

NYSNA, 7 OCB2d 17 2014
(Arb.) (Docket No. BCB-4032-14) (A-14576-14)

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the Department of Correction improperly refused to grant release time for the Grievant, a Welfare Fund trustee, to attend an educational conference. The City argued that the matter was not arbitrable because the Union failed to establish the requisite nexus between the request for arbitration and the contract provision cited as the basis of the grievance. The Union argued that it had established the requisite nexus between the request for release time and the Welfare Fund provisions of the contract and Executive Order 75, which governs the granting of release time. The Board found that there is no nexus to the cited contract provisions but that there is a nexus to Executive Order 75. Accordingly, the petition challenging arbitrability was denied and the request for arbitration was 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 NEW YORK CITY DEPARTMENT OF CORRECTION,**

Petitioners,

-and-

**NEW YORK STATE NURSES ASSOCIATION,
on behalf of KEYSHA MORRIS,**

Respondent.

DECISION AND ORDER

On February 19, 2014, the City of New York (“City”) and the New York City Department of Correction (“DOC”) filed a petition challenging the arbitrability of a grievance brought by the New York State Nurses Association (“NYSNA” or “Union”), on behalf of Keysha Morris (“Grievant”). In the request for arbitration, the Union alleges that DOC

improperly refused to grant release time for the Grievant, a Welfare Fund trustee, to attend an educational conference. The City argues that the matter was not arbitrable because the Union failed to establish the requisite nexus between the request for arbitration and the contract provision cited as the basis of the grievance. The Union argues that it has established the requisite nexus between the request for release time and the Welfare Fund provisions of the contract and Executive Order 75 (“EO 75”), which governs the granting of release time. The Board finds that there is no nexus to the cited contract provisions but that there is a nexus to EO 75. Accordingly, the Board denies the petition challenging arbitrability and grants the request for arbitration.

BACKGROUND¹

Petitioners and the Union are parties to a collective bargaining agreement effective from December 1, 2007, through January 20, 2010, (“Agreement”) that remains in effect under the *status quo* provision of § 12-311 of the New York City Collective Bargaining Law (“NYCCBL”).

The Grievant is a Registered Nurse employed as a Case Management Nurse in the Health Management Division of DOC’s Department of Nursing. She is also a Welfare Plan trustee for NYSNA and, in that capacity, attended the 2012 and 2013 International Foundation of Employee Benefit Plans (“IFEBP”) Annual Conferences. IFEBP is a nonprofit organization that provides education, information, research, and networking opportunities to benefits and compensation professionals. IFEBP is not affiliated with any employee organization or labor union. The

¹ For the purposes of this proceeding, based upon the pleadings, the material facts are not in dispute.

Grievant was granted release time with pay by the former Director of DOC's Health Management Division to attend the 2012 IFEBP Annual Conference. However, the Grievant was not granted release time with pay to attend the 2013 IFEBP Annual Conference but instead she was granted release time without pay, giving rise to the instant matter.

Article VI, §1, of the Agreement defines a grievance, in pertinent part, to include:

- a. A dispute concerning the application or interpretation of this Agreement;
- 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 . . . ;

(Pet., Ex. 1) Article IV, § 1, of the Agreement reads, in pertinent part:

- a. In accordance with the election by [NYSNA] pursuant to the provisions of Article XIII of the Citywide Agreement . . . the Welfare Fund provisions of the 1995-2001 Citywide Agreement . . . shall apply to Employees covered by this Agreement.
- b. When an election is made by the Union pursuant to the provisions of Article XIII, [§] 1 (b) of the Citywide Agreement . . . [those provisions] shall apply to Employees covered by this Agreement, and when such election is made, the Union hereby waives its right to training, education and/or legal services contributions provided in this Agreement, if any. In no case shall the single contribution provided in Article XIII, [§] 1(b) of the 1995-2001 Citywide Agreement . . . exceed the total amount that the Union would have been entitled to receive if the separate contributions had continued.

(Pet., Ex. 1) Article IV, §§ 2 and 3, of the Agreement provide that the Welfare Fund will provide benefits to domestic partners of employees and survivors of employees who die in the line of duty.

Article XIII, § 1 (b), of the Citywide Agreement provides:

Effective January 1, 1979, District Council 37 or any of its affiliated locals or any other certified union which elects to be covered by this Section, shall be entitled to receive such separate contributions as may be provided in this Agreement for welfare, training and legal services benefits, as a single contribution. This

contribution shall be paid by the Employer into a trusted administrative Benefits Fund Trust and shall be held by the trustees of that fund for the exclusive purpose of providing, through other funds, welfare, training and legal service benefits for the employees so covered as well as any other benefits as the Employer and the certified union may agree upon. Such administrative Benefits Fund Trust contribution by the Employer shall be subject to a separate agreement between the Employer and the union. Such agreement shall include among its provisions that the Employer shall continue to have the right to review and approve the distribution of funds to and the level of benefits provided by the individual funds. The individual funds shall also continue to be subject to a separate agreement between the Employer and the union.

In those instances where the contributions for welfare, training and legal service benefits derive from more than one unit agreement and those unit agreements are not uniform as to each other with respect to the aforesaid contributions, the Employer shall have no obligation to comply with the immediately above paragraph unless and until each particular unit agreement contains a provision agreeing to waive the relevant contribution provided for in the unit agreement in question.

(Ans., Ex. 2)

Employee release time is governed by EO 75, and § 2 thereof, entitled “Labor-Management Joint Activities,” reads, in pertinent part:

Employee representatives, duly designated by certified employee organizations, when acting on matters related only to employees in their certified bargaining units shall be permitted to perform the following functions, subject to conditions set forth in [EO 75], without loss of pay or other employee benefits: . . .

- n. To attend meetings as a trustee of union welfare, security or annuity funds.

(Pet., Ex. 6)

On September 18, 2013, the DOC Director of Labor Relations received from the NYSNA Welfare Plan Administrator a request that DOC “authorize the release” of the Grievant to attend the 2013 IFEBP Annual Conference scheduled for October 19 through October 23, 2013. (Pet.,

Ex. 4) DOC's Director of Labor Relations consulted with the City's Office of Labor Relations ("OLR") and concluded that the Grievant should not have been granted release with pay in 2012 to attend the 2012 IFEBP Annual Conference. Thus, on or about September 25, 2013, the DOC only authorized the Grievant release without pay to attend the 2013 IFEBP Annual Conference (*i.e.*, the period of leave was to be charged to the Grievant's leave balances).

On October 7, 2013, at a Step II hearing, the Union amended a previously filed grievance related to the Grievant to include: "The employer denied release with pay of [the Grievant] to attend [IFEBP] Annual Conference to be held from October 19[] through October 24, 2013." (Pet., Ex. 2) The Union amended the requested remedy to include "30 hours of paid time off not to be charged to [the Grievant's] leave balances."² (*Id.*)

No Step II determination was issued. The Grievant attended the 2013 IFEBP Annual Conference and her leave balances were charged accordingly. On October 29, 2013, the Union filed its Step III request.

On December 12, 2013, OLR issued a Step III determination denying the grievance. The Step III determination described the grievance as DOC's "failure to allow [the] Grievant release time" and found no nexus to Article IV of the Agreement as that article "merely establishes a Welfare Fund. It provides no rights for an employee to attend workshops, conferences, or to be given paid leave for attendance at same." (Pet., Ex. 2)

² The Step II hearing was scheduled to address a grievance submitted by the Union on September 6, 2013, that alleged a "[v]iolation of the [Agreement], including but not limited to, Article IV Welfare Fund. Employee is a Welfare Plan trustee. A Welfare Plan Meeting was held in which an educational workshop was provided. Employee was denied release time for that day." (Pet., Ex. 2) The remedy requested was to "[m]ake employee whole; reinstate accrued benefit time of 7.5 hours." (*Id.*) There are no other details in the record regarding the initial September 6 Grievance and it cannot be determined from the pleadings whether the Welfare Plan Meeting referred to in it was connected to the 2013 IFEBP annual Conference.

On January 21, 2014, the Union filed a request for arbitration stating, in pertinent part, the grievance to be arbitrated as:

Employee is a Welfare Plan trustee. A Welfare Plan Meeting was held in which an educational workshop was provided. Employee was denied release time for that day. Grievance amended . . . to include: The employer denied release with pay of [Grievant] to attend [IFEBP] Annual Conference to be held from October 19[] through October 24, 2013.

(Pet., Ex. 2)

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration must be denied because the Union has not established a *prima facie* relationship between the acts complained of and the source of the alleged right, redress for which is sought through arbitration. Specifically, the City argues that there is no nexus between the denial of paid leave to attend the 2013 IFEBP Annual Conference and Article IV of the Agreement, as nothing in that provision expressly or implicitly obligates the employer to compensate Welfare Fund trustees for attending training or educational conferences. The City notes that Article IV expressly states that the Union “waives its right to training, education.” (Pet., Ex. 2)

The City further argues that the Union cannot establish a nexus between the act complained of and Article VI, §1 (b), of the Agreement, which allows the grieving of a claimed violation, misinterpretation or misapplication of the rules or regulations, written policies or orders of DOC. The Union has not cited to any such rule, regulation, written policy or order. According to the City, to the extent that the grievance is read to allege a violation of EO 75, the Union has failed to establish the requisite nexus. EO 75 allows leave with pay for certain

defined union activities, including attending meetings as a trustee of union welfare, security, or annuity funds and to attend union meetings, conferences, and conventions. The City argues that the IFEBP Annual Conference is not a meeting of a union welfare, security, or annuity fund nor is it a union meeting, conference, or convention. EO 75 contains no references to, and the City argues it does not require the City to provide compensation for the attendance at, educational conferences or training. Thus, according to the City, it was not obligated to compensate the Grievant for time spent attending the 2013 IFEBP Annual Conference.

The City also argues that the Union's unsupported claim in its Answer that DOC arbitrarily denied the Grievant compensation while compensating other employees is wholly without merit as the Union has not identified any City employee who received compensation for attending the 2013 IFEBP Annual Conference.

Union's Position

The Union argues that it has established a reasonable relationship between the subject matter of the dispute (the denial of release with pay to a Welfare Fund trustee to attend an educational conference) and Article IV of the Agreement, which incorporates Article XIII, § 1 (b), of the Citywide Agreement. The Union's request for arbitration explicitly identifies the issue as the denial of release time. Thus, the City's misinterpretation of EO 75 is also properly raised. Accordingly, the Union argues, the request for arbitration must be granted.

The Union argues that Article IV of the Agreement and Article XIII, § 1 (b), of the Citywide Agreement must be read together and that both contemplate administrative requirements and the role of Welfare Fund trustees. Pursuant to Article IV of the Agreement, the Union created the NYSNA Welfare Fund, and the Grievant is a trustee of the fund. Article IV of the Agreement incorporates by reference Article XIII, § 1 (b), of the Citywide Agreement, which

details the role of a trustee. The Union argues that the City has long contemplated that the education of union trustees is covered by EO 75 since the obligations of a Welfare Fund trustee require experience that lies outside the typical experience of Union members.

Further, the Union argues that EO 75 explicitly states that employees are to be released “without loss of pay . . . to attend meetings as a trustee of union welfare, security or annuity funds.” (Ans. p. 5) (quoting EO 75) According to the Union, the City’s past practice establishes that the IFEBP Annual Conference constitutes a meeting under EO 75. The Grievant was released with pay to attend the 2012 IFEBP Annual Conference, it was not until the filing of the City’s petition in the instant matter that the City claimed that such payment was in error, and, according to the Union, the City has never before denied a trustee release time with pay to attend the conference.

DISCUSSION

The Union has alleged two sources of right—Article IV of the Agreement, which incorporates Article XIII, § 1 (b), of the Citywide Agreement, and EO 75—for its claim that Grievant was entitled to release time with pay to attend the 2013 IFEBP Annual Conference. The Board finds that, while there is no reasonable relationship between the Union’s claim and cited contract provisions, there is the requisite relationship to EO 75. Accordingly, the petition challenging arbitrability is denied and the request for arbitration is granted.³

The Board has the power “to make a final determination as to whether a dispute is a proper subject for grievance and arbitration.” NYCCBL § 12-309(a)(3). It is the “policy of the

³ While it is unclear from the pleadings whether both claims in the request for arbitration stem from the 2013 IFEBP Annual Conference, the City’s challenge to arbitration only disputes the nexus to Grievants’ claim for leave with pay to attend the 2013 IFEBP Annual Conference. Thus, that is the only issue we decide.

[C]ity to favor and encourage . . . final, impartial arbitration of grievances.” NYCCBL § 12-302. Accordingly, the NYCCBL “explicitly promotes and encourages the use of arbitration.” *PBA*, 4 OCB2d 22, at 12 (BCB 2011). Thus, the presumption is that disputes are arbitrable, and “that doubtful issues of arbitrability are resolved in favor of arbitration.” *Id.*; *see also DC 37*, 13 OCB 14, at 11 (BCB 1974). However, this Board “cannot create a duty to arbitrate where none exists.” *Id.*; *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

To determine the arbitrability of a grievance, the Board employs a two pronged test:

- (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 9 (BCB 2011); *see also NYSNA*, 69 OCB 21, at 7 (BCB 2002).

The Agreement contains grievance procedures and the City has not argued that there are court-enunciated public policy, statutory, or constitutional restrictions barring arbitration of the grievance at issue. Thus, the first prong is satisfied. To establish the second prong requires that the party demonstrate a “relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.” *PBA*, 4 OCB2d 22, at 13; *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). Any “conflict between the parties’ interpretation presents a substantive question of interpretation for an arbitrator to decide.” *Id.*; *see also Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

The Union argues that there is a nexus because without training and education, Welfare Fund trustees cannot fulfill their responsibilities to manage the Welfare Fund which is explicitly

referenced in Article IV of the Agreement and Article XIII, § 1 (b), of the Citywide Agreement. However, the cited contractual provisions concern only the City's obligation to make contributions to the Welfare Fund and its right to review the distribution of funds from the Welfare Fund. These provisions do not address paid release time for Welfare Fund trustees. The fact that the City's denial of release time impacts a Welfare Fund trustee does not, in and of itself, create a nexus between the grievance and Article IV of the Agreement or Article XIII, § 1 (b), of the Citywide Agreement. *See SSEU, Local 371*, 6 OCB2d 16, at 6 (BCB 2013); *Local 1180, CWA*, 79 OCB 35, at 12-13 (BCB 2007).

Regarding EO 75, the City does not dispute that it is applicable to the DOC and that a grievance arising under EO 75 would be arbitrable under the Agreement. Rather, the City argues that the Union has not explicitly cited to any rule, regulation, written policy or order of the DOC. However, the "lack of an explicit citation to a specific contract provision or rule or regulation in the [r]equest for [a]rbitration is not, in and of itself, necessarily fatal to the [r]equest for [a]rbitration." *CCA*, 4 OCB2d 49, at 11 (BCB 2011) (citing *CWA*, 51 OCB 27, at 14 (BCB 1993), *affd.*, *Matter of City of New York v. MacDonald*, No. 405350/93 (Sup. Ct. N.Y. Co. Sept. 29, 1994) (Fisher-Brandveen, J.), *affd.*, 223 A.D.2d 485 (1st Dept. 1996)) (other citations omitted). The Board explained in *CWA* that "if the party challenging arbitrability had clear notice of the nature of the opposing [party's] claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." 51 OCB 27, at 14 (City's challenge to arbitrability was denied even though the union failed to cite to the pertinent contract language until it submitted its answer); *see also DEA*, 43 OCB 73, at 6 (BCB 1989) (petition challenging arbitrability was denied despite the union's failure to cite pertinent

provision in the request for arbitration because the union had clearly stated the nature of the grievance and the City had “not shown that the omission in the request for arbitration has impaired its ability to respond to the request or otherwise to prepare for arbitration”). Thus, the Board will “not dismiss requests for arbitration because of technical omissions when a petitioner’s ability to respond to the request or prepare for arbitration was not impaired.” *NYSNA*, 2 OCB 2d 32, 11 (BCB 2009).

In the instant case, the Step III determination described the grievance as DOC’s “failure to allow [the] Grievant release time.” (Pet., Ex. 2) Thus, the City had clear notice that the Union’s claims concerned release time prior to the submission of the request for arbitration. We find that there is a nexus to the grievance. The Agreement allows for the grievance of a rule, and EO 75 is a rule applicable to DOC. EO 75, § 2(n), allows for leave “without loss of pay or other employee benefits . . . [t]o attend meetings as a trustee of union welfare, security or annuity funds.” (Pet., Ex. 6) Whether this language is reasonably interpreted to cover the attendance at the 2013 IFEBP Annual Conference by an employee who is a Welfare Fund trustee is for an arbitrator to determine. Accordingly, the petition challenging arbitrability is denied and the request for arbitration is granted.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York and the New York City Department of Corrections, docketed as No. BCB-4032-14, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the New York State Nurses Association, docketed as A-14576-14, hereby is granted.

Dated: June 24, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER