L. 621, SEIU & Giattino v. City, OLR & DCAS, 67 OCB 2 (BCB 2001) [Decision No. B-2-2001 (IP & Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and JOSEPH GIATTINO, PRESIDENT,

Petitioners,

-and-

THE CITY OF NEW YORK, THE OFFICE OF LABOR RELATIONS, and THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Respondents.

Decision No. B-2-2001
Docket No. BCB-2062-99

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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK, OFFICE OF LABOR RELATIONS,

Petitioners,

-and-

LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent.

Docket No. BCB-2080-99
(A-7794-99)

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DECISION AND ORDER

On May 18, 1999, Local 621, Service Employees International Union (“Union” or “Local

621") and Joseph Giattino, President ("Giattino") filed a Verified Improper Practice Petition alleging violations of § 12-306 (a) (1), (3), (4), and (5) of the New York City Collective Bargaining Law ("NYCCBL").[1] On June 23, 1999, the City submitted its answer. On August 18, 1999, the Union filed its reply. On November 12, 1999, the City submitted a reply memorandum of law.

On August 9, 1999, the City filed a petition challenging the arbitrability of a grievance which the Union sought to take to arbitration. On October 25, 1999, the Union submitted its answer. On January 6, 2000, the City filed its reply. By notice dated November 6, 2000, the parties were informed that the Board was considering the consolidation of these matters for purposes of decision. They were given the opportunity to submit comment upon the proposed action. The City had no objection to the consolidation for administrative purposes, but the Union objected to the consolidation.

BACKGROUND

The Union represents employees in the title Supervisor of Mechanics (Mechanical Equipment)("SMME"). Prior to April 21, 1999, the employees in this title were classified in the

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[1] Section 12-306 of the NYCCBL provides, in part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

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(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

(5) to unilaterally make any change as to any mandatory subject of bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization . . .

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competitive class, Rule X of the Personnel Rules and Regulations of the City of New York under the heading of The Skilled Craftsman and Operative Service Group. The SMMEs were covered by § 220 of the New York State Labor Law ("§ 220"), and considered prevailing wage employees. Section 220 provides, in part:

> The prevailing rate of wage shall be annually determined herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the following year shall be the rate of wage set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination.

According to the Union, between July 1990 and January 1999, the Union and the City engaged in "long and hotly contested" proceedings before the Comptroller's office pursuant to § 220 to determine the prevailing rate of wages for SMMEs, and the Union won at every stage of the proceeding.

On April 1, 1998, the Comptroller issued an Order and Determination setting a prevailing rate of wages for SMMEs for the period of July 1, 1990 through June 30, 1997. On September 10, 1998, a Decision and Order by the Supreme Court, Appellate Division, First Department, sustained the Comptroller's Determination. On October 1, 1998, the Union commenced an action in the Supreme Court, New York County, to compel compliance with the Comptroller's Determination. On January 22, 1999, the parties signed a Memorandum of Agreement that set forth negotiated wage rates and supplemental benefits to be paid to the SMMEs in satisfaction of the Comptroller's Determination. The suit in Supreme Court was withdrawn thereafter. On March 23, 1999, the Comptroller's Labor Law Bureau determined that SMMEs were entitled to further increases effective

July 1, 1997 and July 1, 1998, after the Union filed a prevailing wage complaint.

On April 21, 1999, the Department of Citywide Administrative Services ("DCAS") promulgated Resolution No. 99-4, which reclassified the SMMEs from Rule X to Rule XI, the Special Crafts and Operational Occupational Group. The resolution listed the former salary range for the SMMEs under Rule X as set "by the memorandum agreement dated 1/22/99 incorporating the most recent Comptroller's Order and Determination for this title pursuant to Section 220 of the Labor Law." The new salary range, listed under Rule XI, was from a minimum of $58,033 to a maximum of $69,000. On the same day, Mayoral Personnel Order No. 99/2 was issued, establishing the same basic salary rates as those in the DCAS resolution, adding Assignment Differentials, and including a statement that the positions were subject to the provisions of the Citywide Agreement, among other things.

On May 18, 1999, the Union filed a Step III grievance, contesting the refusal of the City to pay SMMEs a prevailing rate of wages and supplements as fixed by the Comptroller's Determinations. The grievance stated that Resolution No. 99-4 and the Mayor's Personnel Order No. 99/2 are in violation of Article IV, § 1 of the parties' contract, since the resolution and order purport to fix the salary of SMMEs without reference to any Comptroller's Determination.[2] On May 18, 1999, the Union also filed its Improper Practice. On June 15, 1999, the Union filed a Request for Arbitration. The Union stated the grievance to be arbitrated as:

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[2] Article IV, § 1 of the parties' contract reads:

With the exception of those employees in the titles Supervisor of Iron Work and Deputy Director of Motor Equipment Maintenance (Sanitation) the wages and other supplements applicable to employees covered by this Agreement shall be in accordance with the respective Determinations of the Comptroller subject to the terms and conditions thereof.

> Did the City of New York violate Article IV, Section 1 of its contract with Local 621 by issuing a resolution and personnel order (both dated April 21, 1999) which purport to set wage rates and supplements for City employees holding the title Supervisor of Mechanics (Mechanical Equipment) ("SMME") without regard to applicable Comptroller Determinations?

POSITIONS OF THE PARTIES

Arbitrability

City's Position

The City argues that there is nothing in the contract that enables Local 621 to assert authority over a proper exercise of a management right to issue official documents that cause the reclassification of a title. To find otherwise, the City argues, would be contrary to the contract, the management rights provision of the NYCCBL,[3] as well as provisions of the New York City Charter ("Charter"). The City argues that their management right was never modified or waived through a collective bargaining agreement.[4] The City argues that the Charter, at Chapter 35, § 810 *et seq.*, authorizes the Commissioner of DCAS to take all actions related to classifications of competitive titles in the City.[5] The City states that the Commissioner of DCAS, responding to assertions by the

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[3] The City cites § 12-307(b) of the NYCCBL in part, stating that the City has the right to "determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; and exercise complete control and discretion over its organization . . ."

[4] The City states that the Board has repeatedly construed § 12-307(b) of the NYCCBL to guarantee the City the unilateral right to determine the method, means and personnel by which governmental operations are to be conducted, unless the right has been limited by the parties themselves in the collective bargaining agreement. They cite Decision No. B-37-87.

[5] The New York City Charter, at Chapter 35, § 811 reads, in part:
Powers and duties of the commissioner; general. The commissioner shall be responsible for citywide personnel matters, as set forth in this chapter, and shall have all the powers and duties of a
(continued...)

Comptroller's office that the SMMEs were improperly classified as prevailing wage employees, has the power to create, modify, or abolish positions in the competitive class and fix the salary in those positions.

The City states that the Charter imposes upon the Commissioner of DCAS an obligation to recommend to the Mayor an initial wage and benefit package, which is consistent with management's right to classify titles. The City states that the Board has found that the right of the employer to reclassify its employees is protected by the management rights provision.[6] The City states that the agreement, which the City deems to be non-economic, between Local 621 and the City never expressly waived or modified the City's right to reclassify any of the titles covered by the contract, including the SMMEs. It states that the contract has no explicit waiver or modification of the management right to issue documents, resolutions or orders that reclassify any particular title.

The City states that the remedy sought in this arbitration never existed for a Rule XI title, such as the present SMME title, and argues that the Comptroller has no authority under the prevailing wage law to determine wages for a non-prevailing wage title. It states that the Board and an arbitrator have no authority to direct the Comptroller to establish such a wage for a non-prevailing wage title.

The City argues that at the time the parties entered into the non-economic agreement, § 12-307(a)(1) of the NYCCBL stated that "with respect to those employees whose wages are determined

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[5](...continued)
municipal civil service commission . . .

[6] The City cites Decision Nos. B-59-88 and B-4-79.

under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for by said section." Therefore, it argues, there is nothing that would permit the parties to legally enter into the agreement Local 621 alleges was encompassed by Article IV, § 1 of the parties' agreement. It contends that Article IV, § 1 merely identifies that for prevailing wage employees, one will find wage and supplement information in the applicable Comptroller's Determination. The City states that the provision allegedly violated is not a guarantee that the SMMEs would be classified as prevailing wage for any period of time, and that the Union may have only assumed that this was the case. The City contends that to be arbitrable, the assumption must be clearly supported by the express language of the contract.[7]

The City argues that the dispute presented for arbitration is an objection to the reclassification of SMMEs through the issuance of a resolution and personnel order and is not encompassed by the grievance procedures. The City claims that the Board has held that in any case where an exercise of management prerogative is challenged, the burden initially is upon the union to establish to the satisfaction of the Board that a substantial issue is presented.[8] The City states that the SMME contract excludes grievances related to the DCAS Rules and Regulations, therefore, arbitration on the issue of reclassification is similarly excluded by the contract.

The City claims that the Union has improperly attempted to amend its request for arbitration through the filing of its answer and memorandum of law. The City asserts that the Union had alleged that the City violated Article IV, § 1 of the contract by issuing the offending orders, but that

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[7] The City cites Decision No. B-22-80.

[8] The City cites Decision No. B-28-92.

it changed the grievance to state that it was challenging the failure to pay a prevailing rate of wages. The City states that if the Board were to permit the case to go before an arbitrator, it would require the arbitrator to consider issues that could be binding upon a third party, non-participant - the Comptroller. It argues that that would have the effect of attempting to improperly require the non-party Comptroller to set a prevailing rate of wages for SMMEs, which would be illegal.

Union's Position

The issue, according to the Union, is whether the denial of a prevailing wage to SMMEs after April 20, 1999 constitutes a violation of Article IV, § 1 of the contract. The Union asserts that the only issue presented is whether Local 621 has the right to submit its grievance to arbitration. It states that this Board does not have to, and has no authority to, decide whether the Union or the City has correctly interpreted Article IV, § 1 of the contract. It contends that as this Board has repeatedly ruled, matters of contract interpretation should be resolved through arbitration. The Union states that this dispute is a classic instance of a grievance which can and should be resolved through arbitration.

The Union argues that the City does not and cannot dispute that parties have agreed to submit questions of contract interpretation to an arbitration, as the agreement to arbitrate such disputes is memorialized in Article V, § 1(a) of the contract. The Union also states that there can be no question that there is a hotly contested dispute between the parties concerning the proper interpretation of Article IV § 1 of the contract, which is evident from the pleadings.

The Union contends that Article IV, § 1 of the contract was an agreement by the parties that the wages of the SMMEs would be based upon the prevailing wage for that title set by the Comptroller. The Union further contends that, to the extent DCAS ever had a unilateral management

right to reclassify the SMME title, the City waived that right through Article IV, § 1 of the contract. The Union argues that the Board need not decide whether the Union is correct or even whether it has a likelihood of success at arbitration. Rather, it argues, the Board's inquiry is limited to whether Article IV, § 1 is arguably related to the grievance. The Union cites Decision No. B-46-91 at pp. 9-10:

> . . . [t]he union has the duty to show the existence of an arguable relationship between the provisions invoked and the grievance to be arbitrated. Once an arguable nexus is shown, this Board will not consider the merits of a case; it is for the arbitrator to interpret and decide the applicability of the cited provisions . . .
> Where we are required to determine whether a cited provision is arguable related to the grievance to be arbitrated, we need only find that the provision alleged to have been violated provides a colorable basis for the Union's claim. We resolve doubtful issues of arbitrability in favor of arbitration.

The Union contends that there can be no doubt that Article IV, § 1 of the contract is arguably related to this grievance. The Union states that on its face, Article IV, § 1 provides that SMMEs shall receive wages and supplements based upon Comptroller's Determinations and there is no dispute that Comptroller's Determinations reflect the prevailing wage found by the Comptroller to be due under § 220. On its face then, the Union argues that it is therefore evident that the Union has more than satisfied its burden of showing an "arguable relationship" between Article IV, § 1 of the contract and this grievance.

The Union contends that even assuming the City otherwise had the unilateral right to reclassify the SMME title,[9] this managerial prerogative was waived by Article IV, § 1 of the contract.

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[9] Addressing that issue, the Union makes the claim that the City may not have had the authority (apart from the Local 621 contract) to reclassify the SMME title due to the procedural requirements of Civil Service Law § 20. It goes on to state that the proceeding is not based upon this (continued...)

It argues that, as to the City's contention that the Article does not constitute a waiver, the contention goes to the merits of the claim, not to the question of arbitrability. The Union argues that the Board has held that the issue of whether the City in fact has limited or waived its managerial prerogatives by contract can only properly be decided by an arbitrator.[10] The Union also argues that the Comptroller's finding that the SMMEs were improperly classified was dicta in which the Comptroller recognized he did not have the authority to make such a finding, and the City was not forced to adhere to it.

The Union argues that while there was no duty under the NYCCBL to negotiate a prevailing wage before July 1, 1998, there was no prohibition on doing so either. It contends that the City has cited no authority to demonstrate that negotiations for prevailing wages conducted prior to the July 7, 1998 amendment to the NYCCBL were unlawful. The Union also argues that the City cannot defeat the right of SMMEs to obtain a prevailing rate because of the supposed inability of the Comptroller to act in the absence of a prevailing rate classification since it was the City itself which has purported to change the classification. It contends that in these circumstances, the lack of a prevailing rate classification is no defense and that it is well-settled that a party to a contract cannot avoid complying with its terms by making performance impossible.[11]

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[9](...continued)
law, but upon the City's violation of Article IV, § 1 of the parties' contract and that the Board does not need to, and probably lacks jurisdiction to decide whether the reclassification violated Civil Service Law § 20.

[10] The Union cites Decision Nos. B-12-94 at p. 17; B-30-92 at pp. 14-15.

[11] The Union cites *A.H.A. General Construction, Inc. v. New York City Housing Authority*, 92 N.Y.2d 20 (1998)(. . . a party to a contract cannot rely on the failure of another to perform a condition
(continued...)

The Union states that the City misapplied the "substantial issue" test, which is to be used to evaluate that arbitrability of certain cases of a disciplinary nature. The Union also argues that if the City wants to rely on the exemption from the definition of a grievance for DCAS Rules contained in Article V, § 1(b) of the contract, the City will first have to follow the procedures for Rule enactment contained in Civil Service Law § 20. It argues that if the City chooses not to enact a Rule - the course it has elected to follow - it cannot rely on the exemption for Rules contained in Article V, § 1(b) of the contract. Finally, the Union argues that the grievance is not based on either state or City law, but solely and exclusively on a violation of the contract.

Improper Practice

Union's Position

The Union claims that the City reclassified the SMME title in retaliation for the refusal of the Union to accept coalition wage increases, in retaliation for the positions taken by the Union in bargaining, and in retaliation for the Union's successful exercise of its right to obtain a prevailing rate of wages and supplements pursuant to § 220. By so retaliating, the Union alleges that the City has interfered, restrained, and coerced the SMMEs in the exercise of their rights guaranteed by § 12-305, including but not limited to the right to bargain in violation of § 12-306(a)(1).

The Union adds that by so doing, respondents have discriminated against SMMEs in violation of § 12-306(a)(3), and have attempted to discourage SMMEs from participating in lawful bargaining and § 220 proceedings. The Union argues that the causal nexus between the April 21,

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[11](...continued)
precedent where he has frustrated or prevented the occurrence of the condition).

1999 reclassification of SMMEs and respondents' retaliatory animus for the protected activity is demonstrated by: (i) the timing of the reclassification, which occurred less than three months following the completion of the initial Labor Law proceedings in January 1999 after the SMME title and its predecessors had been deemed a Labor Law § 220 title for approximately 60 years; (ii) statements by the City suggesting that it intended to punish SMMEs and the Union for petitioners' protected actions in pursuing a prevailing rate of wages and supplements; and (iii) the fact that no other § 220 title was similarly reclassified on or near April 21, 1999, confirming that SMMEs were singled out for special unfavorable treatment exclusively because of the positions asserted by the Union in bargaining and the success achieved by the Union in the § 220 process.

The Union argues that by unilaterally changing the terms and conditions of employment of SMMEs relating to matters within the scope of collective bargaining without prior notice to the Union, the City has refused to bargain collectively with the Union in violation of § 12-306(a)(4). Finally, the Union argues that on April 9, 1999, the City, following substantial prodding by the Union, agreed to bargain concerning a March 23, 1999 finding by the Comptroller's Bureau of Labor Law which mandated further increases for SMMEs effective July 1, 1997 and July 1, 1998. The Union states that the bargaining began on May 7, 1999. Nevertheless, the Union contends that on April 21, 1999, the City unilaterally set the wages and supplements for SMMEs for the period beginning April 21, 1999, thereby violating § 12-306(a)(5), which forbids unilateral changes in mandatory subjects of collective bargaining during a period of negotiations.

City's Position

The City states that the only allegations in the Union's petition that are timely concern the

reclassification itself and the Memorandum of Agreement. The City also argues that under *City of Salamanca*,[12] the Union has failed to state a *prima facie* case of improper practice under §§ 12-306(a)(1) and (3) of the NYCCBL because the decision to reclassify SMMEs from prevailing wage employees to non-prevailing wage employees was made solely because the SMMEs perform supervisory duties, which are excluded by § 220. The City also argues that petitioner has failed to state a *prima facie* case and to allege facts sufficient to maintain a claim of failure to bargain in violation of § 12-306(a)(4) of the NYCCBL because the subject of reclassifying the SMMEs is a managerial right under § 12-307(b) of the NYCCBL.

The City argues that the Union has failed to state a *prima facie* case of an improper practice under § 12-306(a)(5) of the NYCCBL. The City states that the Union asserts that the status quo provision somehow applies to SMMEs and that status quo prevents their reclassification. The City claims that for status quo to be relevant, the Union must demonstrate that a bargaining notice was filed pursuant to the NYCCBL, that they have an expired agreement, and that they are engaged in bargaining for the subsequent period with the City pursuant to the NYCCBL. The City contends that none of these elements have been established by the Union.

The City also argues that the status quo provision does not apply to the March 23, 1999 letter from the Comptroller's Office advising the parties of the Comptroller's investigative findings, since it is not a collective bargaining agreement. The City argues that to the extent the improper practice petition alleges that the SMMEs' wages and supplements were fixed in accordance with a Comptroller's Determination because their non-economic agreement provided for such, this issue

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[12] 18 PERB ¶ 3012 (1985).

requires contract interpretation, and the appropriate forum for the resolution of such an allegation, if any at all, is through the mechanisms provided by that contract.

DISCUSSION

Consolidation

Preliminarily, we address the issue of our consolidating these two proceedings for decision, as distinguished from hearing. The question whether to consolidate similar cases for decision usually rests solely within the discretion of the decision-making body, whether an administrative agency or court.[13] We provided notice to the parties of the intent to consolidate the two cases and invited the submission of written comments. The Union opposed consolidation. The City did not oppose consolidation for administrative purposes.

Clearly, there are parties and issues of fact that are common to both cases. Specifically, both cases involve the implementation by the City of the same reclassification orders. Both cases have a long and common background. We will consolidate the cases for the purpose of administrative economy as far as the facts are concerned, but each case will be considered in its own right.

Arbitrability

The City claims that the Union, in its answer and memorandum of law, improperly amended the grievance from a violation of Article IV, § 1 to a challenge of the failure of the City to pay a prevailing rate of wages. At times in the answer, the Union does refer to the grievance as a failure

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[13] *See Lieutenants' Benevolent Association and Sergeants' Benevolent Association v. City of New York, New York City Police Department, New York City Office of Labor Relations*, Decision No. B-45-93.

of the City to pay a prevailing rate of wages. However, the Union relies on Article IV, § 1 to support that proposition throughout the answer and the memorandum of law and, therefore, we find that it did not change the nature of the grievance.

The City also argues that disputes relating to the DCAS Rules and Regulations are excluded from arbitration. Article V, §1(a) of the parties' agreement defines a grievance to include "[a] dispute concerning the application or interpretation of the terms of this Agreement . . .". Section 1(b) of that Article also permits claimed violations, misinterpretations or misapplications of the rules, regulations, written policies and orders of the employer affecting terms and conditions of employment to be grieved, except that, among other things,

> disputes involving the Rules and Regulations of the New York City Personnel Director . . . shall not be subject to the grievance procedure or arbitration.

Here, the Union does not seek to arbitrate any contention that the DCAS Rules and Regulations have been violated, misinterpreted, or misapplied. Rather, the Union contends that the City's actions in promulgating Resolution No. 99-4 and Mayoral Personnel Order No. 99/2 were violative of the wage provisions of Article IV, §1 of the agreement. Thus, the Union's request for arbitration is based on a claimed violation of a substantive provision of the agreement, which arguably would be arbitrable under Article V, §1(a), and not on a claimed dispute involving the DCAS Rules and Regulations, which would be excluded from arbitration. Moreover, the Union's claim that the issuance of Mayoral Personnel Order No. 99/2 (which enumerates salaries and assignment differentials) was violative of Article IV, §1 would not, in any event, be covered by the exclusionary language of Article V, §1(b).

When the City challenges the arbitrability of a grievance, we must first determine whether

the parties are contractually obligated to arbitrate disputes and, if they are, whether the acts alleged in the grievance are covered by that contractual obligation.[14] Here, Article V of the contract provides a grievance and arbitration procedure, but the parties disagree as to whether the instant matter is arbitrable within the meaning of the contract. The burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached.[15] If the Union cannot show such a nexus, the grievance will not proceed to arbitration.[16]

The City argues that since management's statutory right is implicated, the Union must establish to the satisfaction of the Board that a substantial issue is presented. We disagree. This arbitrability test is the exception rather than the rule, and is not applied in every case in which the City merely asserts that its action falls within the purview of the statutory management rights provision. Rather, the Board has reserved this test for cases in which the contract provision invoked by the Union, on its face, does not appear to relate to the subject matter of the management right asserted.[17]

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[14] *See, e.g., New York City Police Department and the City of New York v. Detectives' Endowment Association*, Decision No. B-4-96; *The City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-52-91; *The City of New York v. District Council, Local 1795*, Decision No. B-19-89.

[15] Decision No. B-4-96; *The City of New York and the New York City Department of Transportation v. Doctors Council*, Decision No. B-28-92; *The City of New York v. Local 2021, District Council 37, AFSCME, AFL-CIO*, Decision No. B-58-90.

[16] *Department of Probation and the City of New York v. United Probation Officers Association*, Decision No. B-10-92.

[17] The Board has applied this test most often in cases where an employee was transferred and the Union claimed that the transfer was disciplinary and therefore arbitrable pursuant to a contractual provision that defines a grievance as a claimed wrongful disciplinary action. In those cases, the contract
(continued...)

In the instant matter, the City argues that it was their right to issue the reclassification orders. The Union claims a violation of Article IV, § 1, which states that wages and other supplements applicable to the SMMEs shall be in accordance with the Determinations of the Comptroller. Since the reclassification orders purport to set the wage rates for the SMMEs and the provision cited by the Union arguably deals with the wage rates of the SMMEs, the connection is clear on its face.

The Union claims that the City violated Article IV, § 1 by issuing a resolution and personnel order which purport to set wage rates and supplements for City employees without regard to applicable Comptroller Determinations. Article IV, § 1 provides that "the wages and other supplements applicable to employees covered by this Agreement shall be in accordance with the respective Determinations of the Comptroller subject to the terms and conditions thereof." Since the DCAS Resolution and the Mayoral Personnel Order purport to set wage rates for the SMMEs and Article IV, § 1 states that the SMMEs' wage rates "shall be in accordance with" the Determinations of the Comptroller, the Union has provided the required nexus. We need not look any further.

The City argues that it could not legally enter into the agreement the Union alleges was encompassed by Article IV, § 1. However, the provision the City relies upon, § 12-307(a)(1) of the

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[17](...continued)
provision granting the right to grieve wrongful discipline, on its face, did not appear to be related to the management's right to transfer employees. Accordingly, in those cases, the Union had the burden of showing, by factual allegations, that the transfer in question was intended as a disciplinary action. *See The City of New York and the New York City Health and Hospitals Corporation v. The City Employees Union Local 237, International Brotherhood of Teamsters,* Decision No. B-44-98; *The City of New York v. Doctors Council,* Decision No. B-18-94 and *The City of New York v. District Council 37, Local 375,* Decision No. B-12-93.

NYCCBL, which states that there "shall be no duty to bargain" concerning those matters provided for in § 220, does not *prohibit* bargaining on those matters.[18] Such bargaining, although non-mandatory, was always a permissive subject.

The City claims that Article IV, § 1 does not limit its management right to reclassify employees. However, this argument goes to the merits of the Union's grievance. Once an arguable relationship is shown, this Board will not consider the merits of a case; it is for the arbitrator to interpret and decide the applicability of the contract provision.[19] It is not for us to decide whether this contract provision limits management's rights. Similarly, it is not for us to decide if the contract provision is economic or non-economic.

The City further argues that the remedy sought in arbitration does not exist for a non-prevailing wage title, and the Board and an arbitrator have no authority to direct the Comptroller to establish a wage for such a title. At this point, it would be premature to state that the arbitrator cannot craft an appropriate and enforceable remedy should the arbitrator find a contract violation.

Improper Practice

In consolidating the two proceedings, the Board recognizes that a controversy arising out of the same set of facts may involve related but separate and distinct rights. That is, a particular dispute may encompass rights which derive from both the NYCCBL and the collective bargaining

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[18] Section 12-307(a)(1) was amended, effective July 7, 1998, to state that the duty to bargain over wages and supplements for § 220 employees is governed by § 220. The amendment deleted the statement that there is no duty to bargain for these employees.

[19] *City of New York v. Social Service Employees Union, Local 371*, Decision No. B-46-91 at 9. *See also, the New York City Health and Hospitals Corporation v. Communications Workers of America*, Decision No. B-29-89; and *The City of New York v. Patrolmen's Benevolent Association*, Decision No. B-37-87.

agreement. In such cases, the Board has deferred the dispute to the arbitral forum, which provides an appropriate means for resolving the matter.

The Board has stated that permitting a dispute to proceed first to arbitration is consistent with the declared policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organization,"[20] provided, however, in the event that either the issue raised in the improper practice petition is not resolved in the arbitral forum, or the arbitration produces a result that is alleged to be inconsistent with policies and purposes underlying the NYCCBL, the Board may, upon demand, reassert jurisdiction in this matter to hear and determine the allegations of improper practice.[21]

Here, both the petition challenging arbitrability and the improper practice arise from the same set of facts, from which related but separate and distinct rights emerge. Much of the improper practice hinges on the interpretation of Article IV, § 1 and the question whether the City did indeed limit its managerial prerogative. Therefore, we will defer this dispute to arbitration, with the following qualification: should the arbitrator reach a result that is alleged to be inconsistent with the policies and purposes underlying the NYCCBL, or fail to dispose of any material issue raised in the instant improper practice proceeding, the Board may reassert jurisdiction over this matter upon demand.

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[20] *United Probation Officers' Association v. The City of New York,* Decision No. B-38-91 and *Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters, AFL-CIO ("Local 831") and The City of New York and International Union of Operating Engineers, Local 15C, AFL-CIO, consolidated with The City of New York v. Local 831*, Decision No. B-68-90.

[21] *Id.*

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**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, docketed as BCB-2080-99 be, and the same hereby is, denied; and it is further
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ORDERED, that the improper practice petition filed by Local 621, Service Employees International Union, AFL-CIO, docketed as BCB-2062-99 be, and the same hereby is, deferred until such a time as an arbitrator renders a determination, and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the City of New York.

Dated: January 9, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

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