OSA, 7 OCB2d 28 (BCB 2014)

(Arb.) (Docket No. BCB-4072-14) (A-14690-14)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that OPA violated the Citywide Agreement when it recouped an overpayment from the Grievant that occurred more than six years prior. The City argued that the Union failed to establish the requisite nexus between OPA's recoupment of the Grievant's accrual of unearned sick leave and Article IX, § 8 of the Citywide Agreement, because that section applies only to overpayments of salary. Alternatively, the City argued that disputes over overpayments are not arbitrable, as the decision of the City's Office of Labor Relations in such disputes is final. The Union argued that Article IX, § 8 applies to all overpayments, including those that result from leave advancement, and that there is a nexus between its claims and Article IX, § 8 (c) and (d). The Board found that the Union established the requisite nexus between its claims and Article IX, § 8 (c) and (d). Accordingly, the City's petition challenging arbitrability was denied, and the Union's 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 OFFICE OF PAYROLL ADMINISTRATION,

Petitioners,

-and-

ORGANIZATION OF STAFF ANALYSTS
on behalf of PATRICIA BLUNT,

Respondent.

DECISION AND ORDER

On July 2, 2014, the Organization of Staff Analysts ("Union") filed a request for arbitration on behalf of Patricia Blunt ("Grievant"), alleging that the City of New York ("City") violated Article IX, § 8 (c) and (d) of the Citywide Agreement when it recouped an overpayment

from the Grievant that occurred more than six years prior. On August 13, 2014, the City and its Office of Payroll Administration ("OPA") filed a petition challenging the arbitrability of the grievance. The City asserts that the Union failed to establish the requisite nexus between OPA's recoupment of unearned sick leave from the Grievant and Article IX, § 8 of the Citywide Agreement because this provision applies only to overpayments of salary. Alternatively, the City argues that under Article IX, § 8 (a), disputes regarding overpayments are not arbitrable, as the City's Office of Labor Relations' ("OLR") decision in such disputes is final. The Union argues that Article IX, § 8 applies to all overpayments, including those that result from leave advancements, and that there is a nexus between its claims and Article IX, § 8 (c) and (d). This Board finds that the Union has established the requisite nexus between its claims and Article IX, § 8 (c) and (d). Accordingly, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

BACKGROUND

The Grievant is employed by OPA as an Administrative Staff Analyst, and the Union represents employees in this title. The Union and the City are parties to a collective bargaining agreement that covers the Grievant's title ("Staff Analysts Agreement"), which covers the period of August 25, 2008 to August 24, 2010, and currently remains in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Article XI, § 1 of the Staff Analysts Agreement, provides that Staff Analysts are also covered by the Citywide Agreement, which expired on June 30, 2001, and currently remains in *status quo*.

Around November 2006, and again in August 2008, the Grievant was advanced 85 hours of sick leave pursuant to § 3.4 of the "Leave Regulations for Employees who are under the

Career and Salary Plan" ("Leave Regulations").[1] She was also granted additional sick leave with pay for three months, pursuant to § 3.5 of the Leave Regulations, which is titled "Discretionary Grant After 10 Years of Service."[2] Under the Leave Regulations, leave granted under § 3.4 is chargeable against future earned sick leave, while leave granted under § 3.5 is not. According to the City, in May 2013, OPA began conducting an internal review of the time and leave history for employees who received these types of advanced leave. In or around December 2013, OPA discovered that the Grievant's advances and her use of leave had not been properly processed. The City states, and the Union denies, that the Grievant's leave balances "reflected sick and annual leave time that she was not entitled to and which [she] used from 2007 to 2009 . . . ." (Pet. ¶ 15) The Grievant was advised of this error in a January 27, 2014 memo from her supervisor. The subject of the memo was "Notification of Overpayment," and it stated that the Greivant was "overpaid a total of 203 hours and 47 minutes totaling $9,910.60." (Ans., Ex. A)

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[1] Section 3.4 of the Leave Regulations is titled "Discretionary Grant up to 12 Days" and states:

> In the discretion of the agency head, permanent employees who have exhausted all earned sick leave and annual leave balances due to personal illness may be permitted to use unearned sick leave allowance up to the amount earnable in one year of service, chargeable against future earned sick leave.

(Pet., Ex. 4)

[2] Section 3.5 of the Leave Regulations states:

> In the discretion of the agency head, permanent employees may also be granted sick leave with pay for three months after ten years of City service, after all credits have been used. In special instances, sick leave with pay may be further extended, with the approval of the agency head. The agency head shall be guided in this matter by the nature and extent of illness and the length and character of service.

(Pet., Ex. 4)

On February 19, 2014, the Union filed a Step I grievance citing violations of Article IX, § 8 (c) and (d) of the Citywide Agreement, alleging that OPA could not recover the Grievant's leave time beyond the previous six years. (Pet., Ex. 2) Article IX of the Citywide Agreement is titled "Personnel and Pay Practices." Section 8 addresses "overpayments" and "recoupments." (*Id*.) Article IX, § 8 (c) provides: "Any recoupment shall be limited to the period up to six years prior to the commencement of such proceedings for recoupment." (*Id.*) Section 8 (d) states: "In lieu of wage deductions for recoupment purposes, the Employer may, with the consent of the employee, make deductions from the employee's annual leave or compensatory leave banks." (*Id*.)

The Step I grievance was denied by the Grievant's supervisor. Thereafter, on March 3, 2014, the Union filed a Step II grievance, which was denied on March 24. On April 2, 2014, the Union requested that a Step III hearing be held. According to the Step III decision, which was issued on June 19, the Grievant did not dispute the amount of leave time that she owed. Instead, the Union argued that based on § 8 (c) of the Agreement, OPA could only recoup the leave time that the Grievant had used in the last six years. The Union also argued that the monetary amount owed should be calculated based on the Grievant's salary at the time when she took the leave, rather than at the higher rate of her current salary.

At the Step III hearing, OPA submitted an exhibit titled "Analysis based on current salary." (Ans., Ex. D) The first page of the document included a chart which stated that the "[a]mount owed in time" was 203 hours and 47 minutes. (*Id*.) It then listed the Grievant's current base salary and concluded that the "[a]mount owed based on current salary" was $12,768.41. (*Id*.) OPA also submitted a document titled, "Directive 19- Procedures for Recouping Payroll Overpayments to City Employees" ("Directive 19"). The Union asserts, and

the City denies, that OPA argued that its actions conformed to this directive.[3] (Ans., Ex. E) This document was created by the City's Office of the Comptroller and is part of its "Comptroller's Internal Control and Accountability Directives." (*Id.*) The Directive states that it "establishes uniform procedures for recouping salary overpayments to City employees." (*Id.*)

In denying the Step III grievance, the OLR review officer stated that the issue was not a matter of recoupment because there had been no overpayment to the Grievant. Instead, the review officer found that the issue was one of "over-accrual" and, therefore, there was no nexus between the grievance and Article IX, § 8 (c) and (d) of the Citywide Agreement. (Pet., Ex. 3) On July 2, 2014, the Union filed a request for arbitration, stating the question to be arbitrated as: "Whether the OPA violated Article IX, Sections 8 (c) and (d) of the Agreement when the Agency recouped from the Grievant an overpayment which occurred over six years ago." (*Id.*)

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union has not established a nexus between OPA's recovery of the Grievant's "over-accrual" of leave and the cited provisions of the Citywide Agreement. The City argues that Article IX, § 8 of the Citywide Agreement clearly and unambiguously applies to overpayments, which the City contends refers to salary, and not to leave accruals. According to the City, the Agreement makes a clear distinction between the two, because Article V, entitled "Time and Leave," states that annual leave "shall accrue as follows . . . ." (Pet. ¶ 35) (citing Pet. Ex. 2). Thus, where the parties meant to address time and leave, the word "accrued" or "accrual" is used. (*Id.*) Furthermore, the City contends that the Agreement does not contain any

[3] The City argues that Directive 19 does not apply to the Grievant's situation because it "clearly states that it is regarding 'recouping *salary* overpayments.'" (Rep. ¶ 23)

contractual provisions relating to the recovery of advanced leave, or the time and manner in which an employer may recover such leave.

The City further argues that even if Article IX, § 8 of the Agreement applied to the City's recovery of advanced leave, nevertheless the Union has no right to bring leave recoupment issues to arbitration. The City asserts that, under § 8 (a), an employee who disputes an overpayment may appeal to OLR within 20 days of the employer's notice of its intent to recoup the overpayment. However, according to the Citywide Agreement, the decision of OLR in such a matter is final.[4] The City cites Board precedent that states that where a contractual provision provides that a determination is to be "final," there cannot be a review of the decision in arbitration. (Pet. ¶ 41) (citing *CWA, L. 1180*, 65 OCB 20, at 5 (BCB 2000)). According to the City, while the employer's claimed failure to follow procedure may be arbitrable, here the Union seeks to arbitrate only the merits of OLR's decision at Step III and has not raised any procedural issues. Additionally, the City asserts that, contrary to the Union's arguments, *CWA, L. 1180* applied to the entirety of § 8 and, therefore, the grievance is barred from arbitration regardless of the fact that it cites only § 8 (c) and (d). Consequently, the City requests that its petition challenging arbitrability be granted.

[4] Article IX, § 8 (a) of the Citywide Agreement states, in pertinent part,

> In the event the employee disputes the alleged erroneous overpayment, the employee or the union, except as provided in Section 8(b), may appeal to the Office of Labor Relations ("OLR") within 20 days of a notice by the employer of its intent to recoup the overpayment and no deduction for recoupment shall be made until OLR renders a decision, which decision shall be final. Nothing contained above shall preclude the parties or affected individuals from exercising any rights they may have under law.

Union's Position

The Union argues that the City's petition challenging arbitrability should be denied because there is a clear nexus between the grievance and Article IX, § 8 (c) and (d) of the Citywide Agreement. The Union avers that, contrary to the City's arguments, Article IX, § 8 applies to all overpayments, including those that result from leave advancement, since the language does not set any limitations on how overpayments are made. Rather, according to the Union, Article IX, § 8 merely governs the methods of recoupment for overpayments. Further, the Citywide Agreement does not define what might constitute an overpayment. Thus, the Union argues that the fact that Article V governs the accrual of time and leave is irrelevant, since the issue at hand is the recoupment of an overpayment based on leave advancement, not the accrual of leave. The Union contends that the fact that OPA "repeatedly equated the recoupment of leave to a monetary figure belies the City's argument that Article IX, § 8 of the Citywide Agreement does not apply to the recoupment of leave." [5] (Ans. ¶ 51)

Further, the Union argues that the case cited to by the City, *CWA, L. 1180*, 65 OCB 20, did not hold that Article IX, § 8 applies only to the recoupment of salary. Additionally, that case did not deal with a request for arbitrability based on Article IX, § 8 (c) and (d), as is the issue here. Rather, that case held only that the Union could not arbitrate an alleged violation of Article IX, § 8 (a), because the merits of OLR's decision rendered at a recoupment hearing were final. This is not the issue that the Union seeks to arbitrate here. The Union argues that the Board has held that where both parties proffer arguments regarding the meanings of the terms of an agreement, there is a substantive question for an arbitrator. Here, the issue is whether Article IX, § 8 applies only to the recoupment of salary, as the City argues, or whether the recoupment of

[5] The Union points to the fact that, at the Step III hearing, OPA submitted the documents entitled "Analysis based on Current Salary" and "Directive 19," in order to support its position that it overpaid the Grievant.

leave and salary are equivalent, as the Union argues. Thus, the Union contends that this is a question of interpretation for an arbitrator.

Finally, the Union argues that Article IX, § 8 (a) does not bar the arbitrability of the Union's claims under § 8 (c) and (d). Although Article IX, § 8 (a) states that OLR's decision regarding an alleged erroneous payment shall be final, here "OLR never rendered such a ruling." (Ans. ¶ 61) Instead, OLR claimed that this was not an issue of overpayment but, rather, one of "over-accrual." (Pet., Ex. 3) Moreover, Article IX, § 8 (a) specifically states that nothing in its language "shall preclude the parties of affected individuals from exercising any rights they may have under law." Thus, the Union's claims, which relate only to the procedures for recoupment as outlined in § 8 (c) and (d), are not barred by the finality clause in § 8 (a).

DISCUSSION

"The policy of [this Board], 'as is made explicit by § 12-302 of the NYCCBL . . . is to favor and encourage arbitration to resolve grievances.'" *OSA*, 1 OCB2d 42, at 15 (BCB 2008) (quoting *Local 1182, CWA*, 77 OCB 31, at 7 (BCB 2006)).[6] In recognition of this policy, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)) (internal quotation marks omitted).

[6] Section 12-302 of the NYCCBL provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

DC 37, L. 420, 5 OCB2d 4, at 12 (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). The Board lacks jurisdiction to enforce contractual rights and, therefore, it will generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citations omitted); *see also* N.Y. Civ. Serv. Law § 205(5)(d).

"This Board has long held that '[w]hen a case involves a factual dispute or a question of contract interpretation, [we] will submit the case for resolution by an arbitrator.'" *DC 37, L. 375*, 5 OCB2d 25, at 11 (BCB 2012) (quoting *Local 371, SSEU*, 69 OCB 33, at 5 (BCB 2002)); *see also Local 1157, DC 37*, 1 OCB2d 24, at 9 (quoting *Local 924, DC 37*, 1 OCB2d 3, at 12 (BCB 2008)) ("[W]here the interpretation that each party proffers is plausible, 'the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide.'"). Here, the parties do not dispute that they have agreed to submit certain disputes to arbitration. The relevant inquiry is, therefore, whether there is a reasonable relationship between the Union's claims and the cited contractual provisions. The City argues that there is no nexus, because Article IX, § 8 of the Citywide Agreement applies only to overpayments of salary, and not to "over-accruals" of leave time. The Union, on the other hand, argues that Article IX, § 8 applies to all overpayments, including those which result from leave advancements. For the reasons discussed below, we find that this issue is one of contract interpretation, which is for an arbitrator to determine.

Article IX of the Citywide Agreement is titled "Personnel and Pay Practices," and it includes provisions governing pay procedures, transfer of leave balances, and payment for compensatory time, among other things.[7] Section 8 of Article IX, applies to the recoupment of "overpayments," but does not define or limit that term. Further, both parties agree that the term "overpayment" is not defined elsewhere in the Citywide Agreement. Nevertheless, the City argues that "overpayment" refers only to salary, and characterizes the issue here as one of "over-accrual" of leave rather than overpayment of salary.

Here we find that, regardless of how the action is characterized, it is clear that the City seeks to recover from the Grievant's salary the value of leave that it advanced to her. Although the term "overpayment" is not defined in the Citywide Agreement, it is included in an Article that deals with salary and leave issues, among other things. Thus, it is plausible that Article IX, § 8 applies to the recoupment of leave as well as salary. Moreover, we note that the City's argument that the issue at hand does not concern an overpayment directly contradicts the actions taken by OPA. In attempting to recover the advanced leave time from the Grievant, OPA did not seek to stop the Grievant's leave accrual or deduct accrued leave, but instead tied its recoupment directly to the Grievant's salary. Further, it submitted at the Step III conference a document titled "Directive 19," which expressly states that it "establishes uniform procedures for recouping salary overpayments to City Employees." (Ans., Ex. E). Consequently, we leave it to an arbitrator to determine whether the City or OPA violated Article IX, § 8 of the Citywide Agreement.

We also find that § 8 (a) does not preclude this dispute from arbitration. In *CWA, L. 1180*, the Board found that, due to the language in Article IX, § 8 (a), providing that OLR's

[7] We take administrative notice of the Citywide Agreement, as only select portions of it were attached as an exhibit to the petition in this matter.

decision in an appeal regarding an overpayment is final, the Union could not arbitrate the merits of that decision.[8] 65 OCB 20, at 5. Here, the Union has made clear that it does not wish to challenge OLR's determination regarding the number advanced leave hours, or the fact that they are owed. Rather, the Union seeks only to arbitrate, under Article IX, § 8 (c) and (d), the time period and manner in which the advancement may be recouped. Sections 8 (c) and (d) are separate provisions that do not address the merits of OLR's decision and do not state that they are not subject to arbitration.[9] Rather, these sections refer to precisely the questions that the Union seeks to arbitrate. Therefore, we find that the Union has established the requisite nexus between its claims and Article IX, § 8 (c) and (d) of the Citywide Agreement.

Consequently, for the reasons stated above, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

[8] It is not entirely clear how the overpayment in that case arose. However, the type of overpayment was never raised as an issue, and the City did not argue that Article IX, § 8 (a) was inapplicable.

[9] We are not persuaded by the City's argument that the Board's decision in *CWA, L. 1180* applied to the entirety of Article IX, § 8. The Board in that case cited only the language of § 8 (a), and made an express distinction between issues pertaining to the merits of OLR's decision regarding an overpayment, which are not arbitrable, and issues of procedure, which may be. The Board did not cite to or discuss § 8 (c) or (d).

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 its Office of Payroll Administration, docketed as BCB-4072-14, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, docketed as A-14690-14, hereby is granted.

Dated: November 10, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER