Int'l Org. of Masters, Mates & Pilots, 9 OCB2d 20 (BCB 2016)

(Arb.) (Docket No. BCB-4171-16) (A-15104-16)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the DOT violated the collective bargaining agreement by restricting Grievant's work assignments and overtime opportunities. The City argued that the Union's claims were precluded by *res judicata* and that it failed to establish the requisite nexus between the subject of the grievance and the collective bargaining agreement. The Union argued that its claims were not precluded by *res judicata* and that a nexus existed. The Board found that the Union's waiver was invalid as to the claim seeking to confirm the arbitration award and that the Union's remaining claims are not precluded by *res judicata*. The Board also found that a nexus existed with respect to the wrongful discipline and restriction of overtime opportunities claims and that the parties' Agreement did not allow for the arbitration of past practices. Accordingly, the Board granted, in part, and denied, in part, the petition challenging arbitrability. ***(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-

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, AFL-CIO, on behalf of TIMOTHY MITCHELL,

Respondent.

DECISION AND ORDER

On June 13, 2016, the City of New York ("City") and the New York City Department of Transportation ("DOT") filed a petition challenging the arbitrability of a grievance brought by the International Organization of Masters, Mates & Pilots, International Longshoreman's Association,

AFL-CIO ("Union") on behalf of Timothy Mitchell ("Grievant") alleging that the DOT violated the collective bargaining agreement by restricting Grievant's work assignments and overtime opportunities. The City argues that the Union's claims are precluded by *res judicata* and that there is no nexus between the subject of the grievance and the collective bargaining agreement. The Union argues that its claims are not precluded by *res judicata* and that a nexus exists. The Board finds that the Union's waiver is invalid as to the claim seeking to confirm the arbitration award and that the Union's remaining claims are not precluded by *res judicata*. The Board also finds that a nexus exists with respect to the wrongful discipline and restriction of overtime opportunities claims and that the parties' Agreement does not allow for the arbitration of past practices. Accordingly, the Board grants, in part, and denies, in part, the petition challenging arbitrability.

BACKGROUND

Grievant is a Deckhand at the DOT. The Union is the duly certified collective bargaining representative for the Deckhand title. The City and the Union are parties to a collective bargaining agreement covering the period April 27, 2010 to January 5, 2018 ("Agreement"). The Agreement has a four step grievance process ending in arbitration. Article VI, §1 of the Agreement, in relevant part, defines a grievance as:

> a. A dispute concerning the application or interpretation of the terms of this Agreement;
>
> b. 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 the terms and conditions of employment . . . .
>
> ***
>
> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75 (1) of

> the Civil Service Law upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status.

(Pet., Ex. A) Article VI, § 2 of the Agreement, in relevant part, provides:

> The arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accord with Article 75 of the Civil Practice Law and Rules. The arbitrator may provide for and direct such relief as the arbitrator deems shall be necessary and proper, subject to the limitations set forth above and any applicable limitations of law.

(Pet., Ex. A)

Prior to May 14, 2013, Grievant's responsibilities included inspecting, testing, and operating the passenger ramps used to enter and exit the ferry. On May 14, 2013, the DOT reassigned Grievant to non-safety sensitive work pending the outcome of an investigation into allegations of safety violations relating to his failure to be at his assigned post when a ferry enters the slip. On July 12, 2013, Grievant was charged with misconduct for these safety violations and subsequently, terminated on December 13, 2013.

2013 Arbitration

On December 23, 2013, the Union filed a request for arbitration challenging Grievant's termination ("2013 Arbitration"). The issue presented at the 2013 Arbitration was "[w]hether the [e]mployer wrongfully disciplined the Grievant? If so, what shall be the remedy?" (Pet., Ex. F) As a remedy, the Union sought "[r]einstatement and retroactive benefits, including seniority and back pay." (Pet., Ex. G)

On June 2, 2015, an Arbitrator issued a decision ("2013 Arbitration Award"), finding Grievant guilty of "perform[ing] his duties improperly, inefficiently and negligently." (Pet., Ex. F) Nevertheless, the Arbitrator found that termination was an excessive penalty and ordered the

DOT to "reinstate[ ] [Grievant] to a Deckhand position consistent with the terms of the [Agreement] but without back pay or benefits but with such seniority credits as [ ] Grievant would have had if he had not been discharged from employment." (Pet., Ex. F)

On July 12, 2015, Grievant was reinstated as a Deckhand in a To Be Assigned ("TBA") position.[1] On September 3, 2015, Grievant exercised his seniority to bid on a vessel position in accordance with the DOT's bidding process. On September 14, 2015, the DOT confirmed Grievant's change of assignment to the vessel position he bid on, effective September 28, 2015. However, on or about September 21, 2015, the DOT restricted Grievant's assignments and overtime opportunities to the docks ("DOT's Restrictions") and advised him on September 22, 2015 that these restrictions were based on findings in the 2013 Arbitration Award, that he was "guilty of departing from [his] assigned work area without authorization . . . and performing [his] assigned duties improperly or inefficiently or negligently, on numerous occasions."[2] (Ans., Ex. D)

2015 Grievance

On September 21, 2015, Grievant and the Union filed a grievance at Step I ("Grievance") alleging a "violation of fair and rotating overtime" and "not being allowed to use [] seniority to work on vessels."[3] (Ans., Ex. H) As a remedy, Grievant sought the removal of DOT's Restrictions. On September 25, 2016, the DOT denied the Step I Grievance stating, in pertinent part, that:

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[1] TBA positions are assignments used to cover for employees on leave.

[2] The City similarly denied Grievant's April/May 2016 bid for a vessel assignment.

[3] Article XIII of the Agreement provides:

> Authorization to work overtime compensable in cash shall be evenly distributed, where practicable, within each agency

> DOT has the right to assign employees to duties which are in accordance with safe practices . . . . [F]ollowing [Grievant's] reinstatement by arbitration, in which he was found guilty of being [*sic*] departing his assigned work area without authorization from his supervisor and performing his assigned duties improperly or inefficiently or negligently, on numerous occasions, DOT has determined that [Grievant] cannot be permitted to work safety-sensitive positions aboard vessels. This [ ] has resulted in [Grievant] not being allowed to work overtime on vessels currently and to not be able to work on vessels at all in the future.

(Ans., Ex. I)

On September 28, 2015, the Union appealed the Grievance to Step II. At the October 22, 2015 Step II hearing, the Union argued that DOT's Restrictions violated the Agreement because they violated the 2013 Arbitration Award and the DOT's past practice of awarding assignments on the basis of seniority. On November 4, 2015, the DOT denied the Grievance at Step II.

On or about November 6, 2015, the Union appealed the Grievance to Step III, alleging that the DOT violated Article VI, § 1(b) of the Agreement, by "denying [Grievant] his ability to bid on job assignments pursuant to his seniority, and limiting his ability to bid on overtime work." (Ans., Ex. L) In its December 10, 2015 letter to the Chief Review Officer, the Union supplemented its Grievance, alleging that the DOT failed to comply with the 2013 Arbitration Award when it imposed "*additional punishment"* on Grievant, in violation of Article VI, § 2.[4] (Ans., Ex. M) (emphasis added)

> or agency subdivision, among all those Employees who are eligible to perform the overtime work required.

[4] On or about January 19, 2016, the Union filed an improper practice petition alleging that the City and the DOT violated § 12-306(a)(1), (3), and (4) of the New York City Collective Bargaining Law (New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally and discriminatorily restricting Grievant's assignment and overtime opportunities.

In its May 4, 2015 Step III Reply, the DOT indicated that during the February 26, 2015 Step III hearing the Union alleged that the DOT violated Article VI, § 1(b), by deviating from its past practice of using seniority to determine work assignments. The DOT also indicated in its May 4, 2015 Step III Reply that the Union alleged that the DOT violated Article VI, § 2 because the DOT's Restrictions "punish[ed] Grievant twice" for misconduct addressed in the 2013 Arbitration Award and that Grievant's seniority should control "when bidding . . . on overtime to work on vessels." (Ans., Ex. N) On May 4, 2016, the DOT denied the Grievance at Step III.

On May 17, 2016, the Union filed the instant request for arbitration. The Union described the issue as "[w]hether the [DOT] has fully applied the [2013] Arbitration reinstatement [A]ward. This is a new dispute that could require an arbitrator to resolve issues beyond the scope of the original submission." (Pet., Ex. E)

Article 75 Proceeding

On or about December 21, 2015, the Union filed a petition in New York Supreme Court pursuant to NY CPLR § 7501, et seq. ("Article 75").[5] The Article 75 petition consisted of two causes of action. The first cause of action sought to confirm the 2013 Arbitration Award. The second cause of action ("Second Claim") challenged DOT's Restrictions as a violation of the 2013

[5] NY CPLR § 7501 provides that:

> a written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass on the merits of the dispute.

Arbitration Award and Article XIII of the Agreement. In its January 22, 2016 response to the Article 75 petition, the City did not contest the confirmation of the 2013 Arbitration Award, but argued that the Union had not exhausted its contractual remedies because its pending Grievance alleged that DOT's Restriction violated Article XIII of the Agreement. The City also argued that the employment dispute that formed the basis for the Grievance "arose subsequent to Grievant's reinstatement;" the Union was seeking remedies beyond the scope of the 2013 Arbitration Award; and that the Union could seek these remedies in the arbitration of the Grievance.[6] (Pet., Ex. N) On or about January 22, 2016, the Union withdrew the Second Claim and its request for remedies associated with that claim.

[6] The City argued that the following remedies were outside the scope of the 2013 Arbitration Award:

> c. ordering that the City cease and desist from failing to honor seniority credits restored to the Grievant by the [2013] Arbitration Award;
>
> d. ordering the City to permit Grievant to bid in accordance with his restored seniority to all Deckhand positions on Vessels and to all overtime work;
>
> e. awarding petitioner the costs and disbursements of this proceeding; and
>
> f. awarding such other, further and different relief as the Court may deem just and proper.

(Ans., Ex. G)

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union is precluded by *res judicata* from proceeding to arbitration. The City asserts that the issues in the Union's request for arbitration arise out of the same facts and are identical to the issues raised and decided in the 2013 Arbitration. The City maintains that DOT's Restrictions are an extension of the DOT's May 14, 2013 reassignment to a TBA position and therefore, constitute the same dispute. According to the City, the May 14, 2013 reassignment of Grievant put the Union on notice of DOT's Restrictions. It argues that the Union's failure to challenge DOT's Restrictions in the 2013 Arbitration precludes the Union from challenging them now in arbitration.

The City also argues that the Board must reject the Union's attempt to recharacterize DOT's Restrictions as new discipline. It asserts that the Union framed its claim as a violation of the 2013 Arbitration Award and the Agreement through all the steps of the grievance procedure. Further, the City argues that DOT's Restrictions are not disciplinary because there is no evidence of harm to Grievant or indicia of disciplinary intent, such as the filing of new formal charges pursuant to Article VI, §1(e), or personal animus between DOT's management and Grievant. Rather, the City asserts that its decision to impose DOT's Restrictions on Grievant is "based upon his history of repeated [and] substantiated neglect of his duties and failure to adhere to safety rules and regulations" and that it has a managerial prerogative to make such decisions. (Rep., p. 11)

Further, the City argues that the Union seeks to enforce the 2013 Arbitration Award through the grievance procedure and maintains that Article VI, §2, limits the enforcement of the 2013 Arbitration Award to the courts through an Article 75 action. It asserts that the Union has exercised its right to enforce the 2013 Arbitration Award in the pending Article 75 proceeding. It

argues that allowing the Union to challenge the DOT's Restrictions at arbitration requires reopening the 2013 Arbitration Award and renders it non-final.

The City also contends that there is no nexus between the Grievance and the Agreement because the Union does not cite a source of a right that falls within the definition of a grievance. The City asserts that there are no provisions in the Agreement or rules, regulations, written policies or orders that prohibit DOT's Restrictions. In addition, the City argues that the seniority-based bidding process is neither a term or condition of the Agreement, nor a rule, regulation or written policy or order of the City or the DOT. Further, the City maintains that past practices are not arbitrable under the Agreement.

Finally, the City argues that its challenge to the arbitrability of the Grievance is consistent with its position in the Article 75 proceeding. It asserts that its position in the Article 75 is not a waiver of its right to challenge the arbitrability of the Grievance or an acknowledgement that the Grievance is arbitrable.

Consequently, the City requests that the Board grant its petition and deny the Union's request for arbitration.

Union's Position

The Union argues that it is not precluded by *res judicata* from challenging the DOT's Restrictions at arbitration. It contends that DOT's Restrictions constitute "a new dispute over new discipline" that occurred after Grievant's reinstatement and were not addressed in the 2013 Arbitration. (Ans. ¶ 125) The Union further asserts that it should be afforded the opportunity to challenge the imposition of this new discipline in arbitration because DOT's Restrictions have adversely affected Grievant's earnings and retirement benefits.

The Union also argues that its challenge to DOT's Restrictions is a new dispute that it "properly raised pursuant to the contractual grievance and arbitration clause" and that it is "not merely seeking to enforce the [2013 Arbitration Award]." (Ans. ¶ 121) The Union asserts that it withdrew the Second Claim because the City correctly argued that the DOT's Restrictions are the subject of the pending Grievance. The Union also argues that the City's position in the Article 75 proceeding acknowledges that the Grievance is subject to the Agreement's grievance and arbitration procedure.

Finally, the Union argues that there is a nexus between the subject of the Grievance and Article VI, § 2. The Union asserts that Article VI, § 2, requires that the 2013 Arbitration Award be final and binding and that the DOT's Restrictions "undermine[ ] the finality of the award by imposing a new penalty for behaviors already addressed by the Arbitrator." (Ans. ¶ 130)

As such, the Union requests that the Board deny the petition and grant its request for arbitration.

DISCUSSION

It is the well-established policy under the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see OSA*, 7 OCB2d 28, at 8 (BCB 2014). As such, "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." However, the Board

"cannot create a duty to arbitrate if none exists, [nor can we] enlarge a duty to arbitrate beyond the scope established by the parties" in their collective bargaining agreements. *DC 37, L. 768,* 4 OCB2d 45, at 12 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 12); *see also CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L.371*, 69 OCB 34, at 4 (BCB 2002).

Validity of Waiver

As a condition of the right of a union to seek arbitration, the NYCCBL requires the union and all grievants to file "a written waiver of the right, if any, … to submit the contractual dispute being alleged under a collective bargaining agreement to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." NYCCBL § 12-312(d).[7]

Here, the Union is unable to submit a valid waiver with respect to its claim that the City failed to comply with the 2013 Arbitration Award because it previously filed an action in court under Article 75 seeking to confirm the 2013 Arbitration Award. Since the dispute concerning enforcement of the 2013 Arbitration Award is before the courts, the Union has not satisfied the statutory condition to invoke arbitration of this dispute. *See* NYCCBL § 12-312(d); *see also Local 376, DC 37*, 65 OCB 18 (BCB 2000) (finding waiver invalid when Union filed a request for arbitration and an Article 75 petition to enforce the same arbitration award).

However, the Union's request for arbitration is not limited to enforcement of the 2013 Arbitration Award in as much as it alleges that, "[t]his is a new dispute that could require an arbitrator to resolve issues beyond the scope of the original submission." *Id*. As will be discussed

[7] NYCCBL § 12-312(d) further provides that:

> This subdivision shall not be construed to limit the rights of any public employee or public employee organization to submit any statutory or other claims to the appropriate administrative or judicial tribunal.

more fully below, the evidence establishes that at the lower steps of the grievance process, the Union clearly raised three additional claims: (1) a wrongful discipline claim; (2) a restriction of overtime claim; and (3) a violation of a past practice claim. All three of these claims relate to the events that arose in September 2015, were not issues in the proceeding that lead to the 2013 Arbitration Award, and are not issues before the court in the Article 75 proceeding. Therefore, the Union's waiver with respect to these claims is valid.

Res Judicata

We find that *res judicata* does not preclude the arbitration of the wrongful discipline, overtime or past practice claims. This Board recognizes that "*res judicata* bars a cause of action that could have been presented properly in a prior proceeding against the same party, based upon the same harm and arising out of the same or related facts." *UMD, L. 333, ILA,* 4 OCB2d 37, at 13 (BCB 2011). However, "a subsequent cause of action will not be barred by *res judicata* where the nature of the second action is distinct from the prior action in which a judgment was rendered." *Id. (*citing *GTFM*, *LLC v. Nagy,* 18 A.D.3d 266, 268 (1st Dept. 2005). In addition, *res judicata* will not preclude a subsequent action when the claim could not have been heard during the previous proceeding. *See UMD, L. 333, ILA,* 4 OCB2d 37, at 14.

The record establishes that the Union could not have presented the wrongful discipline, overtime, or past practice claims in the 2013 Arbitration because the claims are based upon different actions and arise out of different facts occurring after the conclusion of the 2013 Arbitration. In fact, the City admits in its Article 75 response that the instant grievance arose subsequent to the 2013 Arbitration Award and that the Union could pursue the remedies it sought in its Second Claim in the arbitration of the Grievance. Accordingly, it is undisputed that the instant claims arising from DOT's Restrictions in September 2015 are different from the issues

raised in the prior arbitration regarding the Grievant's termination in December 2013.[8] These claims could not have been raised or decided in the 2013 Arbitration and are not precluded by *res judicata*.[9]

Notice of the Union's Claims

We reject the City's argument that it was not on notice of the Union's wrongful discipline, overtime, or past practice claims, which the City describes as merely a recharacterization of the dispute in response to the City's petition challenging arbitrability. Where, as here, "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; *see also* CWA, 51 OCB 27, at 14 (BCB 1993), *affd.*, *City of New York v. MacDonald*, No. 405350/93 (Sup. Ct. New York County Sept. 29, 1994), (Fisher-Brandveen, J.), *affd.*, 223 A.D.2d 485 (1st Dept. 1996)).

The evidence establishes that the City had notice of the wrongful discipline, restriction of overtime opportunities, and past practice claims. While the Union did not initially phrase its claim as wrongful discipline in the request for arbitration, it is clear that it was challenging DOT's Restrictions as new discipline. The Union characterized DOT's Restrictions as "additional

[8] For these reasons, we are not persuaded by the City's argument that the May 14, 2013 reassignment of the Grievant precludes the Union from contesting DOT's September 2015 actions. The May 2013 reassignment was temporary and resulted from alleged safety violations during the pendency of an investigation. In contrast, the instant claims "arose subsequent to the Grievant's [July 12, 2015] reinstatement." (Pet., Ex. N)

[9] Similarly, the pending Article 75 action does not preclude the Union from pursuing the instant claims at arbitration. *See DC 37, L. 376,* 65 OCB 18 (BCB 2000) (holding that when the claims in a prior arbitration are different from claims raised in a new request for arbitration, a pending Article 75 action to enforce the prior arbitration award does not preclude the arbitration of such claims).

punishment" in its December 10, 2015 letter to the Chief Review Officer prior to the Step III hearing. (Ans., Ex. M) In addition, the City acknowledged in its Step III Reply that the Union asserted that DOT's Restrictions "punish[ed] Grievant twice." (Ans., Ex. N) Similarly, the Union put the City on notice of its challenge to the DOT restricting Grievant's overtime opportunities. The Grievance alleged "a [v]iolation of [f]air [and] [r]otating [o]vertime." (Pet., Ex. H) In addition, the City acknowledged in its Step III Reply that the Union asserted that Grievant's seniority should control "when bidding . . . on overtime to work on vessels." (Ans., Ex. N) Further, the DOT acknowledged in its response to the Article 75 petition that the Grievance challenged the DOT's restriction on overtime opportunities as a violation of Article XIII. Finally, the Union put the City on notice of its past practice claim. The City acknowledged in its Step III Reply that the Union alleged that the DOT's Restrictions violated a past practice "of awarding bids based on seniority." (Ans., Ex. N)

Based on these facts, it is clear that DOT had notice of the Union's claims at the lower steps of the grievance process and was not prejudiced by the omission of these arguments or the relevant contract provisions in the request for arbitration. Consequently, we will consider the arbitrability of the Union's wrongful discipline, overtime and past practice claims.[10] *See* NYCCBL § 12-302; *UPOA,* 43 OCB 55, at 9-10 (BCB 1989); *DEA*, 43 OCB 73, at 10 (finding that the Board will "not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request for arbitration or prepare for arbitration [is] not impaired.")

[10] Our finding is not to be construed as permitting a party to belatedly broaden the scope of its grievance at the arbitration stage. Rather, where the City, as here, is on notice of the nature of the claim, we will not adopt a strict pleading rule. This is consistent with our well established policy of favoring resolution of disputes through impartial arbitration.

Arbitrability

Where a valid waiver exists, the Board applies a two-pronged test to determine whether a grievance is arbitrable. This test considers:

> 1. whether the parties are 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.

DC 37, L. 420, 5 OCB2d 4, at 12 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 9 (BCB 2011)) (citations and internal quotation marks omitted).

Here, it is undisputed that the parties agreed to resolve certain disputes through a grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute or the constitution. Accordingly, the first prong is satisfied.

With respect to the second prong, the burden is on the Union "to demonstrate a . . . [reasonable] '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). Such a 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)). "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 a nexus exists between the Agreement and the wrongful discipline claim. When, as here, written charges are not filed, whether an action "constitutes discipline depends on the circumstances surrounding the act and therefore, the Board examines whether [the Union] has alleged specific facts that show the employer's motive was punitive."[11] *See DC 37, L. 768,* 4 OCB2d 45, at 13 (BCB 2011) (citing *Local 375, DC* 37, 51 OCB 12, at 12-13). The Union alleges that DOT's Restrictions constitute "additional punishment" for prior misconduct and Article VI, §1(e) provides for the challenge to wrongful disciplinary actions. (Ans., Ex. M) In making this claim, the Union relies upon the reason DOT expressed in its restriction of Grievant's assignment and overtime opportunities, specifically that an arbitrator found Grievant had engaged in misconduct in 2013. Accordingly, we find the wrongful discipline claim arbitrable.[12] *See PBA*, 4 OCB2d 22 (BCB 2011) (granting request for arbitration of a grievance challenging an assignment restriction as discipline); *Local 924, DC 37*, 1 OCB2d 3 (BCB 2008) (granting request for arbitration of a grievance challenging overtime restrictions as discipline).

We also find that a nexus exists between the Agreement and the restriction on overtime opportunities claim. Article XIII requires that overtime be "evenly distributed, where

[11] We note that the service of disciplinary charges is not a prerequisite for the arbitration of the wrongful discipline claim under Article VI, § 1(e). *See Local 375, DC 37*, 51 OCB 12, at 13 (BCB 1993), *affd., Matter of NYC Dept. of Sanitation v. MacDonald,* Index No. 402944/1993 (Sup. Ct. New York County Dec. 20, 1993) (Ciparick, J.), *affd.,* 215 A.D.2d 324 (1st Dept. 1995), *affd.,* 87 N.Y.2d 650 (1996); *Local 924, DC 37*, 1 OCB2d 3, at 13-14 (BCB 2008) (holding that that the lack of written charges does not bar the arbitration of a claim of wrongful discipline where the contractual provision upon which the grievance is based requires the service of written charges).

[12] The City's assertion that DOT's Restrictions do not constitute discipline goes to the merits of the Grievance which can be raised in arbitration. *See PBA*, 4 OCB2d 22, at 13. ("Once an arguable relationship [exists], the Board will not consider the merits of the grievance.")

practicable. . . among all those Employees who are eligible to perform the overtime work required." (Pet., Ex. A) The Union claims that limiting the Grievant's assignment has the direct result of unfairly restricting his overtime opportunities. In fact, DOT's September 22, 2015 letter advised Grievant that his overtime opportunities were limited to the docks. Accordingly, we find the restriction of overtime opportunities claim arbitrable. *See L. 333, UMD*, 43 OCB 35 (finding nexus between identical contract language to Article XIII and a restriction of overtime claim).

Finally, to the extent the Union seeks to grieve a past practice of awarding assignments on the basis of seniority, we find that there is no nexus with the Agreement. We have previously held that past practices are not arbitrable where they are not included in the definition of a grievance. *See SBA*, 3 OCB2d 54, at 9-18 (BCB 2010); *Local 333, UMA*, 43 OCB 35, at 13-14 (BCB 1989) (finding claims based on past practices are not arbitrable under identical grievance procedure language). The Agreement's definition of a grievance is limited to alleged "violation[s], misinterpretation[s] or misapplication[s] of the rules or regulations, written policy or orders of the Employer . . . affecting terms and conditions of employment . . . ." (Pet., Ex. A) This definition does not include claimed violations of a past practice. As such, no nexus exists between the Agreement and the alleged violation of a past practice regarding seniority based bidding.[13] *See SBA*, 79 OCB 15, at 7-8 (BCB 2007) (finding alleged past practice of seniority-based assignment bidding was not arbitrable because it was not included in the definition of a grievance).

In conclusion, we grant the portion of the petition challenging the arbitrability of the claims seeking to confirm the 2013 Arbitration Award and to arbitrate violations of a past practice, and

[13] We do not opine here on whether a past practice exists.

deny the portions of the petition challenging the arbitrability of the wrongful discipline and restriction of overtime opportunities claims.[14]

[14] The Union also argues that DOT's Restrictions violate Article VI, § 2 of the Agreement, which provides that arbitration awards are "final and binding." (Pet., Ex. A) To the extent this argument seeks to confirm the arbitration award, it is dismissed because the Union is unable to submit a valid waiver on this issue, as set forth above. To the extent the Union argues the cited language provides substantive rights and seeks to establish a violation thereof, we need not reach that question as we have found the matter arbitrable on other grounds.

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 portion of the petition challenging arbitrability filed by the City of New York and the New York City Department of Transportation, docketed as BCB-4171-16, hereby is granted as to the claims seeking to confirm the 2013 Arbitration Award and to arbitrate violations of a past practice, and denied as to the wrongful discipline and restriction of overtime opportunities claims, and it is further

ORDERED, that the request for arbitration filed by International Organization of Masters, Mates & Pilots International Longshoreman's Association, AFL-CIO, docketed as A-15104-16, hereby is granted as to as to the wrongful discipline and restriction of overtime opportunities claims.

Dated: October 6, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER