CEU, L. 237, IBT, 5 OCB2d 10

(Arb.) (Docket No. BCB-2987-11) (A-13968-11)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that DOT misapplied the City Vehicle Driver Handbook by approving the use of a City-owned vehicle by the Grievant for commuting but limiting his use of that vehicle to the five boroughs, and thus preventing him from using the vehicle to commute the entire distance to and from his home in Suffolk County. The City argued that the request for arbitration must be denied because nothing in the parties' agreement establishes a right to use a City-owned vehicle for commuting, the City Vehicle Driver Handbook was not a written policy of DOT, and, even if it was, the Grievant did not meet the criteria for the use of a City-owned vehicle for commuting. The Board found that the City Vehicle Driver Handbook is a written policy of the City and that the Union established the requisite nexus between the parties' agreement to arbitrate and the subject of the grievance. Accordingly, the petition challenging arbitrability was 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 DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

DECISION AND ORDER

On October 7, 2011, the New York City Office of Labor Relations ("OLR"), on behalf of New York City ("City") and the City's Department of Transportation ("DOT"), filed a petition challenging arbitrability of a grievance brought by the City Employees Union, Local 237, International Brotherhood

of Teamsters ("Union"), on behalf of Steven DiMarco ("Grievant"). In its request for arbitration, the Union alleges that DOT misapplied the City Vehicle Driver Handbook ("Handbook") by approving the use of a City-owned vehicle by the Grievant for commuting but limiting his use of that vehicle to the five boroughs of the City, and thus preventing him from using the vehicle to commute the entire distance to and from his home in Suffolk County. The City argues that nothing in the parties' agreement or the Handbook establishes the right to use a City-owned vehicle for commuting. Further, the City argues that the Handbook is not a rule, regulation, written policy, or order of DOT, and that, even if it was, the Grievant did not meet the criteria established therein for the use of a City-owned vehicle for commuting. Thus, the City argues, there is no nexus between the act complained of and the agreement to arbitrate. This Board finds that the Handbook is a written policy of the City and that the Union established the requisite nexus between the parties' agreement to arbitrate and the subject of the grievance. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

The Grievant is a Supervisor of Traffic Device Maintenance ("STDM") and the Union is the duly certified collective bargaining representative for that title. DOT and the Union are parties to a collective bargaining agreement, the Special Officers Agreement ("Agreement"), dated September 23, 2006, through September 23, 2008, that remains in effect pursuant to the *status quo* provision of § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Article VI, §1, of the Agreement defines a grievance, in pertinent part, to include:

> a. A dispute concerning the application or interpretation of the terms of this Agreement; [and]

> b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the [City] . . . with respect to those matters set forth in the first paragraph of [§] 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration[.]

(Pet., Ex. 2)

The use of City-owned vehicles by employees is governed by the Handbook, which was created by the Department of Citywide Administrative Services ("DCAS") and the Mayor's Office of Operations in February 2009. A DCAS memorandum that accompanied the distribution of the Handbook in April 2009 stated that the Handbook "was issued for use by all City agencies" and that "[a]ll authorized drivers of City Government Vehicles are required to read and keep a copy of the [Handbook]." (Ans., Ex. C) The DCAS memorandum warns that drivers "must familiarize themselves with the [Handbook]. **Failure to comply with these policies will result in loss of driving privileges.**" (*Id.*) (emphasis in original)

The Handbook states that it "is intended for use by all Mayoral agencies." (Pet., Ex. 4, p. 2) Its purpose is described as "mandat[ing] practices that promote the safety of licensed drivers of City Government Vehicles, their passengers and the public." (*Id.*) Further, it states that "under no circumstances may City Government Vehicles be used for personal or other-than-official City business unless provided for in this [Handbook]." (*Id.*) The Handbook describes the role of the Agency Transportation Coordinators ("ATC") who determine, with approval of the Agency Head, who will be allowed to operate a City-owned vehicle. ATCs are instructed that they "must provide City Authorized Drivers with a copy of [the Handbook] and emphasize the importance of adherence to its requirements." (*Id.*)

Handbook § 3.2, entitled "Take-Home (Commuting) Vehicle Privileges," states, in pertinent part:

> City Government Vehicles may not be used for commuting between a driver's home and workplace unless the driver annually receives written approval from the ATC and Agency Head. Examples of approved take-home privileges include but are not limited to employees who work frequently in field locations, respond to emergencies during non-business hours, or do not have available secure overnight parking near the work location.
>
> Drivers with authorized commuting privileges are encouraged to park at a City-owned or operated work site or garage facility nearest the driver's home, if one is reasonably available within five City blocks. The ATC will assist drivers in identifying City garages that are near the driver's home and assist drivers with obtaining permission to park at those facilities. In addition, drivers must notify their ATC of the regular off-duty parking location of commuting vehicles so that these sites can be recorded.

(Pet., Ex. 4) Handbook § 3.2 also contains instructions for reporting the value of the use of a City-owned vehicle for commuting as a taxable fringe benefit.

Handbook § 3.4 is entitled "Use of City Government Vehicles for Long Distance Travel" and states, in pertinent part:

> Drivers must comply with this manual and with City Comptroller's Directive #6 (October 2001). The directives states that, "Travel is considered to be beyond the boundaries of New York City when the distance the employee travels is more than 75 miles from Columbus Circle, Manhattan; and/or the distance the employee travels is more than 75 miles from the traveler's home; and/or the length of the traveler's day, starting with departure from home and ending with return home is, or would be, more than 11 ½ hours." Drivers must fill out appropriate forms and receive approval from the ATC prior to making an out of town trip.

(Pet., Ex. 4) (quoting City Comptroller's Directive #6)[1]

[1] Handbook § 3.3 is entitled "Temporary Assignment of (Pooled) Vehicles" and is not relevant to the instant matter.

It is undisputed that for several years prior to 1996, the Grievant was allowed to use a City-owned vehicle for commuting between his home and his workplace but that from 1996 through to 2009 employees in the Grievant's division, including the Grievant, were not allowed to use City-owned vehicles for commuting. Since 2009, some employees in the Grievant's division have been allowed to use a City-owned vehicle for commuting. The City avers that since shortly after the Grievant moved to Suffolk County in 2009, he has been "permitted to use his assigned City-owned vehicle to commute from his workplace to a City parking lot that was on the route to his home" but was still within the five boroughs of the City. (Pet. ¶ 18) It is undisputed that the Grievant has not been permitted to take his assigned City-owned vehicle the entire distance to his home outside of the five boroughs of the City. However, the Grievant avers that he has witnessed DOT vehicles being driven on the Long Island Expressway in Nassau and Suffolk Counties.

On April 19, 2010, the Grievant sent an email to the DOT Deputy Commissioner seeking on behalf of himself and other non-resident STDMs "permission to take our assigned vehicles to our homes outside of the five boroughs." (Ans., Ex. A) After noting that he has "been assigned full-time use of a city vehicle and commuting privileges," the Grievant's email continues as follows:

> However, we are not permitted to take them to our homes. I would like to note that the Mayor's Office of Operations considers "outside the city limits" as being beyond 75 miles of Columbus Circle which we all are within. After speaking with DOT's ATC [name deleted], he suggested contacting you on this issue. I was also informed that several other DOT employees have been granted the privilege for years. I personally know of supervisors in our Highway Division who have this privilege. We feel that such a privilege be granted fairly and uniformly to all non-resident employees who meet the criteria for having commuting privilege. I thank you for your consideration in this matter and await your reply.

(*Id.*)[2] DOT's Executive Director of Traffic Administration replied by email on April 22, 2010, that "no changes will be made to the current policy on commuting employees." (Ans., Ex. B) The Grievant replied on April 23, 2010: "I take it that this means we may not take the vehicles to our homes outside the 5 boroughs." (*Id.*)

On May 6, 2010, the Union filed a Step IA grievance describing the grievance, in pertinent part, as:

> The non-resident [STDMs] have been denied commuting privileges to our homes outside of the five Boroughs. We feel this is a misinterpretation of the City-Wide policy regarding the use of City-owned vehicles. We also feel in light of the fact that other [DOT] employees have such privilege that it is unfair and unreasonable to deny us the same privilege.

(Pet., Ex. 5) No Step I decision was issued. On or about January 26, 2011, the Union filed a Step II grievance. On April 14, 2011, DOT's Director of Labor Relations denied the Step II grievance because "the use of City-owned vehicle to commute to and from an employee's home is a privilege that ***may*** be granted at the discretion of the agency." (Pet., Ex. 6) (emphasis in original)

The Union filed a request for Step III review on April 18, 2011, and a Step III conference was held on August 12, 2011, at which time the Union clarified that the grievance was an individual one and not a group grievance. The Union reiterated that other DOT employees were allowed to use City-owned vehicles to commute to homes outsides of the five boroughs of the City and argued that the Grievant satisfied all the criteria for the commuting privilege contained in the Handbook. The Step III grievance was denied on August 24, 2011, based on OLR's finding that the Handbook was not a rule, regulation, written policy or order of the employer and because the Grievant did not receive written approval from the ATC and Agency Head to use a City-owned vehicle for commuting to his home in Suffolk County.

---

[2] The other employees referred to in the email were not identified.

On September 9, 2011, the Union filed the instant request for arbitration, citing Article VI, § 1(a) and (b), of the Agreement as the provisions violated.

POSITIONS OF THE PARTIES

City's Position

The City states that "DOT has not denied the Grievant the use of a City vehicle for commuting purposes." (Pet. ¶ 31) Rather, DOT has only "denied the Grievant unlimited use of that vehicle to travel outside of the City." (*Id.*) The City argues that the request for arbitration must be denied because there is no rule, regulation, written policy or order of DOT that entitles the Grievant to the use of a City-owned vehicle for commuting to Suffolk County. The request for arbitration itself only cites to the grievance provisions of the Agreement and, as such, is insufficient to demonstrate the requisite nexus.

The City argues that the Handbook is not a rule, regulation, written policy or order within the meaning of Article VI, § 1(b), of the Agreement. The Handbook only sets forth limitations on the assignment of City-owned vehicles. Assuming that the Handbook was a rule, regulation, written policy or order, the Grievant failed to satisfy its criteria because he had not received approval from his Agency Head or ATC to use a City-owned vehicle for commuting to Suffolk County.

The City argues that Handbook § 3.4, cited by the Union, only provides the definition of "Long Distance Travel" for the purposes of compliance with City Comptroller's Directive #6. It does not require a City-owned vehicle to be provided to an employee, nor does it grant City employees who have use of a City-owned vehicle "an unfettered right to unlimited mileage at City expense." (Pet. ¶ 31) The Union has not identified any provision of the Handbook establishing a term or condition of employment,

the misapplication of which would state a violation of the grievance provisions of the Agreement. Thus, the request for arbitration must be dismissed.

Union's Position

The Union argues that the Handbook constitutes a written policy of DOT as it applies to all City Agencies and notes that DCAS' cover memorandum explicitly refers to it as a policy. The Union cites to a decision of the Office of Trials and Hearings ("OATH") showing that the Handbook "is use[d] as a rule to punish employees in the disciplinary process." (Ans. ¶ 11) The Union also notes that in the email of April 22, 2010, DOT's Executive Director of Traffic Administration explicitly refers to DOT's commuting policy. Thus, a grievance alleging the misinterpretation of this written policy is arbitrable, and the Grievant seeks to arbitrate how he was treated under these policies and procedures.

DISCUSSION

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). Further, "the NYCCBL explicitly promotes and encourages the use of arbitration, and 'the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration.'" *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)); *see also DC 37*, 13 OCB 14, at 11 (BCB 1974). The Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." NYCCBL § 12-309(a)(3). However, the Board "cannot create a duty to arbitrate where none exists." *PBA*, 4 OCB2d 22, at 12; *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

To determine the arbitrability of a grievance, the Board employs a two pronged test:

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

UFOA, 4 OCB2d 5, at 9 (BCB 2011); *see also NYSNA*, 69 OCB 21, at 7 (BCB 2002).

To establish a nexus between the collective bargaining agreement and the subject of the grievance "a party need only demonstrate a . . . 'relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *PBA*, 4 OCB2d 22, at 13 (quoting *PBA*, 3 OCB2d 1, at 11 (2010)); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). This showing, by definition, "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact constitute 'an interpretation of the agreement that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)); *see also* Civil Service Law § 205.5(d). Thus, "[o]nce an arguable relationship is shown, the Board will not consider the merits of the grievance . . . [as] where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

The City has not argued in the instant case that there are court-enunciated public policy, statutory, or constitutional restrictions barring the arbitration of the grievance. Rather, the City argues that the Handbook is not a rule, regulation, written policy or order of DOT and that, assuming it was, the Grievant has not pleaded a sufficient nexus between the Handbook and his claim. We disagree.

The question presented is whether the Handbook is a written rule or policy of DOT. For the Handbook to "be considered a written rule, [it] must be 'addressed generally to the [agency] and have set forth a general policy applicable to affected employees.'" *New York City District Council of Carpenters, UBCJA*, 3 OCB2d 9, at 11 (BCB 2010) (quoting *Local 3, IBEW*, 45 OCB 59, at 11-12 (BCB 1990); citing *SSEU*, 77 OCB 5 (BCB 2006); *CEU, L. 237*, 77 OCB 27 (BCB 2006)). Further, "[i]n our prior decisions, we have consistently emphasized that a policy promulgated by the City and made enforceable at each of its agencies may constitute a predicate for arbitration." *OSA*, 1 OCB2d 42, at 17 (BCB 2008) (finding Personnel Services Bulletin issued by DCAS arbitrable under an identical grievance provision as at issue in this case) (citing *DC 37*, 39 OCB 28, at 24-26 (BCB 1987) (finding Personnel Policy and Procedure subject to arbitration); *Local 924, DC 37*, 1 OCB2d 3, at 10-12 (BCB 2008) (finding Mayoral Executive Orders subject to arbitration)).

The Handbook explicitly states that it "is intended for use by all Mayoral agencies." (Pet., Ex. 4, p. 2) The DCAS memorandum that accompanied its distribution instructed that drivers of City-owned vehicles "are required to read and keep a copy of the [Handbook]" (Ans., Ex. C) That memorandum also warns that "[f]ailure to comply with these policies will result in loss of driving privileges." (*Id.*) (emphasis deleted) City employees have been disciplined for failing to abide by the Handbook. *See Taxi & Limousine Commission v. Alvarez*, Oath Index No. 924/11 (December 17, 2010), *affd.*, NYC Civil Service Commission Item No. CD-11-43-A (July 12, 2011) (inspector suspended for 20 days for failure to comply with the Handbook). On this basis, we find the Handbook to be a written policy of the City applicable to DOT and that a claimed misapplication of the Handbook is arbitrable under the Agreement.

In the instant matter, it is undisputed that DOT approved the use of a City-owned vehicle by the Grievant for commuting within the City limits, which, for the Grievant, DOT has defined as the five

boroughs. Handbook § 3.4, however, defines "[t]ravel . . .beyond the boundaries of New York City" not by reference to the five boroughs, but as when the "distance the employee travels is more than 75 miles from Columbus Circle." (Pet., Ex. 4) It is also undisputed that the Grievant lives within 75 miles of Columbus Circle. Further, the Union avers that other DOT employees are believed to commute with DOT assigned City-owned vehicles to locations outside of the five boroughs. Given these circumstances, we find that the Union has shown a nexus between the subject of the grievance and the policy set forth in the Handbook that the Grievant claims has been misapplied by DOT. Whether, as the City argues, the Grievant fails to meet all of the criteria in the Handbook goes the merits of the dispute and is for the arbitrator to resolve. *See PBA*, 4 OCB2d 22, at 13. Thus, the petition challenging arbitration is denied and the request for arbitration 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, that the petition challenging arbitrability filed by the New York City Office of Labor Relations, on behalf of New York City and the New York City Department of Transportation, docketed as BCB-2987-11, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by City Employees Union, Local 237, International Brotherhood of Teamsters, docketed as A-13968-11, hereby is granted.

Dated: March 6, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER