OSA, 7 OCB2d 8 (BCB 2014)

(Arb.) (Docket No. BCB-4008-13) (A-14454-13)

Summary of Decision: The City filed a petition challenging the arbitrability of a grievance brought by the Union. In its request for arbitration, the Union alleged that the City violated Article IV of the Citywide Agreement and the City's Leave Regulations by failing to properly compensate Grievants for overtime worked. The City claimed no nexus existed between the allegations and either the Citywide Agreement or the Leave Regulations. The City argued that neither the Citywide Agreement nor the Leave Regulations apply to Grievants because they were managerial employees during the relevant time period and therefore explicitly excluded from coverage. The Board found that a nexus existed between the Union's grievance and the Agreement cited and therefore denied the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

THE ORGANIZATION OF STAFF ANALYSTS,

Respondent.

DECISION AND ORDER

On October 24, 2013, the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by the Organization of Staff Analysts ("Union" or "OSA") on behalf of Edward Bowen, David Nussbaum, Alice Moise, Sally Ramirez, and all other similarly situated employees ("Grievants"). Grievants are employed by various agencies in the title Administrative Staff Analyst, Levels II and III ("ASA"). In its request for arbitration, the Union

alleges that the City violated Article IV of the Citywide Agreement and § 2 of the City's Leave Regulations for Employees Who Are Under the Career and Salary Plan ("Leave Regulations") by failing to properly compensate Grievants for overtime worked. The City claims that there is no nexus between the allegations and the Agreement referenced. The City argues that neither the Agreement nor the Leave Regulations apply to Grievants because they were managerial employees during the relevant time period and are therefore explicitly excluded from coverage. The Board finds that a nexus exists between the Union's grievance and the Agreement and therefore denies the City's petition.

BACKGROUND

On July 29, 2010, the Board of Certification ("BOC") found ASAs eligible for collective bargaining, with the exception of certain specified managerial or confidential positions, and thus added ASAs to OSA's Certification No. 3-88. *See OSA*, 3 OCB2d 33 (BOC 2010), *affd. Matter of City of New York & NYCHA v. Bd. of Certification & OSA*, Index Nos. 402466/10 & 402496/10 (Sup. Ct. N.Y. Co. Oct. 27, 2011) (Kern, J.). While the City filed a notice of appeal related to the Supreme Court's decision, it did not perfect its appeal by the August 23, 2012 deadline. The City did not comply with the Board's order in *OSA*, 3 OCB2d 33, until February 10, 2013.[1] On that date, the City complied with the BOC Order and the City began deducting union dues from Grievants' paychecks through "dues check off" procedures.

On July 2, 2013, the Union filed a request for arbitration which, as amended, asserts that the City violated Article IV of the Citywide Agreement and § 2 of the Leave Regulations by

[1] The Union requested a compliance conference in March 2012 and again in September 2012 when the parties were unable effectuate the Board's order on their own. On November 28, 2012, OCB Staff held a conference where the parties agreed to implement the BOC Order on February 10, 2013.

failing to properly compensate Grievants and other similarly situated employees for overtime they worked on and after August 2012.[2] The Union seeks a remedy to make Grievants whole, including back pay, interest, and/or compensatory time for all overtime worked.

In its request for arbitration, and in the underlying grievance, the Union alleges that the City failed to properly compensate Grievants for overtime worked in accordance with Article IV of the Citywide Agreement and the City's Regulations Governing Compensatory Time Off, Compensation for Overtime, and Meal Allowances for City Employees.[3] The Union attached these provisions to its Step III grievance. The Citywide Agreement explicitly defines "grievance" as "a dispute concerning the application or interpretation of this Agreement." (Pet., Ex. A) Furthermore, Article XV, §§ 2 and 4 of the Citywide Agreement provide for "any grievance of a general nature affecting a large group of employees and which concerns the

[2] This request for arbitration followed the City's denial of a Step III grievance stating the same claim in June 2013. In denying the Step III grievance, OLR asserted that it was untimely and lacked the necessary specificity required to move forward. The City notes that the request for arbitration similarly lacks details regarding the allegations, and does not state whether compensable overtime was ever requested by Grievants or approved by Grievants' supervisors. Also, the request for arbitration does not provide details regarding which agencies are involved in this controversy, or who similarly situated employees may be. It is well settled that compliance with contractual provisions setting forth procedural requirements, including time-sensitive deadlines, is left to the arbitrator. Therefore, this decision will not consider whether the grievance was timely or whether the Union complied with necessary procedure. See *generally CWA, L. 1182*, 77 OCB 31 (BCB 2006). *Cf. DC 37, L.* 2507, 6 OCB2d 9 (BCB 2013) (*citing SSEU, L. 371*, 3 OCB2d 53 (BCB 2012) (finding claims arbitrable in spite of technical omissions in an arbitration request where the opposing party's ability to respond to the request or prepare for arbitration is not impaired).

[3] The City and District Council 37, AFSCME, AFL-CIO ("DC 37"), are parties to a collective bargaining agreement, known as the Citywide Agreement, covering the period of January 1, 1995, through June 30, 2001. Pursuant to NYCCBL § 12-307(a)(2), the Union's members are subject to the terms and conditions set forward in that agreement. The Citywide Agreement remains in full force and effect pursuant to the *status quo* provision of § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement" to be addressed through the filing of a Step III grievance and allows for the Union to appeal an unsatisfactory Step III determination by submitting the grievance to an arbitrator. Article IV of the Citywide Agreement, entitled "Overtime," consists of 14 sections spanning six pages of the contract. Article V § 1(a) of the Citywide Agreement states that the City's "[Leave Regulations] and amendments, and official interpretations relating thereto, in effect on the effective date of this Agreement and amendments which may be required to reflect the provisions of this Agreement shall apply to all employees covered by the Agreement." (Pet., Ex. A) Section 2 of the City's Regulations Governing Compensatory Time Off, Compensation for Overtime, and Meal Allowances for City Employees, entitled "Overtime Provisions," consists of nine subsections and spans three pages. (Pet., Ex. C) These provisions address a number of situations in which covered employees accrue compensation in time or money based on a variety of factors.

Until Grievants were moved into the bargaining unit on February 10, 2013, they received benefits from the Management Benefits Fund ("MBF"). The MBF provides basic life insurance, health insurance, and other similar benefits, generally at no cost to the employee. An active employee is eligible for coverage by the MBF if the employee's title is ineligible for collective bargaining, the title is managerial or confidential, and the employee is scheduled to work at least 20 hours per week. Prior to February 10, 2013, Grievants also accrued annual leave according to the schedule provided in the Managerial Pay Plan. That rate is faster than the rate to which Grievants would be entitled as OSA members. It is undisputed that Grievants did not receive overtime compensation prior to February 10, 2013.

POSITIONS OF THE PARTIES

City's Position

The City asserts that the grievance in question is not arbitrable because there is no nexus between the instant grievance and the Citywide Agreement. It argues that Grievants were not covered by the Citywide Agreement at the time the grievance arose. The City contends that Grievants were, at that time, excluded by Article I of the Citywide Agreement, which provides that "Managerial, confidential, exempt civil service employees, and other employees ineligible for collective bargaining are excluded from the coverage of this agreement." (Pet. Ex. A) The City alleges that Grievants became non-managerial employees and were moved into the Union, by agreement, on February 10, 2013. Until that point, the City contends that Grievants were not covered by the Citywide Agreement because they remained managerial employees. The City points to multiple emails from an OSA Delegate-at-Large in January and February of 2013, which imply that the Union did not consider Grievants to be Union members until February 10, 2013. Moreover, the Union requested compliance conferences on multiple occasions because Grievants had not been placed in the Union. Thus, the Union is claiming non-managerial rights for members that could only flow from a contract that did not cover Grievants at the time the grievance arose. Instead, it is clear that Grievants were not members of OSA or any other Union at the time in question and were not entitled to overtime or compensatory time.

The City also argues that Grievants' status as managerial employees raises other considerations. Allowing the grievance to proceed would result in Grievants receiving "double benefits." (Pet., ¶ 79) Grievants already accepted benefits from their managerial status, such as coverage in the MBF and the accrual of additional annual leave. These benefits are meant to be

mutually exclusive from the overtime or compensatory time benefits created by the Citywide Agreement. Allowing Grievants to receive both managerial and non-managerial rights and benefits creates an "untenable absurdity." (Pet., ¶ 79) Additionally, the City notes that Grievants never submitted requests for overtime or compensatory time. They did not seek approval to work outside their shifts. The City's computerized timekeeping system did not provide Grievants with an overtime option while they were managerial employees. This option was only added to the system after February 10, 2013, when, according to the City, the employees became non-managerial employees.

The City also avers that both parties reached a mutual agreement to place Grievants in the unit on February 10, 2013. Allowing this grievance to move forward to arbitration is tantamount to allowing the Union to unilaterally repudiate that mutual agreement. This outcome would "greatly undermine good labor relations in the City" because it would create uncertainty as to the binding effect of similar agreements. (Pet. at ¶ 75)

Finally, the City argues that there is no nexus between the Leave Regulations and the asserted right to overtime or compensatory time. Thus, the Board should grant the City's petition.

Union's Position

The Union argues that the City's petition challenging the arbitrability of the grievance at issue should be dismissed. On July 29, 2010, the Board found ASAs eligible for collective bargaining and, the Union argues, they were covered by the Citywide Agreement as of that date. Therefore, Grievants were clearly covered by the Citywide Agreement on and after August 23, 2012. In support of this contention, the Union points to Article IX, § 14, which states:

> For the purposes of this Agreement employees in all classes of positions not yet classified by the appropriate competent body shall

> be presumptively covered by the terms of this Agreement pending final classification of the affected class of positions.

(Pet., Ex. A) The Union argues that this presumptive coverage applies equally to employees specifically found eligible for collective bargaining by the Board. Furthermore, the Union argues that the City was under an affirmative obligation to add Grievants to OSA's bargaining unit, and that its failure to comply with the Board's order does not affect Grievants' rights under the Citywide Agreement. Additionally, the Union argues that the question of when Grievants became covered by the Citywide Agreement is an arbitrable question in and of itself. The Union asserts that, according to Board precedent, where both parties proffer plausible interpretations of the contract as to whether the grievants fall within the definition of "employee," and are therefore covered by the contract, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *L. 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008) (internal citations omitted).

The Union also asserts that the Citywide Agreement defines a grievance as a dispute concerning the application or interpretation of the terms of the agreement. The Union claims that failure to properly compensate Grievants for overtime falls within this definition. The Union references both the Citywide Agreement and § 2 of the Leave Regulations in its request for arbitration, because the proper payment of overtime is addressed by the Leave Regulations, which are incorporated by reference in Article V, § 1a of the Citywide Agreement.

> All provisions of the Resolution approved by the Board of Estimate on June 5, 1956, on [Leave Regulations] and amendments, and official interpretations relating thereto, in effect on the effective date of this Agreement and amendments which may be required to reflect the provisions of this Agreement shall apply to all employees covered by the Agreement.

(Pet. Ex A) Therefore, the Union argues, there is a clear nexus between the subject matter of the grievance and the Citywide Agreement and the City's Leave Regulations.

DISCUSSION

It is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes. *See* NYCCBL § 12-302;[4] *see also Local 333, UMD, ILA*, 6 OCB2d 22, at 8 (BCB 2013); *CEU, L. 237*, 4 OCB2d 52, at 8 (BCB 2011). To effectuate this policy, the Board is charged with the task of making threshold determinations as to whether a dispute is a "proper subject" for arbitration. NYCCBL § 12-309(a)(3); s*ee also SSEU, L. 371*, 6 OCB2d 16, at 5 (BCB 2013); *DC 37, L. 1505*, 5 OCB2d 32, at 8-9 (BCB 2012). This Board presumes that disputes are arbitrable, and further, that doubtful issues of arbitrability are resolved in favor of arbitration. *See DC 37, L. 1549*, 6 OCB2d 4, at 9 (BCB 2013); *see also CEU, L. 237*, 4 OCB2d 52, at 8; *CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968). However, the Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *SSEU, L. 371*, 6 OCB2d 16, at 5 (quoting *UFOA*, 15 OCB 2, at 7 (BCB 1975)). Therefore, we will not create a duty to arbitrate where none exists, nor enlarge a duty to arbitrate beyond the scope established by the parties. *See DC 37, L. 1549*, 6 OCB2d 4, at 9.

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is

[4] NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

> 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.

SSEU, L. 371, 6 OCB2d 16, at 6. *See also DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012); *SSEU*, 3 OCB 2, at 2 (BCB 1969).[5] Where the City challenges the existence of a nexus between the grievance and the Agreement, the Union must show a *prima facie* relationship exists between the allegations and the source of the alleged right. *See DC 37, L. 1549*, 6 OCB2d 4, at 10 (BCB 2013). Here, the Board finds the two-prong test is satisfied and, therefore, the grievance is arbitrable.

First, it is clear that the parties are obligated to arbitrate their controversies through a grievance procedure ending in arbitration. Here, ASAs, including Grievants, were found eligible for collective bargaining and added to the Union's bargaining unit on July 29, 2010, "subject to existing contracts, if any." *See OSA*, 3 OCB2d 33, at 166. Therefore, according to this Board's final and binding order, as affirmed by the Court, Grievants were covered by the Citywide Agreement, an existing contract, as of that date. See § 12-309(b) Further, the Citywide Agreement contains grievance and arbitration provisions. Article XV, §§ 2 and 4 of the Citywide Agreement provide for "any grievance of a general nature affecting a large group of employees and which concerns the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement" to be addressed through the filing of

[5] "[I]t is not true that any claim, no matter how insubstantial, may be arbitrated." *Matter of NYS Office of Children & Family Svcs. v. Lanterman*, 14 N.Y.3d 275, 283 (2010). The "reasonable relationship" test is not met where, as a matter of law, the grievance does not allege a breach of the collective bargaining agreement, regardless of the breadth of the arbitration clause. *Id.* However, as long as a contractual interpretation is at least colorable, the Board will determine whether an arbitrator has the authority to decide the merits, even where the merits of the grievance are weak. *Id.*

a Step III grievance and allows for the Union to appeal an unsatisfactory Step III determination by submitting the grievance to an arbitrator. Moreover, we find no evidence to support the City's contention that public policy requires that this Board defer to the alleged agreement made between the parties. The record does not include any details regarding this agreement and there is no indication that the Union waived any rights or received a benefit in exchange for the City's compliance with this Board's order.

It is true that the Board has refused to find a grievance arbitrable where the Union sought benefits guaranteed by a contract that did not cover the grievants and was not incorporated by reference into the grievants' contract. *See SBA.*, 79 OCB 15 (BCB 2007). However, this holding is not applicable to the case at hand. Here, the Board found ASAs, including Grievants, eligible for collective bargaining and added the titles to OSA's Certification No. 3-88 in July 2010. Grievants were covered by the Citywide Agreement on that date, regardless of the City's refusal to comply with that order until February 2013.

Secondly, we find that a nexus exists between the contractual violation as alleged and the referenced provisions of the Citywide Agreement. The Union cites Article IV of the Citywide Agreement, which is entitled "Overtime" and consists of 14 sections spanning six pages of the contract. This provision addresses a number of situations in which covered employees accrue compensation for hours worked in excess of a normally scheduled work week, in time or money, at various rates, based on various factors. The request for arbitration alleges that Grievants were improperly compensated for overtime hours worked by Grievants. Clearly, Article IV of the Citywide Agreement is reasonably related to the Union's grievance, the resolution of which requires an interpretation of its provisions with regard to the proper compensation of overtime hours worked by Grievants.

Furthermore, a nexus exists between the Union's allegations in the request for arbitration and the City's Leave Regulations. Article V § 1(a) of the Citywide Agreement states that the City's "[Leave Regulations] and amendments, and official interpretations relating thereto, in effect on the effective date of this Agreement and amendments which may be required to reflect the provisions of this Agreement shall apply to all employees covered by the Agreement." (Pet., Ex. A) This subsection of the Citywide Agreement incorporates the City's Leave Regulations into the parties' contract. *See DC 37, L. 2507*, 6 OCB2d 9, (BCB 2013). As such, a "dispute concerning the application or interpretation" of the regulations is also a dispute concerning the application or interpretation of the Citywide Agreement. (Pet., Ex. A) Here, the Union alleges that Grievants were not properly compensated for overtime hours worked in violation of City's Leave Regulations, specifically the City's Regulations Governing Compensatory Time Off, Compensation for Overtime, and Meal Allowances for City Employees.[6] These regulations pertain to the proper compensation for overtime hours worked and are therefore clearly reasonably related to the subject of grievance.

The Board recognizes that, as a result of the City's failure to comply with the Boards July 2012 Order, Grievants received benefits consistent with managerial status they may not have otherwise collected if treated as OSA members. However, concerns that arbitration may lead to Grievants receiving "double benefits" or other similar arguments are not relevant to determining

[6] The Union's failure to include an "explicit citation" to Article V of the Citywide Agreement in its request for arbitration "is not, in and of itself, necessarily fatal." *CCA*, 4 OCB2d 49, at 11 (BCB 2011). Where the petitioner had clear notice of the nature of the opposing party's claim and an opportunity to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied despite the union's failure to cite to pertinent contract language until it submitted its answer. *Id*.; *CWA*, 51 OCB 27 (BCB 1993). Here, the Union made clear the subject of the grievance and the City had ample opportunity to settle the grievance at the lower steps. Additionally, the Union properly cited Article V as the contractual basis for grieving these regulations in its answer to the PCA. (Ans., ¶ 61)

if a nexus exists between the subject matter of the dispute and the general subject matter of the Agreement. Rather, concerns regarding an appropriate remedy are within an arbitrator's power to hear and consider along with the merits underlying the request for arbitration.

ORDER

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

ORDERED, that the petition challenging arbitrability filed by the City of New York, docketed as BCB-4008-13, is hereby denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, on behalf of Edward Bowen et. al. docketed as A-14454-13, is hereby granted.

Dated: February 24, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER