Local 333, UMD, ILA, 6 OCB2d 22 (BCB 2013)

(Arb.) (Docket No. BCB-3095-13) (A-14447-13)

Summary of Decision: The City filed a petition challenging the arbitrability of a grievance alleging that the Department of Transportation violated the parties' collective bargaining agreement by refusing to expunge from Grievant's personnel file informal discipline resolved under EO 16 and 78. The City argued that there was no nexus between the collective bargaining agreement and the subject matter of the grievance. Additionally, the City argued that the Grievant waived his right to challenge the discipline and failed to reserve any right he may have had to expunge the disciplinary record from his personnel file. The Board found that Grievant did not waive his right to arbitration of the issue and that the Union showed a plausible nexus between EO 16 and 78 and the Grievant's right to have the 2010 discipline expunged from his personnel file. Accordingly, the grievance was arbitrable. The petition challenging arbitrability was denied, and the request for arbitration 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 CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

LOCAL 333, UNITED MARINE DIVISION, I.L.A., AFL-CIO,

Respondent.

DECISION AND ORDER

On July 29, 2013, the City of New York ("City") and the City of New York Department of Transportation ("DOT") filed a petition challenging the arbitrability of a grievance brought by Local 333, United Marine Division, I.L.A., AFL-CIO ("Union"), on behalf of Alan Csorba ("Grievant"). In its request for arbitration, the Union alleges that DOT violated the parties'

collective bargaining agreement by refusing to expunge the record of an informal discipline that occurred on August 17, 2010 from Grievant's personnel file. The City argues that there was no nexus between the disciplinary action taken by the DOT and Executive Order ("EO") 16 and 78. Additionally, the City asserts that the Grievant waived his right to challenge the discipline and that he failed to reserve any right to have the disciplinary record expunged from his personnel file. The Union argues that there is a clear nexus between EO 16 and 78, which requires expungement of informal discipline in certain instances, and the grievance it seeks to arbitrate. The Board finds that Grievant did not waive his right to arbitration of the issue and that the Union showed a plausible nexus between EO 16 and 78 and the Grievant's right to have the 2010 discipline expunged from his personnel record. Accordingly, the grievance is arbitrable. The petition challenging arbitrability is denied, and the request for arbitration granted.

BACKGROUND

The Grievant is employed as a deckhand by DOT. He is represented by the Union. The City and the Union are parties to a collective bargaining agreement, the Marine Titles Agreement, covering the period from April 27, 2008, through April 26, 2010 ("Agreement"), which remains in *status quo* pursuant to NYCCBL § 12-311(d). Article VI, § 1 of the Agreement defines a grievance as including "[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 of New York shall not be subject to the Grievance Procedure or arbitration." (Ans. Ex. A at 39)

EO 16, issued by the Mayor on July 26, 1978 and amended on October 5, 1984 by EO 78, is entitled "Commissioner of Investigation, Inspectors General and Standards of Public Service." Through EO 16 and 78, the Commissioner of Investigation has responsibility for "the investigation and elimination of corrupt or other criminal activity, conflicts of interest, unethical con-duct [sic], misconduct and incompetence" by City agencies, officers, and employees. (Pet. Ex. 3) EO 78 § 6 entitled "Informal Disciplinary Proceedings" states that:

> a. Each agency head [shall] may [sic] with the advice of the Commissioner establish appropriate reporting requirements, disposition standards and other administrative procedures for informal disciplinary proceedings in addition to those already provided by law or collective bargaining agreements to permit the fair and expeditious resolution of minor violations of the standards of conduct established by such agency head under this Order without prejudice to any rights provided to officers or employees of the City by law or by (contract) [sic] collective bargaining agreement.
> b. **Informal disciplinary proceedings may be undertaken on the following conditions: (i) the employee or official who is the subject of such proceedings shall consent to accept a predetermined penalty upon a finding of cause in lieu of the filing of a formal disciplinary charge; and (ii) the record and result of the informal disciplinary proceedings described in (a) above shall be expunged from all permanent personnel or employment files of the subject official or employee after one year in which such person has not been penalized as a result of any subsequent formal or informal disciplinary proceedings.**
> c. The expungement of records and results of informal disciplinary proceedings described in (b) above applies only to those informal disciplinary proceedings promulgated pursuant to this Executive Order and is not applicable to any of the records, results or procedures provided by law or collective bargaining agreement.
> d. The Inspector General of each agency shall be notified of the disposition of all disciplinary proceedings.

(Pet. Ex. 4) (emphasis added)

On November 22, 2010, the Grievant and representatives from the Union and the City signed an "Agreement of Penalty and Waiver of Rights" ("2010 Stipulation") stating that the Grievant "failed to conduct a proper sweep of the vessel on August 17, 2010 in violation of paragraphs 31, 47, 2 and 1 of the Department's Code of Conduct." (Pet. Ex. 6) Pursuant to this document, "the parties agree[d] to resolve this matter without a formal disciplinary proceeding," and grievant agreed to the forfeiture of four days of annual leave. (Pet. Ex. 6) The 2010 Stipulation also stated, in pertinent part:

> [I]t is agreed, understood, and acknowledged that Alan Csorba is irrevocably waiving any and all rights he may have pursuant to New York Civil Service Law, any other applicable laws, statutes, rules, regulations and contractual agreements which pertain to disciplinary action against New York City employees. This document is executed in consideration of the Department's resolution of the aforementioned charges without the furtherance of disciplinary action in this matter.

(Pet. Ex. 6)

On February 27, 2012, Grievant allegedly failed to conduct a proper sweep of the Hurricane Deck aboard the Staten Island Ferry Boat Spirit of America. Grievant was served with formal disciplinary charges regarding the alleged incident on or about April 19, 2012, and DOT initiated a disciplinary hearing with the City of New York Office of Administrative Trials and Hearings in July of 2012. According to the Union, in or around July 2012, Grievant served DOT with a discovery request. On July 31, 2012, DOT's response stated that on August 17, 2010, Grievant forfeited four annual leave days for failing to perform a proper security sweep, and that DOT would provide specific documents at a later date.

On November 20, 2012, the Union filed a grievance challenging the failure of the City to remove the 2010 Stipulation from the Grievant's personnel file. The grievance stated, in pertinent part:

> DOT disciplined [Grievant] pursuant to Executive Order 16, § 6(b), entering into a stipulation of settlement whereby [Grievant] accepted a predetermined penalty, the forfeiture of four (4) days of annual leave on November 22, 2010. The resolution of the aforementioned case was informal because no disciplinary charges were ever filed against [Grievant] and [Grievant] is [a] permanent civil servant ... DOT now refuses [to] expunge the record and the result of the informal disciplinary proceeding even though Grievant was not disciplined for similar conduct for one year after entering into the stipulation of settlement. This is in violation of Article VI, § 1(b) of the CBA. DOT is now seeking to use the informal discipline against [Grievant] in an effort to terminate his employment.

(Pet. Ex. 2) The grievance was denied at Steps I through III.[1]

On April 30, 2013, during the period in which the grievance was being processed, the Grievant signed a "Stipulation and Agreement" ("2013 Stipulation") relating to the February 27, 2012 incident. Grievant agreed to a thirty-day suspension without pay, a bid restriction through October 31, 2013, and a one-year probationary period commencing on the April 2014 bid. Additionally, the 2013 Stipulation included waiver language substantially similar to the waiver language in the 2010 Stipulation.

On July 1, 2013, the Union filed its request for arbitration regarding the 2010 Stipulation. The request states that the issue to be arbitrated is:

> Whether the employer violated the CBA by refusing to expunge Alan Csorba's personnel file of informal discipline resolved under Executive Order 16?

(Pet. Ex. 2) As relief, the Union seeks "the grievant to be made whole in all respects, including but not limited to expunging his personnel file of all informal discipline." (*Id*.)

[1] The Union asserts that a Step II request was filed; however, no Step II decision was issued. The grievance was denied at Step III on June 13, 2013.

POSITIONS OF THE PARTIES

City's Position

First, the City argues that the grievance is not arbitrable because the Grievant expressly waived any rights to expungement that he may have had when he entered into the 2010 and 2013 Stipulations with DOT. The City maintains that the 2010 Stipulation only provides for use of the agreement as evidence for the purposes of enforcing the obligations contained within the 2010 Stipulation. The 2010 Stipulation does not reserve any arbitration rights nor does it reserve any right to expunge personnel records. Additionally, the City argues that by signing the 2013 Stipulation, Grievant agreed to a thirty-day disciplinary suspension without pay and waived recourse to the grievance or contractual disciplinary procedures available to him. Therefore, the Grievant waived his rights regarding the discipline, its imposed penalty, and his rights to challenge the imposed penalty based on his total disciplinary history.

Second, the City argues that the Union failed to establish the requisite nexus between the DOT's failure to expunge the Grievant's disciplinary record and the Agreement. The City maintains that EO 16, the written provision the Union cites as having been violated, was amended by EO 78, and neither iteration applies to this case. The City argues that EO 16 and 78 only provide a procedure for informal discipline undertaken by an agency's Inspector General. In addition, the City maintains that EO 16 and 78 pertain only to those matters related to the "elimination of corrupt or other criminal activity, conflicts of interest, unethical conduct, misconduct and incompetence" and that the expungement of records "applies only to those informal disciplinary proceedings promulgated pursuant to this Executive Order and is not applicable to any of the records, results or procedures provided by law or any collective bargaining agreement." (Pet. Ex. 4) Finally, the City contends that Grievant's discipline was not

taken pursuant to either EO 16 or 78. Thus, the City maintains that the Union has failed to identify a provision that has been violated. Without a violation, the Union cannot establish a nexus between the DOT's failure to expunge the 2010 Stipulation from the Grievant's personnel file and Article VI, § 1(b) of the Agreement. As such, the City concludes that the Board should grant the petition challenging arbitrability.

Union's Position

The Union argues that EO 16 and 78 apply to all City agencies under the control of the Mayor's office, including DOT. Therefore, the informal discipline provisions of EO 16 and 78 apply to DOT employees. Second, the Union argues that the action being challenged and grieved stemmed from the informal discipline issued under and pursuant to EO 16 and 78 §6. According to the Union, it is undisputed that the Grievant was not served with formal disciplinary charges with regard to his 2010 misconduct, and that the Grievant accepted a predetermined penalty in lieu of DOT initiating formal disciplinary proceedings. Additionally, the Grievant was not the subject of any subsequent formal or informal disciplinary proceedings within one year. Finally, the Union notes that the discipline imposed on the Grievant in the 2010 Stipulation was not pursuant to any of the records, results, or procedures provided by law or by collective bargaining agreement. Therefore, the Union claims that it must be informal discipline subject to EO 16 and 78. Consequently, the Union contends that there is a clear nexus between EO 16 and 78 and the Grievant's right to have the 2010 discipline expunged from his personnel record.

Further, the Union rejects the City's claim that the grievance is not arbitrable because of a purported waiver of the Grievant's rights via the 2010 and 2013 Stipulations. Specifically, the Union notes that the waiver clause in the 2013 Stipulation does not include any language regarding the instant grievance, despite DOT's familiarity with same. Additionally, the waiver

clause in the 2013 Stipulation specifically states that, "[t]his document is executed in consideration of the Department's resolution of the aforementioned charges ***without the furtherance of disciplinary action in this matter***." (Pet. Ex. 7)(emphasis added) Therefore, the Union argues that the 2013 Stipulation solely pertains to the 2013 matter and has no impact on the instant grievance stemming from the incident in 2010.

Finally, the Union argues that the expungement issue set forth in the request for arbitration "is separate and distinct from disciplinary action." (Ans. 14) Therefore, the request for arbitration does not seek to litigate the disciplinary issues underlying the 2010 and 2013 Stipulations. Accordingly, the Board should grant the request for arbitration.[2]

DISCUSSION

It is well-established that the NYCCBL § 12-302 sets forth the statutory policy of the City to favor the use of impartial arbitration. *See DC 37, L.* 983, 6 OCB2d 17, at 8 (BCB 2013) (quoting *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011)).[3] NYCCBL § 12-309(a)(3) grants this Board the exclusive authority "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to [§] 12-312 of this

[2] The Union also argued that its grievance was timely filed; however, the City did not raise any issue of timeliness of the underlying grievance in its petition challenging arbitrability. Further, whether a grievance is timely, "is an argument for the arbitrator to consider, not for the Board." *SSEU, L. 371*, 3 OCB2d 53, at 8 (citing *NYSNA*, 69 OCB 21, at 5-6 (BCB 2002)).

[3] 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.

chapter."[4] 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.* 983, 6 OCB2d 17, at 8 (BCB 2013) (internal quotation marks omitted); *see also CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968). 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." *Id*. (citations omitted)

We have 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.

DC 37, L. 983, 6 OCB2d 17, at 8-9 (BCB 2013)(quoting *NYSNA*, 2 OCB2d 6, at 9 (BCB 2009)) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969).

In the instant matter, we find that the first prong is satisfied because the parties have obligated themselves to arbitrate their controversies through the grievance procedure as set forth in the Agreement and because there is no claim that the arbitration at issue would violate public policy, statutory, or constitutional restrictions. Therefore, we turn to the two remaining inquiries: whether the Union has demonstrated a reasonable nexus between the subject matter in dispute and the source of the alleged right; and whether Grievant waived his right to arbitration in this instance.

Where, as here, the City challenges the nexus, we must consider whether the Union has met its burden of establishing a "*prima facie* relationship between the act complained of and the

[4] NYCCBL § 12-312 sets forth the parties' rights and responsibilities in arbitration and the Board's role in administering an arbitration panel.

source of the alleged right, redress of which is sought through arbitration." *COBA*, 45 OCB 41, at 12 (BCB 1990); *see also Local 924, DC 37*, 1 OCB2d 3, at 12 (BCB 2008). The Board has held that when parties dispute the effect of a term in an EO and "[e]ach interpretation is plausible; the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990); *see also Local 924, DC 37*, 1 OCB2d 3, at 12 (BCB 2008).

In the instant case, the parties dispute the applicability of several provisions of EO 16 and 78.[5] We need not resolve this dispute, we merely determine whether the Union's allegations raise a reasonable argument that the EOs apply and have been violated. The City maintains that EO 16 only provides a procedure for "informal" discipline undertaken by an agency's "Inspector General" and that the discipline that resulted in the 2010 Stipulation was neither informal nor promulgated by an Inspector General. However, the express language of the 2010 Stipulation states that "the parties agree[d] to resolve this matter without a formal disciplinary proceeding." Therefore, if the 2010 Stipulation was not formal discipline, it could reasonably be considered informal discipline. Further, after examination of the EOs, particularly EO 16 §6 and EO 78 §6, it is apparent that DOI left many, if not all, matters relating to informal discipline to the Agencies.[6] Therefore, it is not clear that §6 of EO 16 and 78 applies only to informal discipline promulgated by DOI or an Inspector General.

Moreover, EO 16 and 78 expressly pertain to those matters, which are related to the "*elimination of corrupt or other criminal activity, conflicts of interest, unethical conduct,* ***misconduct and incompetence*** *... applies only to those informal disciplinary proceedings … and*

[5] Here, it is undisputed that DOT is subject to EO 16 and 78.

[6] The language of EO 16 § 6(c) and EO 78 § 6(d) stating that "The Inspector General of each agency shall be notified of the disposition of all informal disciplinary proceedings" implies that a person or entity other than an inspector general could implement the discipline. (Pet. Ex. 3 & 4).

is not applicable to any of the records, results, or procedures provided by law or by collective bargaining agreement." (Pet. 9-10) (emphasis added). We find that it is plausible that the 2010 Stipulation could have been entered into under the procedures set forth in EO 16 and 78 if it was informal discipline as a result of misconduct or incompetence. Therefore, the necessary nexus between the issue of expungement of the 2010 Stipulation and Article VI, § 1 of the Agreement has been established. We find that the conflict between the parties' interpretations of EO 16 and 78 presents substantive questions of interpretation for an arbitrator to decide. *Local 3, IBEW,* 45 OCB 59.

As to the waiver issue, we are not persuaded that the Grievant waived his alleged right to expungement by entering into the 2010 Stipulation. The 2010 Stipulation refers to the stipulation as a Penalty Agreement in the title, is referenced in the body thereof as a penalty agreement, and states that the Grievant agrees to a forfeiture of four days annual leave to be implemented upon execution. In contrast, any right to expungement arises out of the language of EO 16 and 78 and that potential right comes into play only if no further disciplinary action is taken against the Grievant one year after the execution of the Stipulation. The Board does not find under these circumstances that the language of the waiver clearly extends to the right to expungement available under the circumstances prescribed in EO 16 and EO 78.[7]

Therefore, having found a nexus, it is for the arbitrator to determine if the right to expungement of informal discipline from personnel files created by EO 16 and 78 is applicable to the 2010 Stipulation. We find that the Union has met its burden, and we deny the City's petition challenging arbitrability.

[7] The Board finds that this request for arbitration focuses solely on the 2010 stipulation. Therefore, we do not find that the waiver in the 2013 Stipulation is relevant or controlling here.

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 City of New York Department of Transportation, docketed as BCB-3095-13, is hereby denied; and it is further

ORDERED, that the request for arbitration filed by the Local 333, United Marine Division, I.L.A., AFL-CIO on behalf of Alan Csorba docketed as A-14447-13, is hereby granted.

Dated: September 23, 2013
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER