# *Organization of Staff Analysts*, 79 OCB 22 (BCB 2007)

[Decision No B-22-2007] (Arb) (Docket No. BCB-2601-07) (A-12142-06).

***Summary of Decision****:* The City challenged the arbitrability of a grievance alleging that the City, in violation of the parties' collective bargaining agreement, refused to allow an employee on terminal leave to return to work after the employee withdrew her application for retirement. The City argued that the Union's request for arbitration must be dismissed because the Union failed to establish a reasonable relationship between the denial of the employee's request to rescind her retirement and the cited leave regulations incorporated into the contract. The Board found the grievance to be arbitrable. Therefore, the petition was denied and the request for arbitration granted. ***(Official decision follows.)***

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**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 BUILDINGS,**

***Petitioners,***

***-and-***

**THE ORGANIZATION OF STAFF ANALYSTS,**

***Respondent.***

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## DECISION AND ORDER

On February 16, 2007, the City of New York ("City") and the New York City Department of Buildings ("Department" or "DOB") filed a petition challenging the arbitrability of a grievance brought by the Organization of Staff Analysts ("OSA" or "Union") on behalf of Karen Smith ("Grievant"). The Request for Arbitration ("RFA") alleges that the City, in violation of the parties' collective bargaining agreement ("Agreement"), denied Grievant's request to return to work from

terminal leave after the employee withdrew her application for retirement. The City argues that the RFA should be dismissed because the Union has failed to establish a nexus between the subject of the grievance and the Agreement. We find the grievance to be arbitrable. Accordingly, the petition is denied and the RFA granted.

## BACKGROUND

The City and the Union were parties to the Agreement dated February 26, 2006, covering the period July 1, 2005, through July 12, 2006. The terms of the Agreement remain currently in force pursuant to the *status quo* provisions of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City and the Union are also parties to the Citywide Agreement.

Grievant was employed by the Department in the title Administrative Staff Analyst. She began her employment with the Department on or about June 29, 1986, and, after 19 years, informed her Department in September 2005 that she would retire. As a result of Grievant's use of terminal leave, the effective date of Grievant's retirement was scheduled to be March 2, 2006. The last day Grievant physically appeared and worked for the Department was September 15, 2005. On that day, Grievant completed the process by which employees are separated from the Department. Attached to the Petition as Exhibit 6 is the "NYC Department of Buildings Employee Separation Checklist" for Grievant that indicates Grievant's "Effective Date of Separation" as "Sept. 16, 2005" and the "Reason for Separation" as "Retirement." (Pet. Ex. 6.) Grievant was considered to be on terminal leave from September 15, 2005, through March 2, 2006, during which time she was compensated

under the terminal leave provisions of the Citywide Agreement.[1] On or about December 5, 2005, Grievant filed an "Application for Service Retirement" with the New York City Employees' Retirement System ("NYCERS") requesting "retirement from City service to take effect on 03/02/2006." (Pet. Ex. 7.)

On January 30, 2006, Grievant, via an e-mail, informed Gina Betro, the Department's Assistant Commissioner of Administration, that she "would like to end my terminal leave and return to DOB effective February 27, 2006." (Pet. Ex. 8.) Betro responded on February 1, 2006, via an e-mail, which reads, in pertinent part:

> Your paperwork indicates that you filed retirement papers and have been separated from the Department. Your effective retirement date is 3/2/06. The Department is not considering any other action at this time, so your retirement will proceed as planned.

(Pet. Ex. 8.)

Grievant responded on February 7, 2006, via an e-mail, which reads, in pertinent part:

> I have changed the date of my return to DOB due to the fact that we will be returning to New York earlier than anticipated. I will officially end my terminal leave effective Wednesday, February 22, 2006[,] and return on that date. I will be filing form 542 (withdrawal of service retirement application) with NYCERS and will bring you a copy upon my return. Who will I report to?

(Pet. Ex. 8.) The referenced NYCERS Form 542 is appended to the petition as Exhibit 10. Betro responded on February 10, 2006, via an e-mail, which reads, in pertinent part:

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[1] 1995-2001 Citywide Agreement, § 17, reads in pertinent part:

> Terminal leave with pay shall be granted prior to final separation to employees who have completed at least ten (10) years of service on the basis of one (1) day of terminal leave for each two (2) days of accumulated sick leave up to a maximum of one hundred-twenty (120) days of terminal leave.

(Pet. Ex. 12.)

> The Department is under no obligation to take you back. You may want to reconsider rescinding your retirement papers since we are not offering you a position with the Department.

(Pet. Ex. 8.) Grievant responded that same day via an e-mail, which reads, in pertinent part:

> Sorry Gina, that is not the case. I can withdraw my retirement any time before my official retirement date and as long as I am still on payroll (which I am), can return to DOB. You can verify that with OSA.

(Pet. Ex. 8.)

Ethel Coffinas, the Department's Director of Human Resources, responded to Grievant's e-mail that day. The e-mail reads, in pertinent part:

> Per our conversation, according to NYCERS and the Law Department at DCAS [Department of Citywide Administrative Services], the agency is under no obligation to take you back. If you have already withdrawn your retirement, you are able to resubmit it.
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> As you requested, I did call OSA and spoke with Richard Guarino. I communicated our research findings to him as well. He said he would call me back once he looks into things and that's fine. He can research on your behalf but that doesn't change the fact that both NYCERS['] and DCAS' legal department both said the same thing.

(Pet. Ex. 8.) Grievant responded on February 14, 2006, via a letter to Coffinas formally requesting to return to the Department. The letter reads, in pertinent part:

> This letter is my formal request to return to the Department of Buildings effective February 22, 2006. I have attached a copy of NYCERS form 542 (withdrawal of previous retirement application) with verification that it was sent today, February 14, 2006. Please advise who I should report to.

(Pet. Ex. 9.) Coffinas responded on February 15, 2006, via an e-mail, which reads, in pertinent part:

> Please accept this e-mail as a third and final response to your request to return to the Department of Buildings. As stated in Gina Betro's e-mail dated February 2, 2006 [,] and my e-mail dated February 10, 2006, your request to return to the Department of Buildings is denied.

(Pet. Ex. 2.)

Grievant filed a second "Application for Service Retirement" with NYCERS on or about March 1, 2006, requesting "retirement from City service to take effect on 03/02/2006." (Pet. Ex. 11.) Since March 2, 2006, Grievant has been receiving her full pension benefits.

The Union requested a Step III review on April 24, 2006. The Office of Labor Relations ("OLR") held a Step III conference on December 1, 2006, and issued a decision on December 7, 2006, denying the grievance. The pertinent part of the decision reads:

> Upon a careful review of the record, I find no contractual violation. Following a terminal leave period, the grievant resigned her employment by retiring on or about September 16, 2005. Although she was paid her accrued leave time through on or about March 3, 2005, she was not on terminal leave at this time. As such, she was not an active employee or otherwise entitled to reinstatement after resigning her position. The NYCERS rules concerning an employee's right to withdraw a retirement application applies only to the employee's retirement status for NYCERS purposes and does not require the agency to reinstate the employee. Accordingly, the Agency properly exercised its discretion to deny the grievant's reinstatement request. This grievance is denied and OLR File No. 043165 is hereby closed.

(Pet. Ex. 14.)

On December 19, 2006, the Union filed the RFA, claiming that the Step III determination quoted above inaccurately summarized the facts and that Grievant was on terminal leave and an active employee when she requested to return to work. The RFA asserts as the issue to be arbitrated: "Whether the Department of Buildings can refuse to allow an active employee on terminal leave to return to work." (Pet. Ex. 2.)

Article VI, § 1(b), of the Agreement defines a grievance as:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to any agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York or the Personnel Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws

shall not be subject tot the grievance procedure or arbitration;

(Pet. Ex. 1, p. 14.) The specific contractual provision and/or rule or regulation alleged to be violated is Interpretation C of Rule 2.9 of the Leave Regulations for Employees Who Are Under Career and Salary Plan Guide ("Leave Regulations"), which states: "Subject to the terms of Interpretation D below, a person on terminal leave shall be considered an employee in active service while on terminal leave." [2] (Pet. Ex. 2; Ex. 3, p. 10.) The Leave Regulations and their official interpretations are incorporated by reference in Article V, § 1(a), of the Citywide Agreement, which reads, in pertinent part:

> All provisions of the Resolution approved by the Board of Estimate on June 5, 1956, on "Leave Regulations for Employees who are Under Career and Salary Plan" (hereinafter "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 this Agreement.[3]

The Leave Regulations were issued by the Department of Personnel in May 1980. The RFA also cites the NYCERS Summary Plan Description Tier 4 Members ("NYCERS Summary Plan"), which states: "You may withdraw your application for service retirement by filing a written request with NYCERS up to the day before your effective date of retirement."[4] (Pet. Ex. 2.)

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[2] Interpretation D of Rule 2.9 states:

> An employee does not earn sick or annual leave during terminal leave nor during the period of leave taken immediately prior to final separation which is chargeable to accrued overtime, accrued annual leave, and terminal leave.

(Pet. Ex. 3, p. 10.)

[3] The Board takes administrative notice of the Citywide Agreement.

[4] The RFA also cited Article VI(e) of the Agreement, but the Union has withdrawn that part of the RFA.

## POSITIONS OF THE PARTIES

### City's Position

The City argues that the RFA must be dismissed because the Union has not established a nexus between the subject of the grievance, which the City defines as "the Department's decision not to rehire an employee who separated from the Department to retire," and any written rule, regulation or policy of Grievant's employer. Specifically, the City argues that there is no nexus between the subject of the grievance and Rule 2.9 of the Leave Regulations, which solely deals with the computation of terminal leave. The language quoted by the Union in the RFA is not part of Rule 2.9(c) itself, which states:

> In a case where an employee has exhausted all or most of the accrued leave due to a major illness, the agency head, in his or her own discretion, may apply two and one fifth (2 1/5) workdays for each year of paid service as the basis for computing terminal leave in lieu of any other terminal leave.

(Pet. Ex. 3, p. 11.) Rather, it is part of the commentary following the Rule under the heading "2.9 *INTERPRETATIONS*." The City argues that the interpretations provide guidance related narrowly to the application of Rule 2.9 and cannot in themselves be considered a rule, regulation, written policy, or order under the Agreement. Therefore, the Union has not established a nexus between the subject of the grievance and the Agreement.

Further, the RFA must be dismissed because the reinstatement of employees who have resigned or retired from City service is governed by Section 6.2.1 of the Personnel Rules and Regulations of the City of New York ("Personnel Rules"), and disputes under the Personnel Rules are, under Article VI, § 1(b), of the Agreement, explicitly "not subject to the grievance procedure or arbitration." (Pet. Ex. 1.) Section 6.2.1 of the Personnel Rules states:

> (a) An employee who has completed a probationary term in a permanent position in the competitive or labor class, and who has resigned or retired therefrom may be reinstated with the approval of the commissioner of citywide administrative services to:
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> > (1) the position from which the employee has resigned or retired, if vacant, or to any similar vacant position in the agency in which the employee was employed; or
> >
> > (2) to a position in another agency to which the employee would have been eligible for transfer.
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> (b) such reinstatements may be made only if the separation from employment was without fault or delinquency on the employee's part and the head of the agency to whom the employee has applied for such reinstatement is willing to reinstate the employee.

(Pet. Ex. 4.)

Finally, the City argues that the RFA must be dismissed because NYCERS is not the Grievant's employer. Therefore, the alleged violation of the NYCERS Summary Plan does not constitute a violation of any written rule, regulation, or policy of Grievant's employer.

**Union's Position**

The Union argues that it has established a nexus between the subject of the grievance and Article V, § 1(a), of the Citywide Agreement, which explicitly incorporates the official interpretations of the Leave Regulations. Interpretation C of Rule 2.9 of the Leave Regulations states, in pertinent part: "a person on terminal leave shall be considered an employee in active service while on terminal leave." It is undisputed that Grievant's retirement date was March 2, 2006, and that she was on terminal leave when she expressed her intent to rescind her retirement and return to work. Therefore, the Union argues, Grievant, as an active employee, had the right to resume work at the Department.

Further, the Union argues Section 6.2.1 of the Personnel Rules does not bar arbitration because Grievant requested to return to the Department prior to her retirement. Grievant's effective date of retirement was March 2, 2006; she requested to return to the Department on January 10, 2006, and the Department issued its third and final refusal on February 15, 2006. Assuming, *arguendo*, Section 6.2.1 of the Personnel Rules did apply, the Union argues that the Department's actions were arbitrary and capricious and an abuse of discretion; arguments which go to the merits of the case and are, therefore, for an arbitrator to decide.

Finally, the Union argues that, while the NYCERS is not a mayoral agency, it is subject to the Board's jurisdiction and the OLR is authorized to accept service on its behalf. The NYCERS regulations are applicable to City employees and Grievant, as a permanent civil servant, was required to become a member of the NYCERS and subject to its rules. There are several contexts in which an employee's status is simultaneously governed by the NYCERS regulations, the Personnel Rules, the Leave Regulations, and/or the Citywide Agreement. For example, the New York City Administrative Code vests the NYCERS with the authority to conduct medical reviews of members applying for disability retirement benefits and Article VI, § 9, of the Citywide Agreement provides an employee who suffers a disability for whom no suitable in title position is available is to be referred to the NYCERS. Therefore, the NYCERS Summary Plan provides the nexus between the subject of the grievance and the Agreement.

## DISCUSSION

Section 12-309(a)(3) of the NYCCBL provides this Board with the unique power as an administrative body "to make a final determination as to whether a dispute is a proper subject for

grievance and arbitration procedure established pursuant to section 12-312 of this chapter."[5] *See New York State Nurses Ass'n*, Decision No. B-21-2002 (in depth discussion of public sector arbitration and the Board's role therein). The policy of the NYCCBL, "as is made explicit by § 12-302 of the NYCCBL, . . . is to favor and encourage arbitration to resolve grievances."[6] *Communications Workers of America, Local 1182*, Decision No. B-31-2006 at 7; *see also Doctors Council*, Decision No. B-18-2001 at 9-10. Thus, this Board has long held that "the presumption is that disputes are arbitrable, and that 'doubtful issues of arbitrability are resolved in favor of arbitration.'" *Id.* (*quoting Organization of Staff Analysts*, Decision No. B-19-2006 at 10); *District Council 37*, Decision No. B-14-74 at 12.

This Board has formulated a two prong test to determine arbitrability: "(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.'" *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7 (*quoting Soc. Serv. Employment Union*, Decision No. B-2-69 at 2) (additional citations omitted). 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 CBA." *Id.* at 8.

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[5] NYCCBL § 12-312 promulgates the parties' rights and responsibilities in arbitrations and the Board's role in administering an arbitration panel.

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

> **Statement of policy.** 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.

There is no dispute that the Agreement provides for grievance and arbitration procedures, and there is no claim that arbitration of the issue would violate public policy. While there are no statutory or court-enunciated public policy restrictions to arbitration, the City argues that there is a contractual restriction: that the City is not obligated to arbitrate this controversy because this dispute falls under Section 6.2.1 of the Personnel Rules and disputes under the Personnel Rules are, under Article VI, § 1(b), of the Agreement, explicitly "not subject to the grievance procedure or arbitration." Section 6.2.1 of the Personnel Rules, however, applies to those who have "resigned or retired." The undisputed effective date of Grievant's retirement was March 2, 2006, and she first requested to return to the Department on January 10, 2006. The Department's third and final refusal was issued on February 15, 2006 - two weeks prior to her retirement date. That Grievant is now retired, and arguably subject to Section 6.2.1 of the Personnel Rules, does not obviate her right to file a grievance concerning matters that occurred prior to her retirement. *See District Council 37*, Decision No. B-45-97 at 6 (retirees are allowed to grieve matters subsequent to the effective date of the retirement that allegedly took place during employment).

In *District Council 37*, Decision No. B-45-97, this Board found that because Article V, §1(a), of the Citywide Agreement incorporates the Leave Regulations, Rule 2.9 thereof constitutes a written rule, regulation or policy of an employer that is a party to the Citywide Agreement. In that case, the grievant retired from the Department of Environmental Protection while on unpaid suspension. The day after he retired, he requested to be paid for accrued terminal leave. As in this case, the City defined the dispute as concerning a "post retirement request." *Id.* at 3. The City argued that grievant's status as retiree meant he was no longer an employee and therefore ineligible for grievance procedures established to benefit employees. *Id.* at 4. After noting that Article V, § 1(a),

of the Citywide Agreement states "official interpretations relating [to the Leave Regulations] . . . shall apply to all employees covered by this Agreement," this Board found a nexus between the subject of grievance and the Citywide Agreement. *Id.* at 7-8.

*District Council 37*, Decision No. B-45-97, concerned the calculation of terminal leave under Rule 2.9 itself, while the instant case concerns an official interpretation of Rule 2.9.[7] The City argues that the interpretations of the Leave Regulations do not constitute part of the Citywide Agreement but only provide guidance related narrowly to the application of Rule 2.9. The City's argument, however, contradicts the clear and unambiguous language of the Article V, § 1(a), of the Citywide Agreement which provides, in pertinent part, that the "Leave Regulations . . . and official interpretations relating thereto, . . . shall apply to all employees covered by this Agreement." This Board has stated that "where contract language is clear and unambiguous on its face, there is no need to look into the intent of the parties or to other provisions of the contract to aid in the interpretation of the clause at issue." *District Council 37*, Decision No. B-37-80 at 6 (*quoting Uniformed Firefighters Ass'n, Local 94*, Decision No. B-10-79 at 8); *see also City Employees Union, Local 237*, Decision No. B-31-2001 at 10 (citations omitted). The question of whether Grievant's status as "an employee in active service while on terminal leave" entitles her to rescind her resignation of her position concomitant with her retirement is one we need not, and indeed cannot in this setting, decide. To do so would require us to interpret the language of the agreement. *District Council 37*, Decision No. 16-2004 at 6 (Board declines to interpret the contract terms "service" and "absence"). Such is the function of the arbitrator. *Id.* at 5 ("interpretation of contract terms and the determination

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[7] Interpretation C of Rule 2.9 of the Leave Regulations states that "a person on terminal leave shall be considered an employee in active service while on terminal leave."

of their applicability in a given case is the function of the arbitrator"); *Soc. Serv. Employees Union*, Decision No. B-3-2003 at 4 (same). Therefore, this Board finds that the Union has established the required nexus between the subject of the grievance and the Citywide Agreement.

As for the Union's argument that the NYCERS Summary Plan provides the nexus between the Agreement and the dispute, NYCERS is not Grievant's employer, and Grievant has not cited any section of either the Agreement or the Citywide Agreement incorporating the NYCERS Summary Plan. Therefore, the alleged violation of the NYCERS Summary Plan does not constitute a violation of any written rule, regulation, or policy of Grievant's employer. *Soc. Serv. Employees Union, Local 371*, Decision No. B-28-83 at 8 (a party can only grieve and arbitrate an agreement they are a party to; they cannot establish the necessary nexus by reference to another agreement even if the City is a party to that agreement); *see also Captains Endowment Ass'n*, Decision No. B-xx-2007 at 15; *Sergeants Benevolent Ass'n*, Decsion No. B-15-2007 at 6-7. The Union, therefore, cannot arbitrate a grievance under NYCERS.

**ORDER**

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

ORDERED, the petition challenging arbitrability filed by the City of New York and the New York City Department of Buildings, docketed as No. BCB-2601-07, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts on behalf of Karen Smith, docketed as A-12142-06, hereby is granted.

Dated: June 18, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
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