

Captains Endowment Ass'n, 79 OCB 17 (BCB 2007)

[Decision No B-17-2007] (Arb.) (Docket No. BCB-2596-07) (A-12159-07).

Summary of Decision: The City filed a petition challenging the arbitrability of a grievance filed by the Union alleging that NYPD violated the parties' collective bargaining agreement when it reduced Grievants' salaries. The City contended that this grievance is not subject to arbitration because the Union failed to establish the necessary nexus between the subject matter of the grievance, the reduction of Grievants' salaries, and the source of the alleged rights, the parties' collective bargaining agreement. The Board found that a reasonable relationship existed between the reduction of Grievants' salaries and the violation and/or misapplication of the pay plan set forth in the parties' collective bargaining agreement. Accordingly, the petition is denied. (*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 POLICE DEPARTMENT,**

Petitioners,

-and-

CAPTAINS ENDOWMENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On January 22, 2007, the City of New York and the New York City Police Department ("City" or "NYPD") filed a petition challenging the arbitrability of a grievance brought by the Captains Endowment Association ("Union" or "CEA") on behalf of Edward Armstrong and all similarly situated Captains ("Grievants"). The grievance, filed on October 26, 2006 at Step III,

asserts that NYPD violated the parties' collective bargaining agreement when it reduced Grievants' salaries. The City contends that this grievance is not subject to arbitration because CEA failed to establish the necessary nexus between the subject matter of the grievance, the reduction of Grievants' salaries, and the source of the alleged rights, the parties' collective bargaining agreement. We find that the grievance is arbitrable because a reasonable relationship exists between the reduction of Grievants' salaries and the violation and/or misapplication of the pay plan set forth in the parties' collective bargaining agreement. Accordingly, the petition is dismissed, and the grievance shall proceed to arbitration.

BACKGROUND

CEA is an employee organization under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-303(l) and is the sole and exclusive bargaining representative for employees within NYPD in the ranks of Captain, Captain detailed as Deputy Inspector, Deputy Chief, Police Surgeon, Surgeon, Surgeon detailed as Deputy Chief Surgeon, and Chief Surgeon. The Lieutenants Benevolent Association ("LBA") is also an employee organization under NYCCBL § 12-303(l) and is the sole and exclusive bargaining representative for employees within NYPD in the rank of Lieutenant.

Relevant Contractual Information

On May 20, 2002, NYPD entered into separate collective bargaining agreements with LBA and CEA. The collective bargaining agreement with LBA covered the period from December 1, 2000 to June 15, 2003 ("2000-2003 LBA Agreement"). The collective bargaining agreement with CEA covered the period from May 1, 2001 to October 31, 2003 ("2001-2003 CEA Agreement").

Both contracts set forth a step pay plan, as well as dates on which employees would be entitled to raises in their annual salary.

Article VI § 1(a)(ii) of the 2000-2003 LBA Agreement listed the pay plan for Lieutenants who were promoted to this rank after November 1, 1998 as follows:¹

	Effective Date 11/30/00	Effective Date 12/1/00	Effective Date 12/1/01	Effective Date 3/1/03
Step 1	\$65,167	\$68,425	\$71,846	\$71,846
Step 2	\$65,330	\$68,597	\$72,027	\$73,027
Step 3	\$65,494	\$68,769	\$72,207	\$73,707
Step 4	\$72,151	\$75,759	\$79,547	\$79,547

Further, Article VI § 1(b) of the 2000-2003 LBA Agreement stated that “an employee shall advance one increment step annually on the anniversary date of the employee’s appointment to the class of positions occupied.”

Article V § 1(ii) of the 2001-2003 CEA Agreement listed the pay plan for Captains as follows:

	Effective Date 4/30/01	Effective Date 5/1/01	Effective Date 5/1/02
Step 1	\$76,937	\$80,784	\$83,908
Step 2	\$78,425	\$82,346	\$85,530
Step 3	\$80,972	\$85,021	\$88,309
Step 4	\$90,981	\$95,530	\$103,577
Step 5	\$93,948	\$98,645	-----

¹ The annual salaries that are emboldened in the tables contained herein represent the annual salaries, the increases thereof, and the advancement in the pay plans by Captain Edward Armstrong, who is the only member of the Union to be named in the instant matter.

Further, Article V § 3 of the 2001-2003 CEA Agreement provided that “each employee shall progress one increment step in the employee’s rank annually, on the employee’s anniversary date, . . . except as provided in Section 4d below.” In addition, Article V § 4(d) set forth that “employees in the rank of Captain shall be subject to the salary schedule set forth in Section 1(ii) above.”

On June 30, 2006, NYPD and LBA entered into a Memorandum of Understanding which set forth, *inter alia*, a new salary structure providing general wage increases for Lieutenants. This memorandum was incorporated into a new collective bargaining agreement which covered the period from June 16, 2003 to August 31, 2007 (“2003-2007 LBA Agreement”).

Article VI § 1(a)(i) of the 2003-2007 LBA Agreement listed the most recent pay plan for Lieutenants as follows:

	Effective Date 6/16/03	Effective Date 6/16/04	Effective Date 7/31/05	Effective Date 7/31/06
Step 1	\$75,438	\$79,210	\$81,586	\$84,156
Step 2	\$76,678	\$80,512	\$82,927	\$85,539
Step 3	\$77,392	\$81,262	\$83,700	\$86,337
Step 4	\$83,524	\$87,700	\$90,331	\$93,176

Article VI § 1(b) of the 2003-2007 Agreement stated that “an employee shall advance one increment step annually on the anniversary date of the employee’s appointment to the class of positions occupied.”

Relevant Grievance History

On April 28, 1987, Edward Armstrong became a Police Officer with NYPD. On May 16, 1995, Armstrong became a Detective 3rd Grade, and on September 29, 1996, he was promoted to

Sergeant. On September 28, 2001, Armstrong was promoted to Lieutenant, and at that time, pursuant to the 2000-2003 LBA Agreement, he was paid an annual salary of \$68,425, which was the salary set forth by the pay plan for a Step 1 Lieutenant, effective December 1, 2000. At the June 15, 2003 expiration of the 2000-2003 LBA Agreement, Armstrong was on Step 2 of the pay plan and received the annual salary of \$73,027, as set forth in this LBA contract.

On September 28, 2004, Armstrong reached Step 4 on the Lieutenant's pay plan, as this was his third anniversary in this rank, but he received no contemporaneous increase in his annual salary because no extension to the 2000-2003 LBA Agreement had been negotiated at the time. However, on June 30, 2006, when NYPD and LBA entered into a Memorandum of Understanding which was then incorporated into the 2003-2007 LBA Agreement, Armstrong received retroactive increases to his annual salary, pursuant to Article VI § 1(a)(i) and (b) of the 2003-2007 LBA Agreement, to reflect his advancement to Step 4 in the Lieutenant's pay plan. On July 31, 2006, the date of the final salary increase prescribed by the 2003-2007 LBA Agreement, Armstrong's annual salary was increased to \$93,176. One month later, on August 31, 2006, Armstrong was promoted to Captain.

Upon Armstrong's promotion, he received an annual salary of \$103,577, which, pursuant to Article V § 1(ii) of the 2001-2003 CEA Agreement, represents the salary for a Captain at Step 4 of the pay plan. On October 19, 2006, Armstrong, along with other Lieutenants who were promoted to the rank of Captain on August 31, 2006, received a notice from NYPD stating that "due to a lack of Captains Collective Bargaining agreement, their salary [would] revert back to pre-promotion (Lieutenant rate) as of November 3, 2006 paycheck." (Request for Arbitration in A-12159-07, Exhibit 1.) Due to the decision to revert the salaries from a Captain at Step 4 to a Lieutenant at Step

4, Armstrong’s salary was reduced from \$103,577 to \$93,176.² On October 26, 2006, in accordance with Article XVIII of the 2001-2003 CEA Agreement, the Union, by its Vice-President, submitted a Step III grievance on Grievants’ behalf, requesting that Grievants’ salary rate be reinstated to the annual rate of \$103,577.³ This Step III grievance was denied by the Deputy Commissioner of Labor Relations on November 6, 2006.

On November 21, 2006, the Union appealed the Step III determination to Step IV. On December 19, 2006, the Police Commissioner denied this Step IV appeal stating that Grievants:

were promoted to Captain at the same time as salary increases were being paid to incumbent lieutenants under their new contract. Since the new lieutenants’s rate was higher than the first three steps in the captains’ salary, they were erroneously placed at the top pay of the captains’ salary. When the error was discovered, a decision was made to allow them to remain at their lieutenants’ salary which was still higher than captains at the first three steps so that they would not take a pay cut. (Request for Arbitration in A-12159-07, Exhibit 3.)

² The Union only provided the annual salaries, anniversary dates, and other employment information for Armstrong presumably because he is the only Captain named in the instant matter. However, according to this grievance, Grievants are a class of Captains who had their respective salaries reduced from \$103,577 to their respective pre-promotion Lieutenant rates. Accordingly, should this Board determine the instant matter arbitrable, any relief ordered herein shall apply to Grievants in total.

³ Article XVIII of the 2001-2003 CEA Agreement, in pertinent part, states:
For the purpose of this Agreement, the term “grievance” shall mean:

1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement
2. a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment . . . ;

* * *

It is understood and agreed by and between the parties that there are certain grievable disputes which are of a Department level or of such scope as to make adjustments at Step I or Step II of the grievance procedure impracticable, and, therefore such grievances may be instituted at Step III of the grievance procedure. . . .”

On January 8, 2007, CEA filed the instant request for arbitration claiming that Grievants, upon promotion on August 31, 2006, were paid at the annual rate of \$103,577, “and thereafter was unilaterally reduced as of the November 3, 2006 paycheck.” (Request for Arbitration in A-12159-07.) In support of its position, the Union annexed as exhibits thereto: copies of the Step III and Step IV grievances and their respective determinations, and a copy of Article V of the 2001-2003 CEA Agreement. The Union seeks to return Grievants to the Step 4 Captains’ salary of \$103,577, as of the date they were unilaterally reduced.

On January 22, 2007, the City filed the instant petition challenging the arbitrability of the Union’s grievance.

POSITIONS OF THE PARTIES

City’s Position

The City argues that the Union failed to cite to and/or identify any contract provision, NYPD rule, regulations or procedure on which to base this grievance. However, if CEA intended to cite to Article XVIII § 1(a)(1) or (2) as their basis for this grievance, then this position also requires the denial of the instant grievance. The Board has consistently held that these two provisions, which merely define the term “grievance” as used in the 2001-2003 CEA Agreement, do not “furnish an independent basis for a grievance.” (Petition, ¶ 38.) The Union, to have a viable grievance, had to establish a nexus between the reversion of Grievants’ salaries and “a claimed violation of other articles of the Agreement.” (Id.) Since citing only to the grievance and arbitration provisions of a contract is fatal to a request for arbitration, the instant grievance must be denied.

The City further argues that if CEA intended to cite to Article V § 1(ii) as its basis for this

grievance, then this position also requires the denial of the instant grievance. This contractual provision is clear on its face. A Captain, who was promoted to this rank after May 1, 2002 but had not served one full year in this rank, is entitled to Step 1 on the pay plan, which pays an annual salary of \$83,908. Furthermore, no language in Article V provides that if a Lieutenant made more than a Step 1 Captain, then, upon entering this higher rank, he/she would be entitled to skip steps on the pay plan.

In the instant matter, Grievants, prior to their promotion, received their contractual increases from the 2003-2007 LBA Agreement, and were making upwards of ten thousand dollars more than a Captain at Step 1. Upon their promotion, NYPD made “an administrative error” by placing Grievants at Step 4 on the Captain’s pay plan because this was the only step in this rank that had a higher annual salary than a Lieutenant at Step 4. Once this error was discovered, NYPD “allowed the newly-promoted Grievants to return to their Lieutenant salary of \$93,176 rather than receive the first step Captain salary of \$83,908.” (Petition, ¶ 52.) Since there is no contractual language in the 2001-2003 CEA Agreement that provides for Grievants to skip Steps 1 -3 of the Captain’s pay plan, no reasonable relationship exists between the act complained of in this grievance and the provision cited therein. Thus, the instant grievance must be denied.

Union’s Position

The Union contends that a nexus does exist between the reversion of Grievants’ salaries from Step 4 of the Captains pay plan to their pre-promotion Lieutenants’ salaries. Simply, NYPD violated and/or misapplied Article V § 1(ii) of the 2001-2003 CEA Agreement, and by doing so, reduced Grievants’ wages. (Answer, ¶ 63.) The duty to pay Grievants a specified annual salary set forth in Article V of the 2001-2003 CEA Agreement is central to the instant grievance and failure to pay

Grievants in accordance with this provision is a breach of this contract. Moreover, any deviation from the pay plan is grievable, and therefore arbitrable.

In the instant matter, NYPD admitted that, due to an administrative error, Grievants, upon their promotion, were paid at the Step 4 Captains rate of \$103,577. After discovery of such error, NYPD reduced Grievants' salaries to their pre-promotion levels, which were awarded to them under the 2003-2007 LBA Agreement. Accordingly, a clear nexus exists between the deviation from the Captains' pay plan, which manifested itself in the reduction of Grievants' salaries, and Article V § 1(ii) of the 2001-2003 CEA Agreement. Therefore, the City's petition must be dismissed, and the grievance allowed to proceed to arbitration.⁴

DISCUSSION

Before this Board examines the substantive arbitrability of the instant grievance, we must first address the contention raised by the City which alleges that the Union failed to identify any contractual provision on which to base this grievance, and thus, the grievance should be denied. "This Board does 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." *Local 420, District Council 37, AFSCME*, Decision No. B-9-2002 at 6; *see also Detectives Endowment Ass'n*, Decision No. B-73-89 at 6. In this *Detectives Endowment Ass'n* case, this Board held that, even though the union failed to specifically cite to a contractual provision, the union clearly articulated from the outset the specific subject matter of the grievance. *Id.* at 6. Thus, both parties were aware

⁴ In addition, CEA contends that, in cases such as this instant matter, any interpretation of the collective bargaining agreement should not be performed by the Board, and is better suited for the arbitrator.

of the claim and petitioner had ample opportunity to prepare and address this issue. *Id.*

Here, the Step III grievance stated that Grievants' salaries, upon their promotion, had been set at Step 4 of the Captains' pay plan, that their salaries were being reverted back to their pre-promotion levels, and that the Union requested restoration of their salaries to their previous levels. In NYPD's denial of CEA's Step IV appeal, the Police Commissioner recognized that the instant dispute involved the Captains' pay plan, and made reference to the steps in both the 2001-2003 CEA Agreement and the 2003-2007 LBA Agreement. Finally, in the Request For Arbitration, the Union annexed a copy of Article V of the 2001-2003 CEA Agreement as an exhibit thereto. Based upon the foregoing, we are unpersuaded by the City's argument that the instant grievance should be denied due to the Union's failure to specifically cite to a contractual provision because both parties were aware of the nature of the claim and NYPD had ample opportunity to prepare and address this issue.

Concerning the substantive arbitrability of the grievance in the instant matter, this Board's statutory directive is to promote and encourage impartial arbitration as the selected means for the resolution of grievances. NYCCBL § 12-302; *New York State Nurses Ass'n*, Decision No. B-21-2002. However, we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Soc. Serv. Employees Union, Local 371*, Decision No. B-34-2002 at 4.

In determining arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Services Employment Union*, Decision No. B-2-69 at 2; *see District Council 37, AFSCME*, Decision No. B-47-99 at 8-9, or, in other words, whether there is a reasonable

relationship between the subject matter of the dispute and the general subject matter of the agreement. *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7.

We find that the Union's grievance satisfies the first prong of the arbitrability test because the parties are obligated to arbitrate their controversies through the grievance procedure set forth in the 2001-2003 CEA Agreement, and we find that no statutory, contractual or court-enunciated public policy restrictions are applicable. Thus, we now turn to the second prong of the arbitrability standard to determine whether a reasonable relationship exists between the acts complained of, the reversion of Grievants' salary from Step 4 Captain's level to their pre-promotion Lieutenant's level, and the provision cited therein, Article V of the 2001-2003 CEA Agreement. We find that a nexus does exist, and, thus the instant grievance is arbitrable.

"In general, we have held that disputes related to earned wages and the payment thereof are arbitrable." *Local 30, Int'l Union of Operating Engineers*, Decision No. B-7-2006 at 15; *see also Soc. Serv. Employees Union, Local 371*, Decision No. B-2-91 at 13. In a case analogous to the instant matter, the union grieved the employer's refusal to pay one of its employees in accordance with the established "pay levels" set forth in the parties' collective bargaining agreement. *Committee of Interns and Residents*, Decision No. B-30-86 at 9. This Board found that the Union, in citing to the article in the contract which set forth the applicable salary rates, established a reasonable relationship between the act complained of, the denial of pay, and the source of the alleged right, the contractual provision, and, therefore, the grievance should be submitted to arbitration. *See id.* at 10.

In the instant matter, Grievants, prior to their promotion on August 31, 2006, were paid in accordance with the 2003-2007 LBA Agreement, and specifically, Armstrong was paid at Step 4 of the Lieutenant's pay plan. After their promotion, it is undisputed that Grievants received the annual

salary of a Captain at Step 4, which was \$103,577, which was an alleged “administrative error.” Upon discovery of this error, the Police Commissioner admitted that a decision was made to revert Grievants’ salaries from a Step 4 Captain’s salary to their “lieutenants’ salary which was still higher than captains at the first three steps.” (Request for Arbitration in A-12159-07, Exhibit 3.) Due to this decision, the Union initiated the instant grievance claiming that NYPD had deviated from the pay plan set forth in Article V of the 2001-2003 CEA Agreement, and this deviation constituted a valid grievance.

Based on the foregoing, we find that the Union’s instant grievance involves a dispute concerning the pay plan set forth in Article V of the 2001-2003 CEA Agreement, and that interpretation of this contract is required to resolve this dispute in determining the proper annual salary for Grievants. We further find that issues requiring such contractual interpretation including but not limited to the questions, at which step should Grievants have started and can NYPD impose a salary rate upon Grievants that is set forth in an unrelated collective bargaining agreement, are best left for the arbitrator. *See Local 30, Int’l Union of Operating Engineers*, Decision No. B-7-2006 at 13. Therefore, since CEA established a nexus between the act complained of, the deviation from the contractual pay scale of Captains, and the provisions invoked in the grievance, Article V of the 2001-2003 CEA Agreement, the instant grievance is arbitrable and the City’s petition challenging arbitrability is dismissed.

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 Police Department, docketed as BCB-2596-07, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by Captains Endowment Association, on behalf of Edward Armstrong, and all similarly situated Captains, docketed as A-12159-07, and the same hereby is granted.

Dated: May 3, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER