LEEBA, 9 OCB2d 12 (BCB 2016)

(Arb.) (Docket No. BCB-4157-16) (A-15041-16)

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the City's failure to pay unit members the maximum salary rates violated the parties' Agreement. The City argued that payment of the maximum rate is not required by the Agreement or the MOA and does not constitute a grievable issue. It also argued that the Union failed to establish a nexus between the grievance and any provisions of the Agreement, or DOT's rules, regulations, or written policies. The Union contended that a nexus exists between its request and the salary provisions of the Agreement. The Board found that the Union established the requisite nexus. 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 TRANSPORTATION,
Petitioners,

-and-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On January 15, 2016, Law Enforcement Employees' Benevolent Association ("LEEBA" or "Union") filed a request for arbitration on behalf of New York City Department of Transportation ("DOT") employees in the titles of Associate Inspector Levels I and II, Highway and Sewer Inspector, Service Inspector, and Senior Service Inspector ("Grievants"), alleging that

the City of New York ("City") and DOT violated the Inspectors (Highways & Sewers) collective bargaining agreement ("Agreement"), by not paying the maximum salary rates for these titles. On March 2, 2016, the City filed a petition challenging the arbitrability of the grievance. The City argues that payment of the maximum rate is not required by the Agreement or the MOA and does not constitute a grievable issue. It also argues that the Union has failed to establish a nexus between the grievance and any provisions of the Agreement or the DOT's rules, regulations, or written policies. The Union contends that a nexus exists between its request and the salary provisions of the Agreement. The Board finds that the Union established the requisite nexus. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

There are approximately 150 Grievants employed by DOT and currently represented by LEEBA. Prior to October 6, 2015, these titles were represented by the Laborers International Union of North America, Pavers and Road Builders District Council, Local 1042 ("Local 1042"). The City and Local 1042 were parties to the Agreement, which was effective October 15, 2008 to October 14, 2010, and signed a Memorandum of Agreement ("MOA") for a successor agreement effective October 15, 2010 to June 17, 2018.[1] On October 6, 2015, LEEBA was certified as the exclusive collective bargaining representative for these titles.

Article VI, § 1(a) of the Agreement defines the term "grievance" as "[a] dispute concerning the application or interpretation of the terms of this Agreement." (Pet., Ex. 3)

[1] Pursuant to the MOA, the terms and conditions of the Agreement remain in effect, except as modified or amended by the MOA. Section 2 of the MOA modifies the Agreement by providing for general wage increases.

Article VI, § 1(b), defines the term "grievance" as "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, ***written*** policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the [City] shall not be subject to the grievance procedure or arbitration." (*Id*.) (emphasis in original)

LEEBA claims that the Agreement and the MOA contain several provisions that reference maximum salary rates, which were bargained for, and which form the basis of its grievance. In particular, Article III of the Agreement is titled "Salaries," and § 2 thereof provides that "[e]mployees in the following title(s) shall be subject to the following specified salary adjustment(s) and/or salary range(s)." (Pet., Ex. 3) Article III § 2(a) and 2(b), both include a column titled "Minimum" with subtitles, "Hiring Rate" and "Incumbent Rate," and a column titled "Maximum."[2] (*Id*.) Section 2 of the MOA is titled "General Wage Increases," and subsection (d) provides that "[t]he general increases shall be applied to the base rates, incremental salary levels and the minimum 'hiring rates', minimum 'incumbent rates' and maximum rates (including levels) if any, fixed for the applicable titles." (Pet., Ex. 4) LEEBA asserts, and the City denies, that no employee has ever been paid the maximum salary rates listed in the Agreement.

[2] In its answer, LEEBA also cites multiple other sections of Article III of the Agreement, all of which include the term "maximum salary." For example, Article III, § 1(b) provides, in pertinent part, that "[u]nless otherwise specified, all salary provisions of this Agreement, including minimum and maximum salaries, advancement or level increases, general increases, education differentials and any other salary adjustments, are based upon a normal week of 35 hours . . . ." (Pet., Ex. 3) Article III, § 1(d) provides that "[t]he maximum salary for a title shall not constitute a bar to the payment of any salary adjustment or pay differentials provided for in this Agreement but the said increase above the maximum shall not be deemed a promotion." (*Id*.) Article III, § 3(c), provides that "[t]he general increases provided for in this [§] 3 shall be applied to the base rates, incremental salary levels and the minimum 'hiring rates,' minimum 'incumbent rates' and maximum rates (including levels), if any, fixed for the applicable titles." (*Id*.)

It is undisputed that on or about November 2, 2015, the Union filed a group grievance[3] with the City directly at Step III.[4] On December 3, 2015, a Step III conference was held. On December 29, 2015, the Step III review officer denied the grievance. The Step III review officer's decision stated that "[t]he grievance alleges the [DOT] is not compensating Grievants correctly in that Grievants are all long-service employees, but are not earning the maximum salary rate available to their respective titles as set forth in the [Agreement], and the [MOA] incorporated into that contract."[5] (Pet., Ex. 5) In denying the grievance, the review officer stated, in pertinent part, that:

> A review of the record reveals no contractual violation by the [DOT]. Article III (Salaries) of the contract reveals provisions for the minimum hiring rate, the incumbent rate, and a maximum range up to which an employee may be compensated. Additionally, this Article addresses general wage increases, pertinent definitions, and the manner in which general and other wage increases are to be implemented. There is no provision concerning mandatory compensation at the maximum rate under any circumstance.

(*Id*.)

On January 15, 2016, the Union filed the instant request for arbitration, which states the grievance to be arbitrated as: "[DOT] is not providing ac[c]ess to max salary rate available to their respective titles as set forth in the [Agreement]." (Pet., Ex. 5) The Step III denial was

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[3] The Step III grievance form is not in the record.

[4] Article VI, § 7 of the Agreement states that "[a] grievance concerning a large number of Employees and which concerns a claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement may be filed directly at Step III of the grievance procedure . . . ." (Pet., Ex. 3)

[5] According to the review officer, the Union did not claim that Grievants have not received the contractually-negotiated salary increases. Rather, the review officer described the Union's position as arguing that "Grievants all are long-service employees and that it is the belief of the Union that their service and commitment are deserving of a greater salary rate than that which is currently paid to each of them." (Pet., Ex. 5)

attached to the request for arbitration. The remedy sought was: "Inspectors reaching Max Salary levels." (*Id*.) On March 2, 2016, the City filed the instant petition challenging arbitrability.

POSITIONS OF THE PARTIES

City's Position

The City asserts that access to a maximum salary is not grievable under the Agreement. The City argues that the petition challenging arbitrability should be granted because the Union did not cite a contractual provision that was violated by DOT.[6] In support of this argument, the City cites Board decisions granting petitions challenging arbitrability where the union failed to cite a relevant contractual provision or only cited to the contractual grievance provision.

The City alleges that "a collectively bargained agreement establishing salary rates does not allow the Union to grieve, as a general matter, any issue it believes is tangentially related to the salary provision of the Agreement." (Pet. ¶ 36) According to the City, there is no nexus here because neither the Agreement nor the subsequent MOA contain language or a provision providing employees access to the maximum salary rate as the Union asserts in its request for arbitration. The City contends that "[t]he Union has only made the suggestion that because the [Agreement] and MOA reference the maximum salary rate, that means that certain employees are entitled to a certain salary at a certain point in their employment tenure." (Rep. ¶ 12) According to the City, the Union cites provisions of the Agreement and the MOA containing the

[6] The City contends that, assuming *arguendo*, the Union is asserting a violation of a rule, regulation, or written policy of DOT that entitles its members to a maximum salary, the Union has failed to cite or identify any such rule, regulation, or written policy. It also asserts that the request for arbitration should be dismissed because the Agreement does not include claimed violations of past practices in its definition of grievance. As the Union did not advance a past practice claim or allege that any rule, regulation, or written policy of the DOT was violated, the Board need not address these arguments.

term "maximum salary," "maximum," or "maximum rates," "out of context from the issue at hand" and, accordingly, these provisions do not establish the requisite nexus. (Rep. ¶ 12)

Finally, the City asserts that to the extent that LEEBA is seeking maximum salary rates for its members at a specific moment in their tenure, this is a subject that is appropriate for collective bargaining, not arbitration.[7] It argues that the Union "is attempting to circumvent its obligations and obtain through a grievance what it has a duty to negotiate during bargaining." (Pet. ¶ 39) As a result, the City asserts that the request for arbitration should be dismissed.

Union's Position

According to the Union, a dispute alleging DOT's refusal to pay the maximum salary rates to any employee constitutes an allegation relating to an application or interpretation of the Agreement. The Union asserts that despite the prevalence of the term maximum salary in the Agreement, no employee in Grievants' titles has been paid the maximum salary rate. Accordingly, it argues that having the ability to earn the maximum salary rate is grievable under the Agreement and the MOA, and thus is arbitrable.

The Union asserts that it clearly articulated the subject matter of the grievance. Indeed, the request for arbitration specifically asserts that DOT "is not providing ac[c]ess to max salary rate available to their respective titles as set forth in the [Agreement]." (Pet., Ex. 5) Additionally, in its answer, the Union asserts that the term maximum salary is contained in the Agreement and the MOA in multiple provisions and cites to Article III §§ 1(b), 1(d), 2(a), 2(b),

[7] The City argues that "[s]hould the Board accept the Union's argument, this could lead to each active employee in the affected title . . . filing a grievance for the failure to obtain a certain salary at a certain point in their employment tenure." (Rep. ¶ 9) Further, the City argues that the maximum salary language is common to its contracts, and was a result of collective bargaining. Thus, it asserts that allowing this "grievance to go to arbitration could potentially result in hundreds of thousands of arbitrations simply because the Union was able to grieve a maximum wage issue in the contract generally." (*Id.*)

and 3(c) of the Agreement as well as § 2(d) of the MOA. It argues that the frequent use of the term maximum salary in the Agreement and the MOA evinces the Union's efforts in bargaining for those rates.

The Union also contends that the cases cited by the City are distinguishable. For example, in cases cited by the City, the unions either relied solely upon the grievance provisions of a collective bargaining agreement, cited provisions in a collective bargaining agreement to which they were not a party, or raised past practices when past practices were not within the definition of grievances.

Finally, the Union argues that despite having successfully bargained for maximum salary rates at the bargaining table, the City is now demanding "that the Union negotiate again and make additional sacrifices to receive access to the [m]aximum [s]alary rates previously bargained for." (Ans. ¶ 61) Accordingly, the Union asserts that the matter is arbitrable and that the petition should be dismissed.

DISCUSSION

It is the well-established policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures).[8] In recognition of this policy, the Board has long

[8] NYCCBL § 12-302 provides that:

> 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.

held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *COBA*, 8 OCB2d 30, at 7 (BCB 2015) (citations and quotation marks omitted); *see also CWA*, 77 OCB 31, at 7 (BCB 2006); *OSA*, 77 OCB 19 (BCB 2006). 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 (BCB 2011) (quoting *UFA, L. 94*, 23 OCB 10, at 6 (BCB 1979)); *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

To determine whether a dispute is arbitrable, the Board applies the following two-pronged test:

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

COBA, 8 OCB2d 30, at 8; *see also UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)); *NYSNA*, 69 OCB 21, at 7 (BCB 2002).

Here, there is no dispute that the Agreement provides for arbitration procedures. Article VI, § 1(a), defines the term "grievance" as "[a] dispute concerning the application or interpretation of the terms of this Agreement." (Pet., Ex. 3) Thus, the Board's inquiry focuses on whether the Union has shown a reasonable relationship between the act complained of and the source of the alleged right. For the following reasons, we find that there is an arguable relationship in this matter.

The instant matter is analogous to *Local 237, CEU*, 69 OCB 6 (BCB 2002). In that case, the union similarly argued that the collective bargaining agreement at issue provided for a salary range for each title, but the employer foreclosed any opportunity to earn more than the minimum salary. The employer contended that it had the right to pay only the minimum salary. The Board held that "[s]ince the alleged violation, regarding salary levels, [was] arguably related to a provision of the agreement, Article III, that addresses those salary levels, the [u]nion has fulfilled its burden to establish a nexus between the act complained of and the contract, and the grievance may proceed to arbitration." *Id*., at 7.

The issue raised here is similar. The Union claims that the City does not allow Grievants to earn the specified maximum salary rate for their titles, while the City maintains that nothing in the Agreement or the MOA requires them to pay the maximum salary rate. We find that salary rates, including the maximum rates the Union is seeking, are expressly stated in Article III of the Agreement, entitled "Salaries."[9] Since the alleged violation, failure to pay the maximum salary rates, is arguably related to a contract provision applicable to the Union, we find that the Union has established the requisite nexus between the contract and the alleged violation. Whether the City has violated the Agreement by not awarding the Grievants the maximum salary rate, as

[9] We find that the City's reliance on *SBA*, 3 OCB2d 54 (BCB 2010), *affd., Matter of Sergeants Benev. Assn. v. City of New York, et al.*, Index No. 100183/2010 (Sup. Ct. N.Y. Co. July 18, 2011) (Lobis, J.), *SBA*, 79 OCB 15 (BCB 2007), *Local 3, IBEW*, 71 OCB 17 (BCB 2003), and *Local 30, IUOE*, 61 OCB 16 (BCB 1998), is misplaced. In those cases, the unions either failed to cite to a contractual provision or written policy that was applicable to the grievants and was allegedly violated, misinterpreted, or misapplied. Instead, the unions advanced a past practice claim where their grievance procedure did not include such violations, cited only their grievance provision, or cited to another unit's agreement. Here, Petitioner has cited the salary rates in its own contract.

claimed by the Union, is a matter of contract interpretation properly before an arbitrator.[10] *See OSA*, 7 OCB2d 22, at 10 (BCB 2014) (finding that it is for an arbitrator to determine the merits of a grievance once a nexus has been established); *see also DEA*, 43 OCB 73, at 9 (BCB 1989).

To the extent the City is arguing that the failure to cite a specific contract provision in the request for arbitration should result in its dismissal, we note that a union's failure to include an "explicit citation to a specific contract provision" in its request for arbitration "is not, in and of itself, necessarily fatal." *CCA*, 4 OCB2d 49, at 11 (BCB 2011) (citations omitted). 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." *CEA*, 79 OCB 17, at 9 (BCB 2007) (*quoting Local 420, DC 37*, 69 OCB 9, at 6 (BCB 2002)). Where "the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." *SSEU, L. 371*, 3 OCB2d 53, at 7 (BCB 2010) (quoting *CWA*, 51 OCB 27, at 14 (BCB 1993), *affd., Matter of City of New York v. MacDonald*, Index No. 405350/1993 (Sup. Ct. N.Y. Co. Sept. 29, 1994) (Fisher-Brandveen, J.), *affd.*, 223 A.D.2d 485 (1st Dept. 1996). Here, even before the Union's request for arbitration was filed, the City had notice of the nature of the Union's grievance. Indeed, the review officer in the Step III decision stated that "[t]he grievance alleges the [DOT] is not compensating Grievants correctly in that Grievants are all long-service

[10] The City's reliance on *CEA*, 3 OCB2d 3 (BCB 2010) to argue that the Union failed to cite a contractual provision permitting it to bring the instant grievance, is misplaced. In *CEA*, the union sought to arbitrate longevity payments based upon a reopener provision triggered by changes in the salary schedule of another bargaining unit. The Board found that the requisite nexus was not established because "the [r]eopener [l]etter's provision, expressly limited to adjustments of another uniformed unit's "salary schedule," does not include the subject of longevity payments." *Id*. at 11. Here, the Union seeks to arbitrate a dispute over a provision in its own Agreement concerning the maximum salary rate.

employees, but are not earning the maximum salary rate available to their respective titles as set forth in the [Agreement], and the [MOA] incorporated into that contract." (Pet., Ex. 5) The City also had notice of the pertinent sections of the Agreement as the Step III review officer cited "Article III (Salaries) of the contract," in her decision. (Pet., Ex. 5) *See CCA*, 4 OCB2d 49, at 12-13.

Accordingly, the petition is denied. This matter may properly proceed to 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 and the New York City Department of Transportation, docketed as BCB-4157-16, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Law Enforcement Employees' Benevolent Association, docketed as A-15041-16, hereby is granted.

Dated: June 8, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER