DC 37, L. 983, 6 OCB2d 17 (BCB 2013)

(Arb.) (Docket No. BCB-3075-13) (A-14340-13)

Summary of Decision: Petitioners challenged the arbitrability of a grievance alleging that DPR improperly transferred certain employees without regard to their seniority, arguing that the parties' collective bargaining agreement precludes disputes involving the City's Personnel Rules. The Union contended that the Personnel Rules do not address employee transfers and that there is a clear nexus between its grievance and the collective bargaining agreement. The Board found that there is a reasonable relationship between the parties' agreement and the Union's grievance. Accordingly, the City's petition challenging arbitrability 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, LOCAL 983, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On March 22, 2013, 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, Local 983, AFSCME, AFL-CIO ("Union"), on behalf of four DPR employees: Ruthie Perez, Domingo Sanchez, Jennifer Ragoonanansingh, and Richard Ventura

("Grievants").[1] In its request for arbitration, the Union asserts that DPR violated the terms of the 2008-2010 Blue Collar Agreement ("Blue Collar Agreement") and the DPR Working Conditions Agreement ("Working Conditions Agreement") by improperly assigning or transferring the Grievants. Petitioners argue that the matter is not arbitrable because DPR transferred the Grievants pursuant to the City's Personnel Rules and Regulations ("Personnel Rules"), and the Blue Collar Agreement exempts disputes involving the Personnel Rules from the definition of a grievance. Petitioners further contend that the Working Conditions Agreement is not applicable to the instant grievance. The Union contends that that the relevant Personnel Rules do not address employee transfers and that there is a clear nexus between its grievance and the terms of the Working Conditions Agreement. The Board finds that there is a reasonable relationship between the provision of the Working Conditions Agreement addressing transfers and the Union's claim that its members were transferred without regard to their seniority. Accordingly, the City's petition challenging arbitrability is denied.

BACKGROUND

The Union is the certified collective bargaining representative for DPR employees in the titles of Urban Park Ranger ("UPR") and Associate Urban Park Ranger ("AUPR"). DPR hired Perez and Sanchez as UPRs on May 29, 2001. They began working provisionally in the AUPR title on August 11, 2008 and March 3, 2009, respectively. DPR hired Ragoonanansingh as a UPR

[1] The Union initially filed the grievance on behalf of six DPR employees. It subsequently withdrew the grievance as it pertained to one employee. (Ans. ¶ 7) In addition, Petitioners alleged, and the Union did not deny, that the grievance was not ripe as to one of the five employees as of the filing date of the request for arbitration. Because the dispute is not ripe as to that employee, the request for arbitration is dismissed only as to that particular grievant. Accordingly, four Grievants remain for purposes of the instant petition.

on October 12, 2009. She began working provisionally as an AUPR on June 7, 2012. DPR hired Ventura as a UPR on September 19, 2005. He began working provisionally as an AUPR on October 24, 2010.

On or about May 21, 2011, the Grievants took the promotional examination for the AUPR title. In June 2012, DCAS established a Civil Service list for the title. Of the four Grievants, only Ventura and Sanchez were placed on the list, as number 3 and 22, respectively, of 58 names. On November 11, 2012, Ventura was promoted to the permanent position of AUPR pursuant to the Civil Service list and, as a result, he was placed in a new work location and transferred from Queens to Manhattan. Sanchez was considered but was not selected for promotion to the AUPR title. Consequently, he was restored to his underlying UPR title and was thereafter transferred from a work location in Manhattan to one in Queens. Perez and Ragoonanansingh, after having not been placed on the list, were also restored to their underlying UPR titles. Thereafter, Perez was transferred from the Bronx to Manhattan to work as a UPR and Ragoonanansingh was transferred within Manhattan from DPR's Central Command office to Battery Park, also to work as a UPR.

The Union contends, and Petitioners deny, that there were employees in the UPR title with less seniority than Perez, Sanchez, and Ragoonanansingh who were not involuntarily transferred on or around November 11, 2012. It also contends, and Petitioners deny, and that two AUPRs in Queens who were appointed on the same date as Ventura but had lower scores than him on the promotional examination were not involuntarily transferred.

On February 5, 2013, the Union filed a request for arbitration, which described the grievance to be arbitrated as:

> Whether the employer, the [DPR], improperly assigned/transferred

> the grievants in violation of the [Working Conditions Agreement] and Article VI, Section 1 (b) of the Blue Collar Agreement and, if so, what shall be the remedy?

(Pet., Ex. 3) As relief, the Union seeks:

> an order declaring that the employer's actions are in violation of the [Working Conditions Agreement], rescind the transfers returning the grievants to their previous assignments and titles, backpay with interest, and any other remedy necessary and proper to make the grievants whole.

(*Id.*)

The parties are bound by both the Working Conditions Agreement and the 2008-2010 Blue Collar Agreement.[2] The Working Conditions Agreement is a bilateral letter agreement dated May 15, 1986, and signed by the Union's Executive Director and the Director of the City's Office of Municipal Labor Relations at that time. Its terms apply to all non-seasonal DPR employees who are represented by the Union. Section 8 of the Working Conditions Agreement is titled "Transfer Policy." (Pet., Ex. 2) Paragraph 2 of that Section provides, in pertinent part: "Involuntary transfers shall be made on the basis of least seniority in title. Seniority in title shall commence on the date of permanent Civil Service appointment and ties will be broken on the basis of original list number." (*Id.*) The Working Conditions Agreement also addresses several other types of transfers, including voluntary and temporary transfers.

Article VI, § 1(b) of the Blue Collar Agreement defines a grievance to mean, among other things:

> 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

[2] The Blue Collar Agreement remains in full force and effect pursuant to § 12-311(d), the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

> conditions of employment; provided, disputes involving the [Personnel Rules] or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration.

(Pet., Ex. 1) The parties agree that the Working Conditions Agreement falls within the definition of "rules or regulations, written policy or orders of the Employer," set forth in Article VI, § 1(b), above.

Rule 5.5.3 of the Personnel Rules discusses the termination of provisional employees and provides that:

> A provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions; provided, however, that:
>
> (a) when there is a large number of provisional appointees in any agency to be replaced by permanent appointees from a newly established eligible list and the agency head deems that the termination of the employment of all such provisional appointees within two months following the establishment of such list would disrupt or impair essential public services, evidence thereof may be presented to the commissioner of civil administrative services; and
>
> (b) after due inquiry, and upon finding that it is in the best interests of the public service, the commissioner of citywide administrative services may thereupon waive the provision of this paragraph requiring the termination of the employment of provisional employees within two months following the establishment of provisional appointees within two months following the establishment of an appropriate eligible list and authorize the termination of the employment of various numbers of such provisional appointees at prescribed stated intervals;
>
> (c) in no case however shall the employment of such provisional appointee be continued longer than four months following the establishment of such eligible list.

(Pet., Ex. 4)

POSITIONS OF THE PARTIES

City's Position

Petitioners offer two arguments in support of their challenge to the arbitrability of the Union's grievance. First, Petitioners argue that the Union failed to establish the requisite nexus between the Grievants' transfers and Article VI, § 1(b) of the Blue Collar Agreement. Petitioners contend that this provision of the Blue Collar Agreement explicitly exempts "disputes involving the Personnel Rules" from the definition of a "grievance," and thus precludes the Grievants from grieving violations of such Rules. (Pet. ¶ 61) According to Petitioners, DPR was required, pursuant to Personnel Rule 5.5.3, to fill all available openings for the AUPR title with individuals from the Civil Service list and replace provisional employees serving in the title. Therefore, DPR's transfer of the employees provisionally placed in the AUPR title was taken "pursuant to the Personnel Rules." (Pet. ¶ 58) Because the parties mutually agreed not to arbitrate grievances involving the Personnel Rules, Petitioners contend that the underlying request for arbitration must be denied and the petition must be granted.

Second, while Petitioners concede that the Working Conditions Agreement is a "written policy" and thus falls within the definition of a grievance under Article VI, § 1(b) of the Blue Collar Agreement, they contend that the Union cannot establish a nexus between the Grievants' transfers and the Working Conditions Agreement because none of the types of transfers addressed in that document are applicable to the Grievants' transfers. DPR transferred the Grievants due to their "reinstatement to their underlying Civil Service titles." (Pet. ¶ 89) Thus, according to Petitioners, these were not "transfers" as contemplated by the Working Conditions Agreement but

rather were "restorations" to the Grievants' underlying titles or promotions to the title for which a list was established. (Pet. ¶ 91) Petitioners contend that, for this reason, the grievance is not arbitrable pursuant to the Working Conditions Agreement.[3]

Union's Position

The Union contends that DPR violated the Working Conditions Agreement by involuntarily transferring the Grievants "other than on the basis of least seniority in title." (Ans. ¶ 21) It asserts that there were many employees holding the title of UPR and with less seniority than Perez, Sanchez, and Ragoonanansingh who were not involuntarily transferred on November 11, 2012. It further asserts that Ventura's original Civil Service list number was three, but that two AUPRs in Queens who were appointed on the same date and had lower scores than him were not involuntarily transferred.

In response to Petitioners' arguments, the Union first contends that the Civil Service laws and the Personnel Rules have nothing to do with transfers and that there is no impediment, statutory or otherwise, to basing transfer decisions on seniority, as the parties agreed to do in the Working Conditions Agreement. The Union points out that just because DPR may have been statutorily required to remove the Grievants from their positions, "it does not follow that DPR was required to transfer" the Grievants from one location to another. (Ans. ¶ 28) (emphasis in Ans.)

Second, the Union disputes Petitioners' assertion that DPR's movement of the Grievants to different work locations was not a transfer "as contemplated by the Working Conditions Agreement." (Ans. ¶ 30) It contends that a transfer is usually defined as a move from one place to another. Regardless, it asserts that where parties' competing interpretations of an agreement

[3] Petitioners also argue that the Union's request for arbitration as it pertained to one of the six original grievants is not ripe because he was not transferred. We dismissed this portion of the request for arbitration and thus will not address it in the instant matter.

are both plausible, the issue should be decided by an arbitrator. Here, the Board is presented with an arbitrable dispute which should be sent to arbitration.

DISCUSSION

It is well-established that "[t]he policy of the NYCCBL is to encourage the use of arbitration to resolve grievances." *CEU, L. 237*, 4 OCB2d 52, at 8 (BCB 2011) (quoting *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011)).[4] Accordingly, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *Id.* (citations and internal quotation marks omitted); *see also CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968). However, "[w]e cannot create a duty to arbitrate where none exist, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *Id.* (citations omitted)

This Board has established the following two-pronged test to determine whether a matter is arbitrable:

> (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.

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

> 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.

NYSNA, 2 OCB2d 6, at 9 (BCB 2009) (citations and internal quotation marks omitted).

The parties have obligated themselves to arbitrate their controversies through a grievance procedure, and there is no claim that the arbitration at issue would violate public policy or that it is limited by statutory or constitutional restrictions. We therefore turn to the remaining issue, which is whether the Union has demonstrated a reasonable relationship between the referenced provisions of the Blue Collar and Working Conditions Agreements and the allegation that DPR involuntarily transferred the Grievants.

Petitioners' principal argument is that the Union cannot demonstrate a nexus between its grievance and the Blue Collar Agreement because DPR transferred the Grievants pursuant to the Personnel Rules, and Article VI, § 1(b) of the Blue Collar Agreement explicitly precludes disputes involving the Personnel Rules from the grievance and arbitration process. We find Petitioners' argument unpersuasive because the Personnel Rules do not address transfers. Petitioners contend that DPR was obliged, pursuant to Personnel Rule 5.5.3, to replace provisional employees serving in the AUPR title upon the establishment of the Civil Service list for that title. They then conclude that DPR's transfer of provisional employees in that title, including the Grievants, was taken pursuant to the Personnel Rules. Yet, Petitioners never established a connection between the Grievants' transfers and Personnel Rule 5.5.3, which merely provides that a provisional appointment must be terminated following the establishment of an appropriate eligible list. As the Union aptly pointed out, although the Personnel Rules mandate that DPR must remove the Grievants from their provisional positions, it does not necessarily follow that it was also required to transfer them to offices in different locations or boroughs. While Petitioners apparently consider the transfers to be the consequence of a change in title, the Personnel Rules do not require

that employees be transferred following termination from a provisional appointment and, in fact, are silent on the issue. Accordingly, DPR's decision to transfer the Grievants falls outside the purview of the Personnel Rules.[5]

Petitioners concede that the Working Conditions Agreement falls within the definition of "rules or regulations, written policy or orders of the Employer," under Article VI, § 1(b) of the Blue Collar Agreement, but argue that the Agreement does not provide the requisite nexus with the Union's claim. Section 8, ¶ 2 of the Working Conditions Agreement explicitly provides that "[i]nvoluntary transfers shall be made on the basis of least seniority in title. Seniority in title shall commence on the date of permanent Civil Service appointment and ties will be broken on the basis of original list number." (Pet. Ex. 2)

The Union maintains there is a reasonable relationship between its grievance and the Working Conditions Agreement. It alleges that DPR violated § 8, ¶ 2 of the Working Conditions Agreement when it transferred the Grievants without regard to their seniority. It is undisputed that none of the Grievants consented to being transferred or were transferred voluntarily. The Working Conditions Agreement mandates that seniority, as defined in that Agreement, must be considered when making an involuntary transfer, and the Union's grievance seeks to arbitrate whether the Grievants' seniority was properly considered when they were transferred. We find

[5] Petitioners rely on a number of Board decisions to support their argument that we have previously recognized that claims concerning the alleged misapplication of the Personnel Rules are not arbitrable under the contract provision at issue in the Blue Collar Agreement and similar provisions in other collective bargaining agreements. *See DC* 37, *L.* 2627, 3 OCB2d 45, at 8 (BCB 2010); *SSEU, L. 371*, 77 OCB 5, at 8 (BCB 2006); *DC 37, L. 1407*, 75 OCB 7, at 16 (BCB 2005); *DC 37, L. 1407 & 768*, 65 OCB 26, at 9 (BCB 2000). We recognize that disputes involving the Personnel Rules are not arbitrable under Article VI, § 1(b) of the Blue Collar Agreement. However, as we stated above, the Personnel Rules are not implicated in the instant dispute and thus the cited cases are distinguishable.

that the Union's claim is reasonably related to the relevant provision of the Working Conditions Agreement and, thus, the dispute is arbitrable.

Having found that the Personnel Rules do not require transfers, we are not persuaded by Petitioners' argument that the Grievants' transfers are "restorations" to an underlying Civil Service title and therefore occur outside the scope of the Working Conditions Agreement. It is for an arbitrator to determine the extent to which the disputed term in the Working Conditions Agreement applies in the context of the parties' dispute. We need only find a "relationship" between the act complained of and the source of the alleged right in order to find a dispute to be arbitrable, and we have done so here. *See CEU, L. 237*, 5 OCB2d 10, at 9 (BCB 2012); *see also PBA*, 4 OCB2d 22, at 14-15 (BCB 2011) ("Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . Such a *prima facie* 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. . . . Where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide.") (citations and internal quotation marks omitted).

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 Human Resources Administration, docketed as BCB-3075-12, is hereby denied; and it is further

ORDERED, that the request for arbitration, docketed at A-14340-13, is hereby granted.

Dated: July 10, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER