DC 37, L. 2507, 6 OCB2d 6 (BCB 2013)

(Arb) (Docket Nos. BCB-3043-12 & BCB-3044-12) (A-14196-12 & A-14197-12)

Summary of Decision: The City challenged the arbitrability of two related grievances alleging that the FDNY violated the terms of the collective bargaining agreement and a side letter to that agreement when it rescinded a five-year recertification program for emergency medical services employees. The City argued that the matters are not arbitrable because neither the agreement nor the side letter requires the FDNY to bargain in order to implement, change, or rescind the program. The Union argued that the petition challenging arbitrability should be denied because the side letter requires the FDNY to implement a five-year recertification program upon the enactment of legislation providing the FDNY with the option to use this recertification method. The Board found that there was a nexus between the Union's claims and the cited contractual provisions. Accordingly, the City's petitions challenging arbitrability were denied, and the Union's requests for arbitration were 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 FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioners,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCALS 2507 & 3621,

Respondents.

DECISION AND ORDER

On September 4, 2012, the City of New York ("City") and the Fire Department of the City of New York ("FDNY") filed two petitions challenging the arbitrability of two related group grievances filed by District Council 37, AFSCME, AFL-CIO, on behalf of its affiliated Locals

2507 and 3621 (collectively, "Union").[1] In its requests for arbitration, the Union claims that the FDNY violated the terms of the collective bargaining agreement and an attached side letter between the parties when it rescinded a five-year recertification program for emergency medical services employees ("Grievants") and replaced it with a three-year recertification program.[2] The City argues that the matters are not arbitrable because neither the collective bargaining agreement nor the side letter requires the FDNY to bargain in order to implement, change, or rescind the five-year recertification program. The Union argues that the petitions challenging arbitrability should be denied because the side letter requires the FDNY to implement the five-year recertification program upon the enactment of legislation providing the FDNY with the option to use this recertification method. This Board finds that there is a nexus between the Union's claims and the cited contractual provisions. Accordingly, the City's petitions challenging arbitrability are denied, and the Union's requests for arbitration are granted.

BACKGROUND

The FDNY is a City agency responsible for protecting the lives and property of City residents and visitors as a first responder to fires, medical emergencies, and other types of public

[1] The petitions challenging arbitrability and the underlying grievances are identical except for the fact that one of the requests for arbitration was filed on behalf of Local 2507, which represents employees in the titles "Emergency Medical Specialist - EMT" and "Emergency Medical Specialist - Paramedic," and the other one was filed on behalf Local 3621, which represents employees in the title "Supervising Emergency Medical Specialist." Pursuant to § 1-12(m)(1) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), these two matters are hereby consolidated because they concern identical facts, claims, and defenses. The parties were notified of the consolidation and did not object.

[2] On June 15, 2012, the Union filed a related verified improper practice petition, docketed as BCB-3025-12, alleging that the City and the FDNY violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally discontinuing the five-year recertification program and replacing it with a different three-year recertification program.

safety disasters. The Grievants are employees in the FDNY's Emergency Medical Service ("EMS"), which is the primary provider of pre-hospital emergency care in the City. The Grievants work in three civil service titles: Emergency Medical Specialist - EMT ("EMT"); Emergency Medical Specialist - Paramedic ("Paramedic"); and Supervising Emergency Medical Specialist ("EMS Supervisor"). EMTs and Paramedics provide timely pre-hospital emergency medical care and basic life support to anyone who requests and/or requires it; Paramedics additionally provide advanced life support. EMS Supervisors supervise the activities of EMTs and Paramedics in addition to performing the duties of these two emergency medical specialist titles. The Union is the certified collective bargaining representative of EMTs, Paramedics, and EMS Supervisors at the FDNY.

The City and the Union are parties to the Emergency Medical Services Agreement ("Agreement"), which expired on June 30, 2006, and remains in effect pursuant to the *status quo* provision of the NYCCBL. Article VII 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 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 terms and conditions of employment . . . .

(Ans., Ex. 1) (emphasis in original)

The instant dispute concerns the FDNY's recertification program for EMTs, Paramedics, and EMS Supervisors. Employees in all three titles are required by law to maintain various certifications and licenses established by the New York State Department of Health ("NYS DOH")

for the duration of their employment.[3] Between March 17, 1996, and July 13, 2007, EMTs, Paramedics, and EMS Supervisors were recertified pursuant to a three-year recertification program, which required each employee to attend training classes at the EMS Academy, demonstrate proficiency of skills, and complete practical and written examinations. During this time period, the Union's members were not eligible to participate in a five-year recertification program known as the New York State Pilot EMS Recertification Program because the underlying state law prohibited the participation of employees of a municipal ambulance services in cities with populations greater than one million. *See* New York State Public Health Law § 3002. The five-year recertification program allows EMS providers to implement ongoing training programs in lieu of a state examination every three years.

On April 21, 2006, during the negotiations that led to the Agreement, the parties entered into a side letter ("Side Letter") memorializing their support for legislation that would allow employees in the three titles to participate in a five-year recertification program. The Side Letter was subsequently attached to the Agreement, which was executed on December 10, 2007. Specifically, the Side Letter provides that:

> The parties agree to jointly support legislation that will enable the FDNY to create a five year certification program for EMTs and Paramedics.
>
> The parties agree to jointly take steps necessary to ensure that the NYS Department of Health 5 year Certification pilot program is opened up to include the New York City Emergency Medical Service, and that the NYS DOH extend the pilot program as may be required.
>
> If the parties are unsuccessful, for whatever reason, in implementing

[3] EMTs and EMS Supervisors are required to maintain a valid NYS DOH EMT-Basic certificate or a valid NYS DOH EMT-Paramedic certificate. Paramedics must maintain a valid NYS DOH Advanced EMT-4 Paramedic certificate as well as a New York City Regional Emergency Medical Advisory Committee ("NYC REMAC") certificate.

> such change including if the provision is overturned by a judicial or administrative tribunal, the parties agree to reopen the contract to bargain over alternative savings that are equivalent in value to which the union was credited under the contract.[4]

(Pet., Ex. 9) The parties also included this language in a Memorandum of Agreement ("MOA") entered into on April 21, 2006. The parties represented that, subsequent to the execution of the Side Letter and the MOA, legislation was enacted enabling the FDNY to create a five-year recertification program for EMTs and Paramedics.

On July 13, 2007, the FDNY issued a new policy and procedure for the maintenance of required certifications and licenses that required eligible EMS employees to participate in a "5 Year Continuing Medical Education (CME) Recertification Program" ("five-year recertification program" or "program"). (Pet., Ex. 8) The FDNY's five-year recertification program allowed EMTs, Paramedics, and EMS Supervisors who were in "continuous practice," had "demonstrated competence in applicable behavioral and performance objectives," and had "demonstrated completion of appropriate continuing education, to renew [their] certification for five years." (Pet. ¶ 25) Pursuant to the program, eligible employees were required to participate in drills, instruction periods, training programs and other requirements established by the FDNY. For example, participants were required to complete "at least 130 hours of EMS training including but not limited to pediatrics, geriatrics, environmental emergencies, legal issues, emergency vehicle operation, and medical emergencies." *Id*. Failure to participate in these activities or otherwise comply with the requirements of the program would subject an employee to disciplinary action and/or termination for failure to maintain his or her required certification.

According to the Union, in early 2012 the FDNY informed the Union that it no longer

[4] During the negotiations that led to the Agreement, the parties sought productivity savings in order to fund additional compensation for bargaining unit members. The parties agreed to the Side Letter in order to realize the purported savings.

wished to continue its five-year recertification program and desired to return to a three-year challenge refresher program. The parties met a few times to discuss the FDNY's contemplated change. The Union was not opposed to the change in principle, but sought assurances regarding certain aspects of the program. The City claims that these assurances concerned aspects of training that were not requirements of the three-year challenge refresher program.

On February 15, 2012, the Union alleges that the FDNY unilaterally rescinded its five-year recertification program. It is undisputed that, on March 1, 2012, the FDNY transitioned into a three-year challenge refresher program for recertification. This new program requires all bargaining unit members to take a written test every three years in order to be recertified. In contrast, the five-year recertification program did not require any such written test.

On April 4, 2012, on behalf of each affiliated local, the Union filed two Step III grievances, alleging that the FDNY violated, misapplied, and misinterpreted MOA § 9 when it unilaterally changed its five-year certification program to a three-year challenge refresher program. On April 25, 2012, a Review Officer from the New York City Office of Labor Relations denied the grievances. Accordingly, on May 18, 2012, the Union filed two requests for arbitration, both of which describe the grievances to be arbitrated as:

> Whether the employer, the New York City Fire Department, violated the EMS Agreement and the April 21, 2006 side letter when it rescinded the 5 year recertification program, and if so, what shall be the remedy?

(Pet., Ex. 3) As relief, the Union requests that an arbitrator "[r]einstate [the] 5 year recertification program, order FDNY to bargain over any changes to [the] program, and in all other ways make [the] grievants whole." (*Id*.)

POSITIONS OF THE PARTIES

City's Position

The City argues that the grievance is not arbitrable because the Union has failed to establish the requisite nexus between the employer's decision to return to the examination process contained in the three-year challenge refresher program and any alleged rights contained in the Agreement, MOA § 9, and/or the Side Letter. MOA § 9 only concerns the parties' support of legislation. Because the grievance does not concern legislation, there is no application or interpretation of the terms of the Agreement for an arbitrator to make.

The City maintains that the essence of the Union's grievance is a claim that the City failed to bargain under MOA § 9 and the Side Letter when the FDNY adopted and applied the three-year challenge refresher program. Such an assertion, however, is beyond the scope of the definition of a grievance and is not reviewable via the arbitration process. Although the Union contends that the City's failure to bargain violated MOA § 9, the terms of the MOA do not require or even contemplate bargaining before the implementation, rescission, or changing of certification and/or training programs. Accordingly, the City asserts that the Union has failed to establish a nexus between the subject of its grievance and MOA § 9.

Similarly, assuming *arguendo* that the Side Letter is part of the Agreement, the City maintains that the terms of the Side Letter also do not establish the requisite nexus. According to the City, the Side Letter only requires the parties to "jointly support legislation that will enable the FDNY to create a five year certification program" and "to ensure that the . . . Certification pilot program is opened up" to EMS employees at the FDNY. (Pet. ¶ 43) (citing Pet., Ex. 9) The City maintains that the Side Letter neither grants any grievance rights regarding the creation or implementation of the five-year certification program nor imposes any obligations upon the City regarding the Union's grievance rights.

Union's Position

The Union argues that there is a nexus between the Union's claim and the cited provisions, and, therefore, it is for an arbitrator to decide whether a contractual violation occurred. Article VII, § 1(a), of the Agreement defines a grievance as "a dispute concerning the application or interpretation of the terms of this Agreement." (Ans., Ex. A) The Side Letter is physically attached to the Agreement and incorporated by reference. Therefore, the Union argues that misinterpretations and/or violations of the Side Letter are encompassed within the Agreement's definition of a grievance.

Contrary to the City's assertions, the Union argues that the Side Letter does more than merely create an agreement to support the enactment of legislation because it states that "[i]f the parties are unsuccessful, for whatever reason, in *implementing such change* . . . ." (Ans. ¶ 26) (citing Pet., Ex. 9) (emphasis added) According to the Union, it is for an arbitrator to determine whether "such change" includes the implementation of the five-year recertification program after legislation is enacted. The Union contends that it would be a "tortured and irrational reading" of the Side Letter if it were interpreted so as to only require the parties to support legislation that would merely give the FDNY the option to use the five-year recertification program. (Ans. ¶ 28) The Union questions why the parties would support the legislation "[i]f the parties had no intention of implementing the five-year recertification program once the legislation was passed." (*Id*.)

DISCUSSION

The NYCCBL 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." NYCCBL § 12-302; *see also 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 task of making threshold determinations of substantive arbitrability." *ADW/DWA*, 4 OCB2d 21, at 10 (quoting *DEA*, 57 OCB 4, at 9-10 (BCB 1996)); *see also* NYCCBL § 12-309(a)(3). 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).

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 (BCB 1976). 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 disputes concerning the application or interpretation of the Agreement's terms and claimed violations, misinterpretations, or misapplications of the rules or regulations, written policies, or orders of the FDNY affecting terms and conditions of employment. The issue that the Union seeks to arbitrate is whether the FDNY violated the terms of the Side Letter when it unilaterally rescinded the five-year recertification program and implemented a three-year challenge refresher program without bargaining. In order for the grievance to be arbitrable, this Board must find a reasonable relationship between the Union's claim and the cited provisions. For the reasons set forth below, we find that the requisite nexus has been established.

The grievance asserts that the FDNY's unilateral rescission of the five-year recertification program violated the Side Letter. During negotiations, the parties agreed to jointly support legislation enabling EMTs and Paramedics to participate in the five-year recertification program. The Side Letter anticipates that if the parties are successful in securing the legislation, it will be made available to the Grievants. Moreover, the Side Letter contains the express right to reopen

the Agreement in the event that the City is unable to implement the five-year recertification program, even if caused by external events, such as a judicial invalidation of the legislation. Thus, there is a reasonable relationship between the language of the Side Letter and the question of whether the provisions require the FDNY to continue the five-year recertification program in the absence of bargaining.

Consequently, for the reasons stated above, we deny the City's petitions challenging arbitrability and grant the Union's requests 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 petitions challenging arbitrability filed by the City of New York and the Fire Department of the City of New York, docketed as BCB-3043-12 and BCB-3044-12, are hereby denied; and it is further

ORDERED, that the requests for arbitration filed by District Council 37, AFSCME, AFL-CIO, Locals 2507 and 3621, docketed as A-14196-12 and A-14197-12, are hereby granted.

Dated: March 6, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

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MEMBER