PBA, 5 OCB2d 11 (BCB 2012)

(Arb.) (Docket No. BCB-2986-11) (A-13978-11)

Summary of Decision: The City challenged the arbitrability of the Union's grievance alleging that the NYPD violated the collective bargaining agreement by refusing to provide certain Union members with the correct number of vacation days. The City argued that the grievance concerns a dispute over the determination of the members' hire dates, a subject that is not governed by the parties' agreement, and that there was no nexus with the agreement. The Union contended that the NYPD's denial of vacation days directly violated a specific provision of the parties' agreement. The Board found that a reasonable relationship exists between the act complained of and the contractual provision relied upon. 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 POLICE DEPARTMENT,

Petitioners,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Respondent.

DECISION AND ORDER

On October 6, 2011, the City of New York ("City") and the New York City Police Department ("NYPD" or "Department") filed a petition challenging the arbitrability of a grievance filed by the Patrolmen's Benevolent Association of the City of New York, Inc. ("Union") on behalf of its member Giancarlo Osma and all other

similarly situated police officers ("Grievants"). In its request for arbitration, the Union alleges that the NYPD violated the parties' collective bargaining agreement ("Agreement") when it failed to provide the Grievants with the correct number of authorized annual vacation days. The City argues that the actual basis for the grievance is the Union's contention that the NYPD incorrectly determined the Grievants' hiring dates, which is a subject that is not governed by the Agreement. It asserts that, because there is no nexus between the Agreement and the subject of the grievance, the Board should deny the request for arbitration. The Union argues that the grievance alleges a violation of a specific provision of the parties' Agreement and is thus reasonably related to the Agreement. This Board finds that a nexus exists between the act complained of and the cited contractual provision. Accordingly, the petition challenging arbitrability is denied and the request for arbitration is granted.

BACKGROUND

The Union is the duly certified collective bargaining representative for all members of the NYPD holding the rank of Police Officer. The Union and the City are parties to the Agreement, which covers the period from August 1, 2006 through July 31, 2010, and remains in *status quo*.

Article XXI, § 1 of the Agreement provides, in relevant part:

> a. 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 written rules, regulations or procedures of the Police

> Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters;
>
> 3. a claimed improper holding of an open-competitive rather than a promotion examination;
>
> 4. a claimed assignment of the grievant to duties substantially different from those stated in the grievant's job title specification.

(Pet. Ex. 1). Article XI of the Agreement is entitled "Vacations." Section 2 of Article XI provides that "employees hired on or after July 1, 1988 and before July 1, 2008" shall be provided with twenty (20) work days of authorized annual vacation during the first five years of service. (*Id.*). Article XI, § 3 provides that "employees hired on or after July 1, 2008" shall be provided with ten (10) work days of authorized annual vacation during the first five years of service. (*Id.*).[1]

The NYPD hired Osma in July 2007 as a probationary police officer and assigned him to the Police Academy for training. On August 23, 2007, Osma voluntarily resigned his position in lieu of academic termination. The NYPD rehired or reinstated Osma as a probationary police officer on July 8, 2008.[2]

The Union alleges that, in advance of a vacation that he planned to take in October 2009, Osma contacted his payroll supervisor to verify the accuracy of the number of vacation days listed on his paycheck. It further alleges that the payroll supervisor confirmed that Osma should be receiving 20 vacation days per year, and that,

[1] Article XI, § 4 of the Agreement provides that, effective July 31, 2010, "employees hired on or after July 1, 2008" shall be provided with ten work days of authorized annual vacation during the first two years of service and 13 work days of authorized annual vacation during the third, fourth and fifth years of service. (Pet. Ex 1).

[2] The NYPD first assigned Osma a tax identification number on July 9, 2007, and then assigned him a different one on July 8, 2008.

according to the NYPD, Osma's resignation had no effect on his benefits since he returned to the Department within one year of his resignation.

The Union additionally alleges that, in reliance on this information, Osma subsequently took a vacation in April 2010. On May 28, 2010, Osma's paycheck reflected for the first time that he had exceeded his authorized number of vacation days and had negative twelve days in his vacation bank. In an attempt to clarify the discrepancy between what he was allegedly told by his payroll supervisor and what his paycheck reflected, Osma contacted the City's Office of Labor Relations ("OLR"). OLR informed Osma that he was only entitled to ten vacation days per year during his first five years of service because his hire date was considered to be July 8, 2008.[3]

On or about August 26, 2010, the Union filed a Step III grievance on Osma's behalf, alleging a violation of Article XI of the Agreement.[4] The NYPD denied the grievance on September 13, 2010. On or about October 15, 2010, the Union filed a Step IV grievance, and on November 5, 2010, amended the original grievance to include police officers Stephanie Robles, Tashana Roberts, Joseph Wong, "and all other officers

[3] The City denies all of the factual allegations concerning Osma with the exception of his dates of hire, resignation, and rehire.

[4] In its Step III grievance letter, the Union referenced New York Civil Service Law ("CSL") § 80(2), which it stated provides that "[a]n employee who has resigned and who has been reinstated or reappointed in the service within one year thereafter shall . . . be deemed to have continuous service." (Pet. Ex. 1). The Union thereafter wrote, "Accordingly, police officers reinstated or reappointed within one year of their resignation from the Department are restored to the salary and benefits that they enjoyed prior to their resignation. We request that the Department treat Officer Osma as having continuous service since his 2007 appointment for purposes of vacation days and all other benefits to which he is entitled pursuant to the CBA or applicable law or practice." (*Id.*).

similarly situated to Police Officer Giancarlo Osma with respect to their vacation days."[5] The NYPD denied the Step IV grievance on September 2, 2011.

On or about September 22, 2011, the Union filed a request for arbitration, in which it submitted the following statement of the grievance to be arbitrated:

> Whether the Police Department violated Article XI of the Collective Bargaining Agreement by failing to provide Police Officer Giancarlo Osma and other similarly situated police officers with the correct number of vacation days to which they are entitled pursuant to Article XI of the Collective Bargaining Agreement.

(Pet. Ex. 2).

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration should be denied because there is no nexus between the alleged harm that the Union seeks to rectify and the parties' Agreement. It contends that although the Union asserts a claim pursuant to the provision of the Agreement governing vacation time, it is "in essence" grieving the determination by the City and the NYPD of the Grievants' applicable hire date. (Pet. ¶ 44). However, there is no language in the Agreement that grants the Union the right to grieve a police officer's date of hire. Therefore, there is no nexus to the Agreement.

The City further argues that, although not explicitly asserted in its request for arbitration, the Union is claiming that CSL § 80(2), which "applies to determining hiring

[5] Stephanie Robles, Tashana Roberts, and Joseph Wong were hired as police officers by the NYPD on or about July 9, 2007. Wong resigned his position on or about July 16, 2007. Robles and Roberts resigned their positions on or about December 20, 2007. All three were rehired or reinstated as police officers on or about July 8, 2008.

dates for seniority and lay-off purposes," should govern the determination of the Grievants' hire dates with regard to the calculation of vacation time. (Pet. ¶ 58). The City contends that the Union's claim under CSL § 80(2) as to the determination of hire dates does not fall within the Agreement because the parties have not agreed to arbitrate that issue.

In reply to the Union's arguments, the City clarifies that it does not assert that CSL § 80(2) is applicable to the dispute. Rather, it argues that the Agreement does not contain any provision similar to the concept of "continuous service" referenced in CSL § 80(2). (Rep. ¶ 42). Therefore, the Union's assertion that the Grievants' resignations do not affect their hire dates for purposes of calculating vacation time bears no reasonable relation to the parties' Agreement.

Union's Position

The Union contends that the petition challenging arbitrability should be dismissed because there is a "clear and substantial relationship" between the subject matter of the claim and Article XI of the Agreement. (Ans. ¶ 4). It asserts that there is no dispute that the claim falls within the "lawfully permissible scope of arbitrability." (Ans. ¶ 73). Thus, it has satisfied the first prong of the arbitrability analysis. The Union further asserts that it has fulfilled the second prong of the arbitrability test since there is a "reasonable relationship" between Article XI of the Agreement and its allegation that the City has not provided the Grievants with the correct number of vacation days pursuant to that contractual provision. (Ans. ¶ 75). Since a grievant need only demonstrate that the contractual provision is arguably related to the subject of the grievance to be arbitrated, the Union has satisfied its burden.

Moreover, the City and the NYPD misconstrue the Union's grievance by erroneously describing it as a challenge to the determination of the Grievants' applicable hire dates. However, the Union never asserted that it is grieving hire dates. Rather, it is grieving the Department's violation of Article XI of the Agreement and the Grievants' rights under it. This distinction is reflected in the Union's "precise and concise statement" of the grievance to be arbitrated as well as the remedy sought, which is the provision of the appropriate number of vacation days pursuant to the Agreement. (Ans. ¶ 76).

Further, the Union contends that the fact that it referenced CSL § 80(2) in its Step III grievance letter does not negate the contractual nature of the dispute. It is for the arbitrator to determine the relevance of the CSL to the contractual claim constituting the instant dispute.

DISCUSSION

The NYCCBL explicitly states that it is the policy of the City "to favor and encourage . . . impartial arbitration of grievances between municipal agencies and certified employee organizations." NYCCBL § 12-302. Accordingly, the policy favoring the arbitrability of grievances is clear and well-established:

> [T]he presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration. However, 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.

Local 1180, CWA, 79 OCB 35, at 10 (BCB 2007) (citations and notations omitted). To carry out this policy, the "Board is charged with the task of making threshold

determinations of substantive arbitrability." *DEA*, 57 OCB 4, at 10 (BCB 1996); *see* NYCCBL § 12-309(a)(3).[6]

To determine whether a grievance is arbitrable, the Board employs the following 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.

Local 621, SEIU, 4 OCB2d 36, at 13 (BCB 2011) (citations and internal quotation marks omitted).

It is undisputed that the City and the Union have agreed to arbitrate disputes that fall within the contractually-defined term "grievance." No superseding public policy or other restriction has been alleged that would prohibit arbitration of the instant dispute. The remaining question before the Board is therefore whether the dispute falls within the scope of the parties' Agreement. Where challenged to do so, "[t]he burden is on the Union to establish an arguable relationship between the City's acts [or omissions] and the contract provisions it claims have been breached." *SSEU, L. 371*, 4 OCB2d 38, at 8 (BCB 2011) (citation omitted). If the Union demonstrates such a nexus, then the grievance will proceed to arbitration.

Here, the Union claims, and we agree, that there is a reasonable relationship between the City's alleged failure to provide the Grievants with the correct number of

[6] 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 . . . ."

vacation days and Article XI of the Agreement. One of the stated definitions of a grievance is "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." (Pet. Ex. 1). The Union seeks arbitration over "[w]hether the Police Department violated Article XI of the Collective Bargaining Agreement by failing to provide Police Officer Giancarlo Osma and other similarly situated police officers with the correct number of vacation days to which they are entitled pursuant to Article XI of the Collective Bargaining Agreement." Since Article XI addresses the allocation of annual vacation days, the grievance clearly alleges a violation of the Agreement. As the dispute falls within the scope of the Agreement's grievance and arbitration provision, the Union has satisfied the second prong of the arbitrability test.

The City contends that, although the Union frames its grievance as a contractual violation, the gravamen of the claim concerns the NYPD's alleged failure to assign the correct hire dates to the Grievants. It argues that the assignment of hire dates is not a subject the parties have agreed to arbitrate. In support of its argument, the City points to the Union's citation to CSL §80(2), arguing that the Union's reliance on the statute demonstrates that it was forced to look outside the four corners of the Agreement to find authority to support the grievance. It concludes that the Union therefore cannot establish the requisite nexus between the Agreement and the alleged harm to the Grievants that it seeks to rectify.

We find this argument unavailing. By characterizing the Union's grievance in such a manner, the City asks us to go beyond a "threshold determination of substantive arbitrability" and interpret the contractual underpinnings of the parties' dispute. *See DEA*, 57 OCB 4, at 10. However, the Board's function "is confined to determining

whether the grievance is one which, on its face, is governed by the contract." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also SSEU, L. 371*, 4 OCB2d 38, at 8 (citations omitted). The plain language of the instant grievance reflects that the Union is challenging the NYPD's allocation of vacation days under the Agreement. To the extent the Agreement uses the phrase "hire dates," it is an issue of contract interpretation that is properly placed before an arbitrator. *See CCA*, 3 OCB2d 43, at 10 (BCB 2010) ("[I]t is well established that the Board in deciding questions of arbitrability will not inquire into the merits of a dispute.") (citations omitted).

Moreover, we find unpersuasive the City's contention that the Union's reference to CSL § 80(2) in its Step III grievance letter reflects a lack of a nexus between the grievance and the Agreement. The Union has not alleged a violation of CSL § 80(2) as the basis for its dispute over the allocation of vacation days. Instead, the Union has asserted a violation of a specific provision of the Agreement, placing the grievance within the scope of the parties' duty to arbitrate. The fact that the Union, in its grievance, referred to CSL § 80(2) as informing the calculation of the Grievants' hire dates for purposes of determining their right to vacation days under Article XI of the Agreement does not change the essence of the claim. It remains a claim of contractual right, not one of a statutory entitlement. Therefore, we find that the reference to the CSL does not remove the grievance from the scope of arbitrability. *See Local 237, I.B.T.*, 55 OCB 23, at 13 (BCB 1995) (finding a grievance arbitrable based on the respondent's reliance in its arbitration request upon the collective bargaining agreement, and not the referenced statutory law, as the source of the right to arbitrate).

We find that the Union has presented an arbitrable grievance, and it is for an arbitrator to construe Article XI of the Agreement to determine whether the NYPD violated its provisions with regard to the allocation of Grievants' authorized annual vacation days. We therefore dismiss the petition challenging arbitrability and grant the Union's request for arbitration.

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 Police Department, docketed as BCB-2986-11, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association of the City of New York, Inc., docketed as A-13978-11, 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
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PETER PEPPER
MEMBER