, where, as here, the record clearly establishes that both parties were aware of the nature of DEA's claim and that the City had ample opportunity to prepare and address this issue. *See CEA*, 79 OCB 17, at 9; *DEA*, 43 OCB 73, at 6.

The "policy of the NYCCBL is to encourage the use of arbitration to resolve grievances."<sup>10</sup> *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." *DC 37*, L. 2627, 3 OCB2d 45, at 7 (BCB 2010) (internal citations omitted); *SSEU*, L. 371, *supra* (quoting *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." *Id.* (quoting *DC 37*, L. 768 and *SSEU* L. 371, 3 OCB2d 7, at 15 (BCB 2010)); *see also COBA*, 53 OCB 14, at 5 (BCB 1994).

In determining arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *SSEU*, 3 OCB 2, at 2 (BCB 1969); *see DC 37*, *Local 1157*, 1 OCB2d 24, at 8 (BCB 2008), or, in other words, whether there is a reasonable relationship between the subject

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<sup>10</sup> 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.

matter of the dispute and the general subject matter of the agreement. *NYSNA*, 69 OCB 21, at 4-5 (BCB 2002).

Here, the parties are undisputedly obligated to arbitrate their controversies through the grievance procedure set forth in the 2006-2012 DEA Agreement, and no claim of any statutory, contractual, or court-enunciated public policy restrictions have been made. *See CEA*, 79 OCB 17, at 11. Therefore, the sole question before us is whether a reasonable relationship exists between § 3 of the 2006-2012 DEA Agreement and the payment to Detectives who were promoted between August 1, 2004 and March 31, 2006, of an annual base salary which was lower than the annual base salary of Police Officers who were at the top step of their pay plan. We find that no such relationship exists, and, accordingly, grant the petition.

We have had several similar cases involving efforts to arbitrate the City's placing newly-promoted employees on positions within the contractual salary scale applicable to said employees, but which have resulted in the promotees receiving lower salaries than employees in their former titles. Grievants with a substantially identical grievance provision to that involved here have asserted, as does the DEA here, that a nexus can be found, either because the result constitutes "a claimed violation, misinterpretation, or inequitable application of the" Agreement, or is arbitrable as an unwritten policy of ensuring that promotion should entail a raise in salary upon promotion. *SBA*, 79 OCB 15, at 6-7 (BCB 2007); *CEA*, 3 OCB2d 3, at (BCB 2010): *SBA*, 3 OCB2d 54, at 9-11 (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.). In each of these cases we found, as we are constrained to do here, that these claims failed to establish a nexus.

As was the case in *SBA*, 79 OCB 15, at 7, the DEA's claim that the lower base salaries paid



to promoted employees as a result of the disjointed timing of the ratification of collective bargaining agreements between the lower rank and the promotional rank does not establish a nexus because the wage rates listed in the 2004-2008 DEA Agreement are “explicit and specific to each Step.” The Union has not alleged that the newly promoted were not paid in accordance with those wage rates, and therefore “grievants’ claim [is] not arbitrable because the grievance must involve ‘a dispute concerning the application of the terms of this agreement.’” *SBA*, 79 OCB15, at 6 (quoting *SSEU. L. 371*, 31 OCB28, at (BCB 1983) (emphasis in original)); *cf. CEA*, 79 OCB17 (BCB 2007) (reduction of newly promoted captains’ salaries to lieutenant’s salaries after initial placement to higher step of captain’s salary schedule, alleged to have been “administrative error” posed arbitrable question as to appropriate wages under agreement).<sup>11</sup>

Here, the clear and unambiguous language of the 2006-2012 DEA Agreement, the governing collective bargaining agreement for these parties, states that the period for which it applies is April 1, 2006 to March 31, 2012 and, in § 3 of the 2006-2012 DEA Agreement, sets out explicit annual base salary rates that each Detective in a particular step is to be paid. However, the Union grieves a claim of a discrepancy in annual base salaries between Detectives who were promoted between August 1, 2004 and March 31, 2006, and Police Officers. Nothing in the 2006-2012 DEA Agreement references salaries, percentage increases, or any other aspect of annual base salaries for the period of August 1, 2004 to March 31, 2006. Moreover, the 2008-2012 DEA MOU, which was the agreement governing wages and other economic terms immediately preceding the 2006-2012

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<sup>11</sup> In affirming our recent decision in *SBA*, 3 OCB2d 54, the Supreme Court, New York County observed that, unlike the case the case before the Court, *CEA* involved an “alleged violation of the pay plan” in the applicable collective bargaining agreement, and thus presented an arbitrable claim, as we found in that case. *Matter of Sergeants Benev. Assn.*, Index No. 100183/2011 at 8.

DEA Agreement, also never referenced the period of August 1, 2004 to March 31, 2006. In fact, the only contract that is in the record in the instant matter that does address this particular time frame is the 2004-2008 DEA Agreement, but this particular contract is no longer controlling with respect to wages and compensation for Detectives.

Accordingly, we find that the instant matter compels the same result as that in the *SBA* case because the annual base salary rates set forth in the 2006-2012 DEA Agreement are specific and explicit as to what each Detective in a particular step is entitled to receive as an annual base salary. The Union's claim is not arbitrable because the Union cannot cite to an allegedly violated, misinterpreted, or misapplied provision in the 2006-2012 DEA Agreement. Therefore, the Union cannot establish the requisite reasonable relationship between the subject matter of the grievance and the applicable collective bargaining agreement. *See SBA, 79 OCB 15, at 6.*

In addition, to the extent that DEA is attempting to grieve the provision in the 2006-2012 DEA Agreement providing that "Detectives Third Grade shall be placed on a salary schedule at the lowest step which would provide for an increase in salary from the designated Detective's Police Officer salary," we again note that this particular provision, § 3(b) of the 2006-2012 DEA Agreement, does not apply to the time frame at issue in this request for arbitration. The Union's grievance attempts to obtain raises for Detectives that were promoted into that title between August 1, 2004 and March 31, 2006, while the 2006-2012 DEA Agreement expressly addresses the time period of April 1, 2006 to March 31, 2012. On its face, this provision does not apply to the employees at issue in the instant matter. *See DC 37, L. 1549, 69 OCB 29, at 6 (BCB 2002)* (denying the union's request for arbitration because no reasonable relationship existed between the act complained of and a dress code regulation, where the grievants were Police Communication

Technicians and the provision cited applied solely to Police Administrative Aides); *see also CCA*, 79 OCB 10, at 20 (BCB 2007) (arbitration precluded where allegedly violated provision expressly stated that decisions by the department to place employees on sick leave and/or limited duty were “final, unless amended by recommendation of the Commissioner”).

We also find unconvincing the Union’s argument that the grievance has a nexus with one of the NYPD’s “longstanding Department-wide procedures” providing that a promoted employee is entitled to an annual base salary that is either equal to or higher than the annual base salary that the employee would have received had he remained in the lower rank. (Ans. ¶ 29). Although the Union claims that the NYPD violated a “well-known procedure” that provides that promotees are entitled to a raise in their annual base salary when promoted, (Ans. ¶ 30), the DEA fails to cite to any written regulation, policy or procedure that provides for such benefit. Accordingly, this “well-known procedure” must be viewed as an alleged past practice which has not been memorialized in any writing. Here, as in *SBA*, 3 OCB2d 54, at 9, the applicable definition of a grievance does not include past practices, and thus no nexus as to such a claim can be stated. *Id.*; *see also SBA*, 3 OCB2d 3, at 14-15.

Accordingly, we do not find a reasonable relationship between the act complained of in DEA’s grievance and the parties applicable collective bargaining agreement. Therefore, the DEA’s Request for Arbitration is denied, and the City’s Petition challenging arbitrability is granted.

**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-2754-09, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by the Detectives' Endowment Association, docketed as A-13025-09, hereby is denied.

Dated: New York, New York  
December 20, 2011

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

CHARLES MOERDLER  
MEMBER