COBA, 8 OCB2d 30 (BCB 2015)

(Arb.) (Docket No. BCB-4115-15) (A-14898-15)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that DOC violated the parties' collective bargaining agreement when it failed to pay Grievant the appropriate rate and provide other benefits after a separation from service. The City argued that the request for arbitration must be denied because the Union has not established the requisite nexus to the Agreement. The City further argued that the Union is seeking to arbitrate DOC's application of the Civil Service Law, which it contends is not grievable nor within the jurisdiction of the Board. The Board found that the Union had established the requisite nexus to the Agreement and was not seeking to arbitrate the Civil Service Law. Accordingly, the petition challenging arbitrability was denied, and the request for arbitration was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Petitioners,

-and-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,
on behalf of ANDREA THOMPSON,

Respondent.

DECISION AND ORDER

On June 22, 2015, the City of New York ("City") and the New York City Department of Correction ("DOC") filed a petition challenging the arbitrability of a grievance brought by the Correction Officers' Benevolent Association ("Union") on behalf of Andrea Thompson ("Grievant"). In its request for arbitration, the Union alleges that DOC violated the parties'

collective bargaining agreement ("Agreement") when it failed to pay Grievant at the appropriate rate and provide other benefits after a separation from service. The City argues that the request for arbitration must be denied because the Union has not established the requisite nexus to the Agreement. The City further argues that the Union is seeking to arbitrate DOC's application of the New York State Civil Service Law ("CSL"), which it contends is not grievable under the Agreement nor within the jurisdiction of the Board. This Board finds that the Union has established the requisite nexus to the cited provisions of the Agreement and is not seeking to arbitrate the CSL. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

Grievant is a Correction Officer ("CO"), and the Union is the duly certified collective bargaining representative for the CO title. The City and the Union are parties to the Agreement. The Agreement's grievance and arbitration procedures, found in Article XXI, § 1, define a grievance as:

> a. A claimed violation, misinterpretation, or inequitable application of the provisions of this Agreement;
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> b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, except as otherwise provided in this [§] 1a, the term "grievance" shall not include disciplinary matters. . . .

(Pet., Ex. 1)

Grievant was appointed as a CO on April 1, 1999, and went on sick leave on or around September 23, 2011, due to a non-work related disability. In mid-2012, DOC moved to terminate Grievant pursuant to CSL § 73, entitled "Separation for ordinary disability;

reinstatement." CSL § 73 provides that: "When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a [non-work related] disability . . . [their] employment status may be terminated . . . ." (Pet., Ex. 5) By letter dated September 26, 2012, DOC informed Grievant that she was terminated pursuant to CSL § 73, effective September 27, 2012. (*See* Pet., Ex. 6) At the time of her termination, Grievant was receiving the salary and benefits of a CO with 14 years of service. (*See* Ans. ¶ 32)

CSL § 73 provides that an employee terminated pursuant to that provision may seek reinstatement "within one year after the termination of such disability" if a medical examination establishes that the employee is fit to perform the duties of their former position. (Pet., Ex. 5) CSL § 73 further provides:

> If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of their former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field in his former department or agency.[1] If no appropriate vacancy shall exist to which such reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed on a preferred list for his former position in his former department or agency, and he shall be eligible for reinstatement in his former department or agency from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar position in his former department or agency.

(Pet., Ex. 5)

Within one-year of her termination, on or about September 4, 2013, Grievant sought reinstatement pursuant to CSL §73. On October 24, 2013, Grievant was notified that she had been found physically fit to perform the duties of a CO. (*See* Pet., Ex. 8) DOC avers that it had

[1] The Agreement specifies salary and benefits by grade (First through Sixth) and years.

no vacancies at that time. DOC placed Grievant on a preferred list and reinstated Grievant as a CO on May 27, 2014. Grievant was not reinstated to her prior position; she was reinstated as a probationary employee with the salary and benefits of a first-year CO.[2]

On August 18, 2014, the Union filed a Step I Grievance ("Grievance"), alleging violations of Article VI, VIII, X, XI, and XV of the Agreement.[3] The cited provisions specify pay and benefits for employees based upon "years" but do not address reinstatement or how years are calculated. (Ans., Ex. B) The Union stated that these provisions were violated because Grievant "was reinstated as a probationary employee, and with [the] salary, longevity, personal and vacation leaves of a first year employee" instead of being treated as an employee with 15 years' service. (Pet., Ex. 9) No Step I or Step II decisions were issued and, on November 19, 2014, the Union filed a request for Step III review.

On March 11, 2015, a Step III conference was held and, on April 14, 2015, the Step III decision was issued denying the Grievance. The Step III Review Officer found that there was no nexus between cited provisions of the Agreement and the facts of the underlying dispute and noted that "nothing in these cited provisions governs reinstatement of employees who have been separated from service as a result of a non-work related medical disability." (Pet., Ex. 2) Further, the Review Officer found that CSL § 73 is not a grievable rule, regulation, or procedure of DOC.

On April 30, 2015, the Union filed the instant request for arbitration claiming that DOC "violated Articles VI, VIII, X, XI, and XV of the [Agreement] by reinstating Grievant as a [CO]

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[2] The City avers that Grievant had an adjusted seniority date for use with vacation picks and post selections. (*See* Reply ¶ 7)

[3] Article VI provides the salary rates; Article VIII provides for longevity adjustments; Article X provides for leave; Article XI provides for vacation; and Article XV provides that seniority is to be taken into consideration in filling vacancies.

with probationary status and with the salary, longevity, personal and vacation leave, and seniority of a first-year employee . . ." (Pet., Ex. 2)

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration must be dismissed because the Union cannot establish a *prima facie* relationship between the act complained of and a specific contractual right. According to the City, there is no nexus between Grievant's claim of entitlement to reinstatement with a salary and benefits commensurate with a 15-year tenured position and the Agreement. The City argues that the gravamen of this grievance clearly relates to Grievant's dissatisfaction with her reinstatement pursuant to the terms of CSL § 73. The cited Agreement provisions do not address a return to service following a separation due to a non-work related medical leave or the CSL, nor do they grant the right to grieve actions taken pursuant to the CSL. Thus, according to the City, the Union has failed to cite a relevant contract provision. The City notes that the grievance did not cite the Agreement's grievance provisions and argues the claim does not fit within the Agreement's definition of grievance.

The City argues that its actions were consistent with the CSL, as it placed Grievant on a preferred list and appointed her when a position became available. However, according to the City, Grievant was given the salary and benefits of a first-year CO because there was a break in continuous service as her reinstatement was effected more than one year after her termination.[4]

[4] In its pleadings, the City does not set forth the basis for its position that a reinstatement after more than a year constitutes a break in continuous service or why a break in continuous service would result in Grievant being treated as first year probationary employee. We note that the Step III Decision states that the City argued before the Step III Review Officer that the matter was governed by a provision of the Personnel Rules and Regulations of the City of New York which states that

The City also argues that, to the extent the Union is seeking to grieve DOC's application of the CSL, such is not grievable under the Agreement. The City cites Board decisions addressing similar grievance provisions that hold that the CSL is outside of the scope of the parties' agreement to arbitrate. The City also cites Board precedent holding that interpretations of the CSL are beyond the scope of the Board's authority.

Union's Position

The Union argues that the City confuses the specific nature of the grievance with Grievant's reinstatement. The Union asserts the gravamen of the grievance does not relate to Grievant's dissatisfaction with her reinstatement under the CSL and that Grievant does not seek to arbitrate the CSL. Rather, according to the Union, the grievance is a pay and benefits dispute inextricably linked to Grievant's service time and, thus, there is nexus with the Agreement's pay and benefits provisions. Grievant seeks to arbitrate the failure of the City to take all of her years of service into consideration, pay her at the appropriate rate, and provide her the other benefits to which she is entitled under the cited provisions of the Agreement. The Union argues that several Board decisions hold that a grievance which alleges a violation of a collective bargaining agreement's pay and benefits provisions based upon a member's years of prior service is arbitrable. The Union cites *DEA*, 43 OCB 73 (BCB 1989), as holding that a grievance alleging that the City did not properly take into consideration all of a detective's years of service when determining his salary and benefits was arbitrable even where the agreement did not explicitly address how years of service were calculated. The Union also cites to *Local 420, DC 37*, 69

"[a]ny such reinstatement effected more than one year after such separation shall not constitute continuous service." (Pet., Ex. 2) The Step III decision further notes that the Union disputed the applicability of this rule to Grievant's situation.

OCB 9 (BCB 2002), as finding a nexus between a general salary provision and an employee's grievance that the employee was not paid the proper rate upon reinstatement.

The Union argues that the fact that a statute, the CSL, also addresses the issue is not determinative, citing Board precedent holding that compliance with the CSL does not foreclose arbitration. The Union further argues that its failure to cite to the grievance provisions earlier in the process is not grounds to deny the request for arbitration as it did not impair the City's ability to respond to the grievance and because the grievance provision is not relied upon as a source of the substantive contract rights alleged to have been violated.

DISCUSSION

The City challenges the arbitrability of a grievance concerning DOC's failure to pay a reinstated CO as an employee with 15 years of experience. The Board finds that the Union has established the requisite nexus to the Agreement and is not seeking to grieve the CSL.

The "policy of the [C]ity [is] to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). Accordingly, "the NYCCBL explicitly promotes and encourages the use of arbitration, and 'the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration.'" *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)); *see also DC 37*, 13 OCB 14, at 11 (BCB 1974). Under NYCCBL § 12-309(a)(3), the Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." The Board, however, "cannot create a duty to arbitrate where none exists." *PBA*, 4 OCB2d 22, at 12; *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

The Board employs a two pronged test to determine the substantive arbitrability of a grievance:

> (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
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> (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

UFOA, 4 OCB2d 5, at 9 (BCB 2011); *see also NYSNA*, 69 OCB 21, at 7 (BCB 2002).

Regarding the first prong, the Agreement has an arbitration clause, and the City has not argued in the instant case that there are any court-enunciated public policy, statutory, or constitutional restrictions barring the arbitration of the grievance. While the City argues that the Union is seeking to arbitrate its application of the CSL, a statute that is not arbitrable under the Agreement, we find that the Union is not seeking to arbitrate anything other than the terms of the Agreement.[5] The fact that the City's reinstatement of Grievant was taken pursuant to the CSL does not foreclose the arbitration of an alleged violation of the Agreement. *See COBA*, 43 OCB 72, at 11 (BCB 1989) ("the City may not insulate its action from compliance with applicable requirements of the NYCCBL or oust this Board of its jurisdiction in collective bargaining and contractual matters merely by demonstrating that the measures it took were permitted by law.") Here, the Agreement's arbitration provision provides for the arbitration of alleged violations of the Agreement and the Union has alleged such violations. Therefore, we find that the first prong is satisfied.

[5] As we find that the Union is not seeking to arbitrate the City's application of the CSL, the City's reliance upon *Local 420, DC 37*, 43 OCB 9 (BCB 1989), is inapplicable because there the Board found that the Union was challenging the employer's termination of an employee pursuant to the CSL.

Regarding the second prong, to establish a nexus between the collective bargaining agreement and the subject of the grievance "a party need only demonstrate a . . . 'relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *PBA*, 4 OCB2d 22, at 13 (quoting *PBA*, 3 OCB2d 1, at 11 (2010)); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). By definition, this showing "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact constitute 'an interpretation of the agreement that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)); *see also* CSL § 205.5(d). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . [as] where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

We find that the Union has established the requisite nexus. The Union seeks to grieve Grievant's compensation rate subsequent to her reinstatement, arguing that under the Agreement she should receive the pay and benefits commensurate with 15 years of service. We have generally held that "disputes related to earned wages and the payment thereof are arbitrable." *CEA*, 79 OCB 17, at 11 (BCB 2007) (quoting *Local 30, IUOE*, 77 OCB 7, at 15 (BCB 2006)) (quotation marks omitted).

Further, the instant matter is analogous to *DEA*, 43 OCB 73, at 9 (BCB 1989), where we found arbitrable a claim that the City failed to place an employee on the right step of a contractual salary scale. In *DEA*, the grievant had been promoted to detective in 1973, demoted in 1977, and promoted to detective again in 1986. Upon his second promotion, the City paid

grievant as a first year detective, and did not credit the grievant for the time served as a detective in the 1970s. The Union had cited contractual provisions that "provide[d] 'base annual rates' of pay for detectives based on grade and step, but [did] not expressly state how an employee qualifies for a particular grade or step nor does it provide, on its face, that continuous years of service in title is the sole factor in determining the base rate of pay." *Id.*, at 8. We found that whether "salary is based on years of continuous, rather than cumulative service, too, addresses the merits of the grievance and presents a question for an arbitrator, rather than this Board, to decide." *Id.*, at 9 (holding that a grievance alleging that prior service was not considered was arbitrable "even where the contract did not expressly mandate that such prior service be considered.");[6] *see also Local 420, DC 37*, 69 OCB 9 (BCB 2002) (finding arbitrable a claim that a reinstated grievant was paid at the wrong salary rate in violation of salary provision); *CEA*, 79 OCB 17 (finding arbitrable a claim that a promoted employee not paid at proper level on pay scale).

Therefore, we find that there is a relationship between the Union's claim and the cited provisions of the Agreement. Accordingly, the petition challenging arbitrability is denied, and the request for arbitrability is granted.

[6] In support of this holding, the Board cited *UFA*, 31 OCB 1 (BCB 1984). In *UFA*, the union grieved the Fire Department's refusal to credit prior City service towards promotion and compensation. The City argued there was no nexus to the parties' contract since it did not address credit for prior City service. We rejected the City's argument, found that the calculation of years of service goes to the merits of the dispute, and granted the request for arbitration. *Id.*, 31 OCB 1, at 6.

ORDER

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

ORDERED, that the petition challenging arbitrability filed by the City of New York and the New York City Department of Corrections, docketed as BCB-4115-15, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers' Benevolent Association, docketed as A-14898-15, hereby is granted.

Dated: October 6, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

CAROL A. WITTENBERG
MEMBER

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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