DC 37, L. 1505, 5 OCB2d 32 (BCB 2012)

(Arb) (Docket No. BCB-3016-12) (A-14144-12)

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the Department of Parks and Recreation violated the collective bargaining agreement and its own procedures and policies by failing to consider certain seasonal employees for rehire. The City argued that the matter is not arbitrable because the Agreement does not require that these seasonal employees be rehired and there is no written rule or policy establishing such a right. The Union argued that the petition challenging arbitrability should be denied because DPR violated its longstanding "rule or regulation" regarding the rehiring of the seasonal employees at issue. The Board found that there was no nexus between the contract and the Union's claim. Accordingly, the City's petition challenging arbitrability was granted, and the Union's request for arbitration was denied. ***(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 PARKS AND RECREATION,

Petitioners,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1505,

Respondent.

DECISION AND ORDER

On May 18, 2012, the City of New York ("City") and the New York City Department of Parks and Recreation ("DPR") filed a petition challenging the arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO, Local 1505 ("Union"). The Union's request for arbitration claims that DPR violated Article VI, §§ 1(b) and 16, of the 2008-2010 Blue Collar

Agreement ("Agreement") and its own procedures and policies by failing to consider certain seasonal employees ("Grievants") for rehire. The City argues that the matter is not arbitrable because the Agreement does not require that these seasonal employees be rehired and there is no written rule or policy establishing such a right. The Union argues that the petition challenging arbitrability should be denied because DPR misinterpreted, misapplied, and violated its longstanding "rule or regulation" regarding the rehiring of the seasonal employees at issue. This Board finds that there is no nexus between the Agreement and the Union's claim. Accordingly, the City's Petition Challenging Arbitrability is granted, and the Union's Request for Arbitration is denied.

BACKGROUND

DPR is a City agency responsible for maintaining the City's parks system, which includes providing recreational and athletic facilities and programs. The Grievants are seasonal employees at DPR who work in the civil service title of City Park Worker.[1] Among other duties, the Grievants assist in the cleaning, general maintenance, gardening, and forestry functions of the City's park areas as well as assist in the repair of buildings, equipment, monuments, and facilities. The Union is the sole and exclusive collective bargaining representative of City Park Workers.

The City and the Union are parties to the Agreement, which expired on March 2, 2010, and currently remains in effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

[1] The request for arbitration lists the grievants as "Dilcy Benn, *et al.*" However, the grievance form, which is appended to the Union's Request for Arbitration, lists the aggrieved employees as "President Dilcy Benn, *et al.* for Seasonals CPW" and further provides that "[s]easonal workers are not being returned to work according to seniority after a satisfactory season." (Pet., Ex. 2)

("NYCCBL"). Article VI of the Agreement sets forth the parties' grievance procedure and provides that the types of grievances subject to arbitration include:

> a. A dispute concerning the application or interpretation 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 terms and conditions of employment . . . .

(Pet., Ex. 1) In addition, Article VI, § 16, of the Agreement sets forth limited due process rights for seasonal employees, providing that:

> The first season of employment as a seasonally appointed employee of the Department of Parks and Recreation shall be deemed a "probationary" season. After the first season, a seasonal employee of the Department of Parks and Recreation who has both completed his/her "probationary" season and has worked for at least ninety (90) cumulative days with the Department of Parks and Recreation in a seasonal capacity is terminated, the employee or union representative may request a review by the Commissioner or his designee within ten (10) calendar days of such termination.

(*Id*.)

The crux of the instant dispute is the Union's claim that DPR unilaterally ignored established rules and procedures as well as decades of past practice by failing to rehire long time seasonal City Park Workers. The City alleges that DPR does not have any written policy or procedure concerning the rehiring of seasonal City Park Workers. The Union, however, cites a seasonal evaluation form that DPR supervisors use to evaluate the performance of seasonal employees and to recommend or not recommend them for rehire.

The seasonal evaluation form is a two-page document that is completed at the end of each season for every DPR seasonal employee. It seeks employee information, performance ratings, information about supervisory conferences, supervisor comments, and a certification of the

ratings by the supervisor and employee. Supervisors are required to rate seasonal employees based on the following four criteria: (1) Quality of Work; (2) Attendance; (3) Job Knowledge; and (4) Attitude. Employee job performance is rated on a scale of 1-5 for each criterion, and an overall score of less than twelve is considered unsatisfactory. The form provides that "[e]mployees who score less than 12 cannot be considered for rehire without attaching written support from a Borough Commissioner or Chief of Operations." (Pet., Ex. 4) At the end of the form, there is a box for the supervisor to indicate whether he or she recommends the employee for rehire the following year.

According to the Union, the vast majority of seasonal City Park Workers are not employed for only a single season and for decades seasonal City Park Workers whose evaluations included recommendations for rehire were routinely rehired.[2] The Union alleges that, for the first time, in 2011, DPR chose not to rehire seasonal City Park Workers whose evaluations from the previous season indicated that they were recommended for rehire. Instead, for the 2011 season, the Union claims—and the City denies—that DPR hired individuals whom it had not previously employed. As a result, the Union filed a grievance on May 4, 2011, alleging that DPR violated the Agreement because "[s]easonal workers are not being returned to work according to seniority after a satisfactory season." (Pet., Ex. 2)

On March 12, 2012, the Union filed a request for arbitration, which describes the grievance to be arbitrated as:

> Whether the employer, the Department of Parks & Recreation, violated Article VI Section 1(b) and Section 16, and its own written procedures and policies, including but not limited to the Seasonal Evaluation when it failed to consider the grievants for rehire, and if so, what shall be the remedy?

[2] The City denies that such seasonal City Park Workers were routinely rehired.

(Pet., Ex. 2) As relief, the Union requests that an arbitrator issue "an order declaring the employer's actions violative of the [Agreement], make a good faith consideration of the grievants for rehire, backpay with interest, and any other remedy necessary and proper to make the grievants whole." (*Id*.)

POSITIONS OF THE PARTIES

City's Position

The City argues that Article VI, § 1(b), of the Agreement does not provide a basis upon which to arbitrate the grievance because the Union has not identified any rule, regulation, written policy, or order that has been violated.[3] Although the Union references a seasonal evaluation procedure, there is no written rule or policy regarding the rehiring of seasonal City Park Workers; the only document that exists is the seasonal evaluation form itself. The City maintains that the seasonal evaluation form is not a written policy because it does not contain any explicit directives or create any specific rules, regulations, standards, or requirements for the rehiring of seasonal employees. The seasonal evaluation form only identifies the performance standards required of employees for consideration for future employment and provides a space for supervisors to recommend their rehiring. Notwithstanding these facts, even if the seasonal evaluation form is construed as a rule or regulation, the Union cannot establish the requisite nexus because the form does not specify any right to be rehired or set forth a related procedure.

Furthermore, the City maintains that alleged violations of unwritten rules that are the "understood, established practice of the parties" are not arbitrable. (Rep. ¶ 15) (citing Ans. ¶ 28)

[3] The City contends that, to the extent that the Union also argues that the instant matter is a dispute concerning the application or interpretation of the Agreement, such an argument must fail. Article VI, § 16, of the Agreement is clear and unambiguous, and, therefore, there is no contractual language for an arbitrator to interpret or apply.

The Agreement does not include violations of past practice within the definition of a grievance. According to the City, the Board has held that the definition of a grievance must include alleged violations of past practice in order for such claims to be arbitrable under the contractual language cited by the Union.

The City argues that Article VI, § 16, of the Agreement also does not provide the requisite nexus because it neither requires nor contemplates that seasonal City Park Workers will be rehired. Instead, Article VI, § 16, of the Agreement only affords certain seasonal City Park Workers who are terminated the right to have their termination reviewed by a designated representative of the Commissioner. In contrast, another collective bargaining agreement entered into by the parties—the 2005-2008 Revised Seasonals Agreement—contains language that contemplates a preference for rehiring employees in a different seasonal title, City Seasonal Aide.[4] However, the Revised Seasonals Agreement does not apply to City Park Workers. The parties thus understood precisely how to incorporate language establishing a preference for the rehiring of seasonal employees, yet they did not include any such language in the Agreement.

[4] Article XX, § 4(a), of the 2005-2008 Revised Seasonals Agreement provides:

> The first season of employment for City Seasonal Aides employed by the Department of Parks and Recreation ("seasonal personnel") shall be deemed a probationary season. The department shall as soon as practicable notify those employees whose services during their probationary season has not been certified as satisfactory. All seasonal personnel who have completed the previous season satisfactorily shall have preference for rehiring in the forthcoming season."

(Pet., Ex. 5)

Therefore, the Union seeks to gain through the arbitration process that which it could not gain through collective bargaining.[5]

Union's Position

The Union argues that DPR misinterpreted, misapplied, and violated its longstanding rule or regulation regarding the rehiring of seasonal City Park Workers. Although the Union maintains that the seasonal evaluation form is a written rule or regulation of DPR, the Union contends that Article VI, § 1(b), of the Agreement does not require a rule or regulation to be written. According to the Union, the parties did not limit Article VI, § 1(b), of the Agreement solely to written rules and regulations because the word "written" does not precede "rules and regulations." Had the parties intended to submit to arbitration only violations, misapplications, or misinterpretations of written rules or regulations, the contract language would have been drafted with the word "written" appearing before "rules and regulations." Therefore, Article VI, § 1(b), of the Agreement also permits claims of violations of "accepted procedure[s], custom[s] or habit[s]." (Ans. ¶ 30) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, definition of "rule")

The Union asserts that Article VI, § 16, of the Agreement provides support for the arbitrability of its claim because it demonstrates the parties' intent that seasonal employees will resume their employment the following season and beyond. This contractual provision's explicit declaration that the first season of employment is a "probationary season" evidences the parties' understanding and intent that seasonal employees have an expectation of continued employment

[5] The City also argues that the Union has not provided any evidence that an actual grievance exists because the Union has not named a single seasonal City Park Worker that the employer has refused to rehire. According to the City, the sole named grievant, Dilcy Benn, is not employed on a seasonal basis and, therefore, is not directly affected by the outcome of the grievance.

provided that they successfully complete their probationary period. Upon completing probation, Article VI, § 16, of the Agreement grants seasonal employees limited due process rights if they are terminated. According to the Union, the parties would not have contracted for such rights if there was no obligation or expectation of rehire. The Union argues that providing due process rights when seasonal employees are terminated but not when long tenured seasonal City Park Workers are not recommended for rehire is "nonsensical" and contrary to the parties' intent. (Ans. ¶ 36)

The Union contends that the Revised Seasonals Agreement applicable to City Seasonal Aides lends further credence to the Union's claim because City Seasonal Aides and seasonal City Park Workers perform parallel functions and are similarly situated. Significantly, the seasonal evaluation form is used to evaluate all DPR seasonal employees, not solely seasonal City Park Workers. It is the supervisor's recommendation on this form that provides the basis for the Seasonal City Aides' rehiring rights. According to the Union, the parties did not intend to grant rights to one set of similarly situated employees while denying those same rights to the other. Therefore, the Union should be permitted to present to an arbitrator evidence and testimony regarding the aforementioned contractual terms, the parties' intent, and past practice.

DISCUSSION

The NYCCBL provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes.[6] *See ADW/DWA*, 4 OCB2d 21, at 10 (BCB 2011); *NYSNA*, 69 OCB 21, at 6 (BCB 2002). To carry out this policy, the "Board is charged with the

[6] NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

task of making threshold determinations of substantive arbitrability."[7] *ADW/DWA*, 4 OCB2d 21, at 10 (quoting *DEA*, 57 OCB 4, at 9-10 (BCB 1996)). 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 ADW/DWA*, 4 OCB2d 21, at 10; *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). The "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which considers:

> (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 8-9 (BCB 2011) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). This inquiry does not require a final determination of the rights of the parties because the Board lacks jurisdiction to enforce contractual rights. *See* CSL § 205(5)(d); *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9. Accordingly, the Board generally will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).

[7] 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 . . . ."

When the City challenges the arbitrability of a grievance based on a lack of nexus, "[t]he burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached." *Local 371, SSEU,* 65 OCB 39, at 8 (BCB 2000) (citations omitted)*; see also DC 37,* 61 OCB 50, at 7 (BCB 1998); *Local 371,* 17 OCB 1, at 11. If the Union establishes an arguable relationship, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW,* 45 OCB 49, at 11 (BCB 1990) (citations omitted); *see also PBA,* 3 OCB2d 1, at 11 (BCB 2010).

Here, it is undisputed that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance procedure, which provides for final and binding arbitration of specified matters, including claimed violations, misinterpretations or misapplications of the rules or regulations, written policies or orders of DPR affecting terms and conditions of employment. The issue that the Union seeks to arbitrate is whether certain seasonal City Park Workers were wrongfully denied the opportunity to be rehired in violation of DPR's seasonal evaluation form and/or alleged unwritten rule of rehiring or giving preference to the rehiring of satisfactorily performing seasonal City Park Workers.[8] For the grievance to be arbitrable, this Board must find a reasonable relationship between the Union's claim and Article VI, § 1(b) and/or § 16, of the Agreement. For the reasons set forth below, we find that the requisite nexus has not been established.

[8] Contrary to the City's assertions, we find that an actual grievance exists because the grievance form attached to the request for arbitration lists as grievants all satisfactorily performing seasonal City Park Workers who were not rehired according to seniority. Although the request for arbitration is admittedly vague, it is clear from the grievance form appended to it that the Benn, as Union President, was filing the grievance in a representative capacity on behalf of a group of members who are ascertainable based on the information provided on the grievance form.

Under the terms of the agreement, the Union may grieve "[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 terms and conditions of employment . . . ." (Pet., Ex. 1) Although, as the Union emphasizes, the word "written" does not precede the term "rules and regulations" in the definition of a grievance set forth above, we have long held that the precise contractual language upon which the Union relies does not encompass alleged violations of past practice. Indeed, in *Doctors Council*, we found that "a change in past practice cannot be the basis of a contractual claim where the contract defines a grievance as 'a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer' but does not include an alleged violation of past practice." 61 OCB 40, at 8 (BCB 1998); *see also SBA*, 3 OCB2d 54, at 9-10 (BCB 2010), *affd., Matter of Sergeants Benevolent Assn. v. City of New York, et al.*, Index No. 100183/2010 (Sup. Ct. N.Y. Co. July 18, 2011) (Lobis, J.).

Although phrased as a violation of an unwritten rule, the crux of the Union's argument is that DPR violated its past practice of rehiring or giving preference to the rehiring of seasonal City Park Workers. Indeed, the Union stresses that the arbitrability of unwritten rules and regulations "is particularly compelling, where, as is the case here, it is an understood, established practice of the parties." (Ans. ¶ 28) Nevertheless, the parties' contractual language does not encompass violations of past practice, and we cannot enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8; *SSEU, L. 371*, 69 OCB 34, at 4.

We are similarly not persuaded that the seasonal evaluation form provides the requisite nexus between the Agreement and the Union's claim. Even if we were to construe the seasonal evaluation form as a written rule or policy of DPR, the form does not specify any basis upon

which a seasonal employee has the right to be rehired or the right to be given preference for rehiring the following season. While the seasonal evaluation form specifies a minimum performance rating in order for seasonal employees to be considered for rehire and provides a space for supervisors to recommend rehiring, it does not bestow any rights upon seasonal employees or set forth any procedure for their rehiring. The seasonal evaluation form is also used to evaluate City Seasonal Aides, who have preferential rehiring rights; however, the source of their rights is the Revised Seasonals Agreement, not the seasonal evaluation form. While the Union alleges that the parties did not intend to grant rehiring rights to one group of seasonal employees while denying those same rights to another, the Agreement does not contain any such language establishing a preference for the rehiring of seasonal City Park Workers.[9]

To the extent that the Union relies upon Article VI, § 16, of the Agreement, we find that this provision also does not provide the requisite nexus that would allow the Union's claim to proceed to arbitration. Article VI, § 16, of the Agreement merely bestows upon seasonal City Park Workers limited rights of review in the event that they are terminated during the course of their employment. It does not provide any due process rights for seasonal employees who are not rehired. Because the grievance concerns the rehiring of seasonal City Park Workers and not the rights of seasonal employees who have been terminated, Article VI, § 16, of the Agreement does not pertain to the instant matter. Notwithstanding the above, the Union argues that Article

[9] Similarly, in a prior matter, we found that there was no preferential rehiring provision in the Agreement as it existed in 1982-1984. *See L. 983, DC 37*, 41 OCB 26 (BCB 1988). There, we considered whether the City's failure to reappoint a seasonal Park Supervisor violated the 1982-1984 Blue Collar Agreement. We held that a preferential rehiring provision originally found in the 1980-1982 Blue Collar and Seasonal Titles Agreement did not apply to the seasonal Park Supervisor. After 1982, the parties negotiated two separate agreements and the preferential rehiring provision was incorporated into the 1982-1984 Seasonal Agreement, which applied to City Seasonal Aides, but not the 1982-1984 Blue Collar Agreement, which applied to seasonal Park Supervisors.

VI, § 16, of the Agreement is evidence that the parties intended that seasonal employees would be rehired the following season. However, even if the parties shared this intent, the plain language of the provision does not bestow upon employees any substantive rights to be rehired or to be given preference in the hiring process.

Consequently, for the reasons stated above, we grant the City's petition challenging arbitrability and deny 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 Department of Parks and Recreation, docketed as BCB-3016-12, is hereby granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO, Local 1505, docketed as A-14144-12, is hereby denied.

Dated: October 5, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
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CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
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