Detectives Endowment Association, 61 OCB 10 (BCB 1998) [Decision No. B-10-98 (Arb)], aff'd, City of New York v. Detectives Endowment Association, No. 401478/98 (Sup. Ct. N.Y. Co. Oct. 23, 1998).

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,	:	
	:	Decision No. B-10-98
Petitioner,	:	Docket No. BCB-1927-97
	:	(A-6729-97)
-and-	:	
	:	
DETECTIVES ENDOWMENT ASSOCIATION,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On July 28, 1997, the New York City Police Department and the City of New York (hereinafter collectively referred to as "City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Detectives Endowment Association ("DEA" or "Union"). The Union filed an answer on August 28, 1997. The City filed its reply on October 10, 1997. The Union filed a sur-reply on October 21, 1997. The City filed its objection to the sur-reply on October 23, 1997.[1]

[1] The Office of Collective Bargaining Rules (Title 61, §1-07, of the Rules of the City of New York) do not provide for the filing of sur-replies. It is the Board's policy not to encourage the filing of pleadings subsequent to the reply. However, in the instant matter, we conclude that the City set forth a new legal theory in its reply when it asserted that the issue has already been litigated in an Article 78 proceeding and that the case has been brought in the wrong forum. It also revealed the existence of Interim Order 47, which the City argues revokes Interim

(continued...)

Background

Prior to March 30, 1995, the New York City Police Department ("NYPD" or "Department"), the Housing Authority Police Department and the Transit Authority Police Department existed as separate entities. On July 20, 1989, the City and the DEA signed a Memorandum of Agreement ("MOA") which provided that police officers assigned to investigative duties in a Category A unit for a period of 27 months would be designated as third grade detectives. Police officers assigned to investigative duties in a Category B unit for a period of 54 months would be designated as third grade detectives. At the time it was passed, this agreement applied only to members of the NYPD. Interim Order 60 ("I.O. 60"), a Career Program for police officers, was incorporated by reference into the MOA, and established the criteria for advancement to Detective.

On January 18, 1991, an amendment to §14-103(2) of the New York City Administrative Code (hereinafter referred to as the "18 month law") became effective. It reads:

> Any person who has received permanent appointment as a police officer and is temporarily assigned to perform the duties of a detective shall, whenever such assignment exceeds 18 months, be appointed as a detective and receive the compensation ordinarily paid a detective performing such duties.

On March 30,1995, the functions of the Housing and Transit Authority Police Departments were transferred to the NYPD by the Mayor's Executive Order No. 19. According to the Executive Order, the transfer was to be consistent with the terms and conditions of a Memorandum of

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[1](...continued)
Order 60. Thus, to the extent it addresses these questions, the Union's sur-reply will be considered. As such, any arguments raised in the sur-reply that were not directly responsive to the issues raised in the reply will not be considered by the Board in rendering its decision. This includes arguments relating to the 1989 Memorandum of Agreement.

Understanding[2] between the parties.

Following the transfer of functions, the Union alleges that the computation of time credited to detectives for prior service in accordance with the 18 month law was being inequitably applied. According to the Union, detectives that were assigned to the original NYPD prior to the transfer of functions received retroactive seniority credit for service as a detective over and above the 18 months provided for in the law, and detectives formerly assigned to the Transit and Housing Authority did not.

On April 12, 1995, Interim Order 47 ("I.O. 47") was issued, revising the Career Program's eligibility point system for police officers. *Inter alia*, I.O. 47 provides that, "I.O. 60, 60-1, 60-2, 60-3 and 60-4, series 1986 are REVOKED." (Emphasis in original).

On July 2, 1996, the DEA initiated a Step III grievance in which it charged that

> ...members of the NYPD who were former police officers and/or detectives, assigned to the Transit and Housing Police Departments, will not be considered for retroactive seniority time or monies even though they were assigned to investigative tracks, as it relates to the "18 month law."
>
> This organization was told some months ago that Housing and Transit people would receive their retro dates when the Employee Management Division finished computing NYPD personnel retro dates. The reason given was that the personnel folders for Housing and Transit PD were delayed in coming to the NYPD. This information was passed on to those former members of Housing and Transit PD whenever they called this office and through the delegate body at the regular scheduled monthly DEA meetings....This determination re. not crediting former Housing and Transit detectives with retro time came to the attention of this organization at an informal grievance board meeting on June 27, 1996. On July 1, 1996, Jack Healy, Vice President of the DEA and myself were informed that this decision was made some months ago. This organization was never informed

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[2] The Memorandum of Understanding ("MOU"), dated March 31, 1995, was entered into by the Board of the Metropolitan Transportation Authority, the Board of the New York City Transit Authority and the City of New York. The MOU represents an agreement to effectuate the merger of the Transit Authority Police Department and the NYPD.

of that decision...

The DEA requested that OLR intercede on behalf of the detectives to insure that they received the proper retroactive seniority time and monies.

On August 12, 1996, Deputy Chief John P. Beirne responded to the grievance in a letter addressed to DEA Secretary Alfred J. Marini. The OLR concluded that because the provisions of the law were enacted prior to the merger, the 18 month law was never intended to affect the Housing and Transit police officers. At the time the law was passed, Housing and Transit police officers were employees of the Authority and not the NYPD. Therefore, he decided that this was not a proper subject for a grievance.

On September 17, 1996, the DEA filed a Step IV grievance with the Office of the Police Commissioner, which was denied on April 18, 1997, on the grounds that there was no violation, misinterpretation, or misapplication of the current collective bargaining agreement, nor had there been any violation, misinterpretation, or misapplication of the rules or procedures of the Department.

On May 8, 1997, the DEA filed a request for arbitration with the Office of Collective Bargaining. The concise statement of the grievance to be arbitrated was, "Failure of employer to provide all contract benefits to detectives formerly assigned to Transit and Housing Police Departments who are now members of the Police Department by order of the Mayor." The Union alleges violations of, "Article XXVIII, benefits employees are entitled to by law. Article XXI sections 1 and 2. Failure to equitably apply contract terms to all members of unit. All provisions of contract not provided. (Contract on file at OCB). See copy of Mayor's Executive Order 19,

attached."[3]

Positions of the Parties

City's Position

The City maintains that the Union has failed to allege any nexus between the act complained of and the provisions of the Agreement cited by the Union. The City acknowledges that it has agreed to arbitrate grievances with the Union, as defined by Article XXI of the agreement, and that the obligation to arbitrate encompasses claimed violations of any or all of the provisions of the parties' agreement. However, the City asserts that the DEA, in their request for arbitration, failed to identify any provision of the contract which provides for a benefit allegedly being denied. They contend that the only benefits identified by the Union are those provided by law, and there is no claim that they have been incorporated into the contract.

The City also contends that the crux of the grievance is not that there has been a violation of the collective bargaining agreement, but rather a violation of § 14-103 of the New York Administrative Code, in that the DEA is seeking compliance with the 18 month law. The City asserts that the definition of a grievance as set forth in Article XXI, Section 1 of the contract between

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[3] Article XXVIII states: No Waiver: Except as otherwise provided in this Agreement, the failure to enforce any provision of this Agreement shall not be deemed a waiver thereof. This Agreement is not intended and shall not be construed as a waiver of any right or benefit to which employees are entitled by law.

Article XXI states in pertinent part: Section 1. Definitions: a. For purposes 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 rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1(a), the term "grievance" shall not include disciplinary matters.

the parties does not include a violation of the Administrative Code, and that Board precedent precludes the expansion of the duty to arbitrate beyond the scope established by the parties.

Additionally, the City claims that there is nothing in Executive Order No. 19 or its Memorandum of Understanding which addresses the issue of credit of time or the right to benefits after the merger of the three police departments, therefore, the Union has failed to demonstrate the requisite nexus between the act complained of and the source of the alleged right, redress of which is sought through arbitration. They also claim that the Union cannot rely on Interim Order 60 ("I.O. 60") as a platform to assert their grievance, because I.O. 60 was revoked by Interim Order 47 ("I.O. 47"), dated April 12, 1995.

The City also challenges the DEA's standing to assert the grievance. In this connection, the City claims that the Union is trying to grieve a violation of the 1989 MOA that it alleges did not apply to the grievants and expired in 1991.

In its reply, the City asserted for the first time that this dispute, concerning the right to receive retroactive credit for former members of the Transit and Housing Police Departments, has been brought in the wrong forum and has already been fully litigated before a court of law. To this end, the City cites Ferguson v. Barrios-Paoli, 3/22/96 N.Y.L.J. 28, (col. 1), where former police officers of the New York City Transit Authority Police Department instituted an Article 78 proceeding, claiming that they had not been credited with the proper retroactive service credit upon the merger of the Transit Authority and the NYPD. The court held that the petitioners' decision to proceed under Article 78 of the CPLR was the only appropriate forum for the dispute under the circumstances. The City claims that the instant matter is the same as that in Ferguson and thus, the

request for arbitration should be denied.

Finally, the City asserts that the Union, in its answer, raised for the first time a violation of Article VI on longevity adjustments, Article IX on Holiday Payment, Article III on Overtime, Article X on Leaves and Article XI on Vacations. The City refers to these claims as a "last effort grasp at a contract violation," and, accordingly, they should be disregarded.

Union's Position

The DEA maintains that the City of New York has failed to credit prior service in the New York Housing and Transit police departments even though it had been concurrently crediting the original NYPD officers and detectives. It asserts that the City's flat refusal to consider prior service for ex-New York Housing and Transit detectives fails to provide the class of grievants with many, if not all, of the economic benefits of the contract, such as longevity payments, holiday pay, overtime and leaves and vacations, as years of service form a base for determining those contract benefits. Granting one category of detectives retroactive credit for service and not another results in an inequitable application of the provisions of the collective bargaining agreement. Therefore, a sufficient nexus exists between the subject matter of the grievance and the rights prescribed by the contract, as required by the Board of Collective Bargaining ("Board").

The Union claims arbitration, not court action, is the proper venue, as the parties have a dispute based on their collective bargaining agreement, and all administrative remedies arising out of that contract must be exhausted before resorting to court. To this extent, the DEA argues that the NYPD career program for police officers as implemented by the 1989 Memorandum of Agreement and set forth in I.O. 60 still exists (as modified by the 18 month law).

In response to the City's assertion that it lacks standing, the Union argues that once the merger of the departments was in effect on March 30, 1995, the DEA had a right to protect the newly merged members of its unit. The Union characterizes the grievance as the denial of consideration of retroactive service to the former Housing and Transit employees when such benefits are granted to members of the NYPD for service time prior to the merger date of March 30, 1995. Thus, the Union argues, inequitable application of the contract provisions that the Union grieves arose subsequent to the merger, not prior to it.

In its sur-reply, the Union answered the claims by the City that the instant matter is substantially similar to one already litigated in a court of law. The Union acknowledges the holding of the court in Ferguson, noting that the court eventually found that denying the detectives retroactive credit was arbitrary and capricious. However, the Union emphatically disputes the City's framing of the facts so that the instant matter appears analogous. The Union indicates that in Ferguson, individual employees, not the Union, brought the Article 78 proceeding because they had no standing to take contract action on their own, and the PBA would not take contract action on their behalf because of a conflict. Therefore, the Union asserts, the conclusion by the City that the matter should be resolved in court and not arbitration is incorrect.

Discussion

As a preliminary matter, we address the issue of standing. The City contends that the DEA does not have standing to represent the grievants in this matter, as the claims arose prior to the merger and rely on the expired MOA that applied only to members of the NYPD. The DEA rebuts the City's claim by asserting that the grievance focuses on the inequitable application of contract

provisions as between NYPD members and the former Housing and Transit Authority members after the merger took effect. We agree with the City that rights under the terms of the 1989 Memorandum of Agreement are not subject to arbitration in the present case. However, inasmuch as the alleged inequitable application of the terms of the current collective bargaining agreement, the act complained of, did not occur until after the merger, and as the DEA is responsible for representing the former Transit and Housing Authority detectives now that they have been merged into the NYPD, and brought within the coverage of the DEA collective bargaining agreement, we find that the Union has standing to bring this grievance.

The City also argues that the same matter has already been litigated in the courts in the Ferguson case, and as such, the instant grievance has been brought in the wrong forum. The court held that the petitioners' decision to proceed under Article 78 of the CPLR was the only appropriate forum for the dispute. The Union rebuts the City's contention by drawing the Board's attention to the fact that the union involved had removed itself from the dispute due to a conflict, and the officers brought the action on their own. Therefore, the Union asserts, the conclusion by the City that the matter should be resolved in court and not arbitration is not correct.

We conclude that the underlying factual differences between the Ferguson case and the instant grievance are so great as to render the City's argument unpersuasive. An Article 78 proceeding may have been the only proper forum for individual grievants, with no rights as third parties to a collective bargaining agreement. However, in the instant proceeding, all involved are parties to a collective bargaining agreement which mandates that grievances founded on the contract should be sent to an arbitrator. Furthermore, we note that the court, in Ferguson, did not address any

issues relating to an alleged inequitable application of the terms of the contract. Thus, we find that the Union has brought the grievance in the proper forum, and that the instant issue has not been previously litigated.

We do not find that the Union's failure to specify the provisions of the Agreement that were being applied inequitably until its answer (Articles III, VI, X, IX and XI) denied the parties an opportunity to fully consider and attempt to resolve the issue at the lower steps of the contractual grievance procedure. Rather, we note that the DEA alleged early in the grievance procedure that the City was depriving the former Transit and Housing detectives of seniority time and monies by not granting the same retroactive credit as was given to the NYPD detectives.[4] Thus, we cannot find that the City lacked notice of this claim as it relates to the economic provisions of the Agreement. As we stated in Decision No. B-55-89,

> to interpret the framing of the Union's grievance as literally as the City suggests would be tantamount to our adoption of a strict pleading rule which would, in effect, defeat arbitrability although the nature of the underlying claim is clear. Accordingly, our finding herein is not to be construed as permitting a party to belatedly broaden the scope of its grievance. Rather, it is an acknowledgment that, in appropriate case, we may find that the City was or should have been on notice of the nature of a claim, based upon the totality of the grievance as expressed by the Union. This conclusion is consistent with the clear mandate of Section 12-302 of the NYCCBL and with our own well established policy of favoring the resolution of disputes through impartial arbitration [citations

[4] We note the grievance, dated July 2, 1996, lodged with Deputy Chief John Beirne, Commanding Officer of the Office of Labor Relations by the DEA: "[Transit and Housing police officers] will not be considered for retro-active seniority time or monies even though they were assigned to investigative tracks, at it relates to the '18 month bill'" and, "[I]n addition, they were told that would [sic] receive the appropriate retro-active dates of designation to detective along with the appropriate monies due them." and, "[the Transit and Housing police officers] are entitled to the same benefits that the NYPD personnel have been receiving."

omitted].[5]

It is the policy of the New York City Collective Bargaining Law ("NYCCBL") to promote and encourage arbitration as the selected means for the adjudication and resolution of disputes.[6] The Board of Collective Bargaining ("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.[7] In determining questions of arbitrability, it is the function of this Board to decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the controversy at issue is within the scope of that obligation.[8]

It is well-settled that when challenged, a union must establish a nexus between the act complained of and the contract provisions it claims to have been breached.[9] Once an arguable relationship is shown, this Board will not consider the merits of a case; it is for the arbitrator to decide the applicability of the cited provisions.[10]

With respect to the Union's claim that the City has violated Articles XXVIII and XXI, sections 1(a)(1) and 1(a)(2), of the parties' collective bargaining agreement, we note that the parties

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[5] See also, Decision Nos. B-44-91; B-31-90; B-9-89; B-44-88; B-35-87; B-14-87; B-21-84; B-6-76.

[6] See NYCCBL §12-302.

[7] Decision Nos. B-60-91; B-31-90; B-11-90; B-10-90; B-49-89; B-35-89; B-41-82.

[8] Decision Nos. B-31-90; B-6-88.

[9] Decision Nos. B-29-91; B-2-91; B-41-90; B-10-90; B-27-89.

[10] Decision Nos. B-46-91; B-29-89; B-54-90; B-11-90.

do not dispute that a claimed violation of these provisions is within the scope of their agreement to arbitrate. The City argues, however, that the Union has failed to establish the requisite nexus between the contract and the complained of act because the contract does not address the issue of granting retroactive time credit for prior service. They argue that the gravamen of the Union's claim is not a violation of the contract itself, but a violation of Administrative Code §14-103, and as such, a violation of the Administrative Code is not arbitrable.

Where a Union cites a contract provision which arguably deals with the subject matter at issue, it has presented all of the elements appropriate to the limited scope of the Board's inquiry in matters of substantive arbitrability.[11] The DEA claims that "an inequitable application of the provisions of [the] Agreement" [Article XXI, § 1(a)(1)] occurs when prior service in the Transit and Housing Authority has not been factored into the formula for determining entitlements to seniority time and monies pursuant to Articles Article VI on longevity adjustments, Article IX on Holiday Payment, Article III on Overtime, Article X on Leaves and Article XI on Vacations in the collective bargaining agreement. Inasmuch as the Union has asserted that an inequitable application of the provisions of the contract is a consequence on the City's actions, they have met their burden in establishing a nexus between the act complained of and provisions of the collective bargaining agreement.

The City asserts that the "gravamen of the instant grievance" presented by the Union is a claimed failure by the City to comply with the 18-month law, §14-103 of the Administrative Code. It may be that such a claim does form an element of the dispute between the parties herein. To the

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[11] Decision Nos. B-72-89; B-33-90; B-46-91; B-27-93.

extent that it is an element, we find it to be a severable one, since it is not the only alleged basis for the contractual grievance. We stress that the question of whether there has been compliance with, or rather, a violation of the Administrative Code, is not to be considered by the arbitrator. The parties, in Article XXI of their agreement, have bound themselves to arbitrate, *inter alia*, a claimed "inequitable application of the provisions of this Agreement." They have not agreed to arbitrate claimed violations of the Administrative Code. In finding this matter arbitrable, therefore, our grant of arbitration is limited to the former claim and excludes the latter one. Redress, if any, for the latter claim must be sought in another forum. As to the former claim, however, whether the granting of certain contractual economic benefits (*e.g.,* longevity payments, holiday pay, overtime, and leaves and vacations) to some unit members but not others under all of the relevant circumstances constitutes an "inequitable application" of the agreement, is an appropriate question to be determined by an arbitrator.

We note the Union's assertion of I.O. 60, as a rule, regulation or procedure of the Department, as a basis for which this dispute should proceed to arbitration. However, we find that the plain language of I.O. 47 repealed I.O. 60 prior to the time that the Union filed its request for arbitration and its pleadings in this matter. As the provision on which the Union relies has been revoked, the dispute may not proceed to arbitration based upon that ground.

We believe that our dissenting colleagues' reliance on the limiting language of Article XXI, §9 of the Agreement (a section not mentioned by the City in its pleadings), and their suggestion that an arbitrator might violate that section by construing the Agreement to have been amended by §14-103 of the Administrative Code, or by changing the initial appointment dates of detectives who

were employed previously by the TA and the NYHA, are based upon speculation as to the rationale and remedy that might be adopted by an arbitrator. Clearly, an arbitrator is not restricted to awarding the specific remedy requested by a grievant. The possibility that an arbitrator might, in one party's view, misinterpret the Agreement and/or exceed his or her authority in fashioning an award cannot serve as a basis for precluding arbitration. Moreover, if the arbitrator does exceed his or her authority, relief will lie under Article 75 of the CPLR after the award is rendered.

Furthermore, we believe that the dissenting Members' conclusion that a nexus to the contract cannot be maintained without the Union's reliance on the purported amendment of the contract by the §14-103 of the Administrative Code, is based upon their view of the *merits* of the Union's claim, a matter that does not affect its arbitrability. In effect, they conclude that there cannot have been an inequitable application of the substantive provisions of the Agreement unless the Agreement has been amended by the Administrative Code, and that since it would be beyond the authority of an arbitrator to find that such an amendment has occurred, there cannot have been an arguable violation of the agreement. In contrast, we are satisfied that the Union's identification of specific economic benefits under the Agreement, the present payment of which allegedly differs depending on whether a Detective had previous investigative service in the NYPD or in one of the other forces that were merged into the NYPD, is sufficient to establish an arguable nexus to the claim of an inequitable application of the provisions of the Agreement. That finding is as far as this Board is permitted to go in determining a question of arbitrability. It is not our function to interpret the contractual term "inequitable application" or to evaluate the merit of the claim or the likelihood that there will be admissible evidence to support the claim before the arbitrator. Neither is the reason for the alleged

disparate treatment of Detectives a matter that can be considered by us. Perhaps there is a sound statutory reason for the alleged disparity; perhaps there is not. In any event, that reason goes to the merits of the Union's claim and not to its arbitrability.

Finally, the issue of whether this dispute properly is brought as a "class" grievance, as alleged by the Union, or more appropriately is limited to the one named individual, DeFilippis, as claimed by the City, is a matter to be determined by the arbitrator, based upon the evidence to be presented at the arbitration hearing. It has no bearing on the substantive arbitrability of the grievance. If the subject matter of the grievance is within the scope of the parties' agreement to arbitrate, the grievance is arbitrable, regardless of whether it affects one individual or the entire bargaining unit.

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 herein, be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration as to alleged contractual violations be, and the same hereby is, granted.

DATED: New York, New York
March 24, 1998

STEVEN DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME JOSEPH
MEMBER

MEMBER

MEMBER

DISSENT OF CITY MEMBERS

For the reasons set forth below, we respectfully dissent.

This case arose following the merger of the Transit and Housing Police Departments into the New York City Police Department (NYPD), which commenced on or about March 30, 1995. Prior to the merger, the police officers employed by Transit Authority(TA) and those employed by the New York Housing Authority (NYHA) were represented by the Transit Authority, PBA and the Housing Patrolmen's Benevolent Association, respectively, under their own collective bargaining agreement which were separate and apart from the collective bargaining agreement between the NYPD and the NYCPBA. At no time did Administrative Code Sections 14-103 apply to police officers or detectives employed by the TA or the NYHA.

The detectives employed by those authorities prior to the merger were represented by the Housing Patrolmen's Benevolent Association and by the Detective's Endowment Association, New York City Transit Police Department, respectively, under contracts separate and distinct from the DEA agreement which was and is limited to detectives employed by the NYPD. The dates of appointment to Third Grade Detective at the two authorities were governed by their respective collective bargaining agreements, the departments' practices and policies, as well as such laws as may have been applicable to their respective police forces, which did not include Administrative Code Sections 14-103.

Although the grievance at issue here purports to be filed on behalf of a class, the only grievance that was actually submitted in this matter was filed by DEA on behalf of a Detective Richard T. DeFilippis, who was employed by the NYHA prior to June 1995 and by the NYPD thereafter. While employed by NYHA, DeFilippis was not represented by DEA nor covered by its

collective agreement with NYPD. His grievance states:

> As outlined in the attached letter to this organization, Detective DeFilippis, formerly with the NYC Housing Police Department until the merger in June of 1995, states that he is entitled to retroactive investigative time. While in Housing, Detective DeFilippis was assigned to the Queens Narcotics Division, NYPD-OCCB from September, 1986 to October, 1988. From October 1988 to October 1989, he was assigned to the 73 Precinct RIP. From October 1989 to June 1995 Detective DeFilippis was assigned to the PSA #9 Detective Squad. Detective DeFilippis accumulated over twenty-seven and one half months of investigative time in February of 1989 and should have been promoted on or about that date. DeFilippis was promoted to detective investigator on June 29, 1990 after he had accumulated 46 months in the investigative track.
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> The first two paragraphs of the letter referred to above state:
>
> 1. I, Richard DeFilippis Shield # 5296, Tax # 912595 assigned to the 112 Detective squad do respectfully request that you adjust my investigative time for purposes of promotion and pay. The below listed dates and assignments were performed by me and should be reflected as per the Detective Bill guidelines at that time. I was assigned to the Housing PD until June 1995.
>
> | Assignment | From | To |
> |---|---|---|
> | Queens Narcotics Div. (OCCB) | Sept. 1986 | Oct. 1988 |
> | 73 Pct RIP Unit (Det Bur) | Oct. 1988 | Oct. 1989 |
> | PBA #9 Detective Squad | Oct. 1989 | Jun. 1995 |
>
> 2. My promotion date for 3rd grade detective was on 6/29/90. At that time I had performed 46 months in an investigative capacity.

Stripped to its essentials, this grievance would require the NYPD to treat the grievant's promotion date as occurring in February 1989, rather than on June 29, 1990. There is no evidence that at any time during the period referred to above was the grievant represented by DEA or covered in any fashion by Administrative Code Sections 14-103. Rather, he was represented by the HAPBA and covered by its collective agreement. Further, there is no evidence that at any time during that time period De Filippis' June 29, 1990 promotion date was contested by the HAPBA under its collective agreement or otherwise contested by the HAPBA or the grievant on any independent basis.

The Union's grievance should not be arbitrated. It alleges that the NYPD has failed to credit DeFilippis, and other detectives similarly situated, with retroactive service credit based on services performed when they were members of the Transit and Housing Police Departments and represented by unions other than DEA and covered by their collective agreements rather than DEA's contract with NYPD. In its Request for Arbitration, the Union has placed heavy reliance upon the provisions of Administrative Code section 14-103 (the 18 month law), the terms of a 1989 Memorandum of Agreement between the New York City Police Department and the Detectives Endowment Association, and Interim Order No. 60 to show a nexus to the cited provision of the contract.

In its decision, the majority has correctly held that neither the Administrative Code, the 1989 Memorandum of Agreement (MOA) nor Interim Order No. 60 can be arbitrated. Indeed, the DeFilippis grievance (the only specific claim presented by the Union and, thus, certainly not the basis for a "class" grievance, a nicety which the majority entirely and erroneously ignores) goes to the application of the 1989 MOA which has been found inarbitrable. That alone should end the inquiry and preclude arbitration. Nevertheless, the majority incorrectly concluded that an arbitrable claim exists here simply because the Union has cited the following "Definitional" provision in Article XXI §1a. of the DEA collective agreement which the grievant, and others similarly situated, were first covered by in June 1995 when the NYHAPD was merged into the NYPD:

> "a. For purposes of this Agreement, the term grievance shall mean
>
> (1) a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." (Emphasis added.)

That same Article provides, however, in Section 9 that "[i]n case of grievances falling within Section ***1(a)(1) *** the arbitrator's decision, and order or award if any, shall be limited to the

application and interpretation of the collective bargaining agreement, and the arbitrator shall not add to, subtract from or modify any such agreement ***.

Given these provisions, which must be read together, the Board's majority should not have directed that NYPD arbitrate based on an alleged contractual application inequity which could result in the changing of the initial appointment dates of the detectives who were previously employed by the TA and NYHA because of a merger of forces that was not anticipated and, thus, not provided-for in one way or another in the negotiations that resulted in the collective bargaining agreement between DEA and NYPD. And, the result would be the same had the alleged inequity with respect to the calculation of dates of appointment favored detectives employed by the TA and NYHA over those employed by the NYPD prior to the merger were recalculations sought on their behalf based on an asserted inequitable application of the agreement. In either instance, the adjustments being sought (to the extent that they may constitute mandatory subjects of bargaining under the NYCCBL) should be relegated to negotiations between the parties upon the expiration of the agreement, rather than to "rights" arbitration under the collective bargaining agreement.

In these circumstances, an impasse panel could make binding recommendations should the parties be unable to reach agreement in their negotiations. Instead, the majority has directed binding rights arbitration under the collective bargaining agreement and has done so in circumstances wherein the Union has not (and indeed cannot) maintain a nexus to Article XXI §1a. without relying upon Administrative Code Section 14-103 either directly or by asserting, as it does over and over again, that Section 14-103 somehow amends the collective bargaining agreement and/or the 1989 MOA, requiring the adjustment of initial dates of promotion for detectives employed by the TA and NYHA prior to the merger. Plainly, this is a distinction without a difference and should not be

permitted to control the result here. In any event, Section 9 of Article XXI, which the majority ignores, without stated exception explicitly precludes an arbitrator from amending the collective bargaining agreement in the fashion suggested by DEA or otherwise. Nowhere in its decision does the majority deal with this issue.

Under principles of law established under Section 301 of the National Labor Relations Act to govern arbitration covenants in the private sector, even frivolous disputes must be arbitrated unless clearly excluded by the parties' collective agreement. Under the NYC Collective Bargaining Law, as consistently applied by this Board, arbitration of contractual disputes will not be compelled unless and until the party seeking to arbitrate establishes that there is a nexus between the contract provision relied upon and the issue to be arbitrated. We submit that the Union is incapable of maintaining a nexus to the cited contract provision without relying upon Administrative Code section 14-103. In fact, the requested remedy in this case is not compliance with the collective bargaining agreement. Rather in its Request for Arbitration at "4", the Union specifically states that "[t]he remedy is compliance with the 18 month law." It is apparent that the Union's position is that the alleged inequitable application of the provisions of the contract can only be remedied after there has been an initial determination under the 18 month law.

As evidenced by the DeFilippis grievance, the Union is attempting to have its members who were previously employed at NYHA or the TA receive retroactive service credit for certain periods of time served while so employed. The DEA is not claiming that their members are failing to receive the proper benefits based on their original appointment dates as recorded by the NYPD and established in the first instance by the TA or NYHA. Rather, it is its claim that original dates of appointment to the rank of Detective should be changed. There is, however, no substantive

provision in the contract that would allow for such a retroactive change. It is for this reason that the Union has been forced to rely upon the Administrative Code in order to attain the retroactive credit which it seeks, although it should be noted that the 18 month law does not provide for retroactive credit and did not apply at NYHA or the TA.

We agree with the majority's decision to preclude an arbitrator from considering violations of the Administrative Code for the reasons set forth; namely, that the parties have not agreed to arbitrate such claims. However, it is the majority's holding that the claimed violation of the Administrative Code is severable from the claimed violation of the collective bargaining agreement that we find flawed. It is undeniable that the claimed violation of the contract is inextricably linked to the claim that the 18 month law was in some way violated. The alleged contractual violation is incapable of standing alone and for that reason the Union has failed to show a nexus between the act complained of the definitional provision of the agreement cited in its Request for Arbitration.

In its response, the majority notes that it is "satisfied that the Union's identification of specific economic benefits under the Agreement, the present payment of which allegedly differs depending on whether a detective had previous investigative service in the NYPD or in one of the other forces that were merged into the NYPD, is sufficient to establish an arguable nexus to the claim of inequitable application of the provisions of the Agreement." The reality is, however, that a review of the papers filed by the Union in this matter in support of that very contention (alleged inequitable application of the contract) is based on and inextricably interconnected to the precise substantive areas that the majority has held inarbitrable. There thus cannot be an arguable contractual nexus, nor is one spelled out in any fashion by the majority, perhaps mirroring the Union's failure to do so. The existence of such a nexus is a pre-condition to this Board directing the

City to arbitrate. And it would thus follow that the remedies sought here would be outside the arbitrator's jurisdiction.

We submit that the majority's decision represents an arbitrary and capricious departure from the Board's long-standing rule that frivolous or patently baseless claims do not create an arguable contractual nexus. In this respect, our jurisprudence with respect to arbitrability differs markedly from what exists under Section 301 of the National Labor Relations Act where even frivolous or patently baseless claims are directed to arbitration because they may have some "cathartic" value. See, e.g., Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). It is this very basic long-standing difference that is being arbitrarily ignored here.

Dated: March 24, 1998
New York, New York

Saul G. Kramer

Richard Wilsker