SEIU, Local 300, 9 OCB2d 4 (BCB 2016)

(Arb.) (Docket No. BCB-4138-15) (A-14927-15)

Summary of Decision*:** NYCHA challenged the arbitrability of a grievance alleging that it violated the Citywide Agreement when it denied the Grievant compensation for overtime work performed. NYCHA argued that the Union failed to establish the requisite nexus between the grievance and Article IV of the Citywide Agreement because NYCHA is not a party to the Citywide Agreement. It further argued there is no nexus to the parties' Letter or Unit Agreements because they do not contain a provision for overtime. The Union argued that NYCHA elected to be bound by the Citywide Agreement and, furthermore, NYCHA's Rules set forth a requirement to pay overtime. Thus, the Union contended that it had established the requisite nexus. The Board found that the Union established the requisite nexus. Accordingly, NYCHA's petition challenging arbitrability was denied, and the Union's request for arbitration was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 300
on behalf of BETTY GONZALEZ,

Respondent.

DECISION AND ORDER

On June 23, 2015, the Service Employees International Union, Local 300 ("Union") filed a request for arbitration on behalf of Betty Gonzalez ("Grievant") alleging that the New York City Housing Authority ("NYCHA" or "Authority") violated Article IV § 4 of the Citywide Agreement when it denied the Grievant compensation for overtime work performed. On

November 30, 2015, NYCHA filed a petition challenging the arbitrability of the grievance. NYCHA asserts that the Union has failed to establish the requisite nexus between the denial of overtime and Article IV § 4 of the Citywide Agreement because NYCHA is not a party to the Citywide Agreement. It further argues that there is no nexus to the parties' Letter or Unit Agreements because they do not contain a provision for overtime. The Union argues that NYCHA elected to be bound by the Citywide Agreement and, furthermore, NYCHA's Rules set forth a requirement to pay overtime. Thus, the Union contends that it has established the requisite nexus. This Board finds that the Union has established the requisite nexus. Accordingly, NYCHA's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

BACKGROUND

The Grievant is employed by NYCHA as an Administrative Procurement Analyst ("APA"), and the Union represents employees in this title. NYHCA is a separate legal entity from the City of New York ("City"), is not a mayoral agency, and bargains with the certified employee representatives of its employees on certain matters separately from the City. The Union and NYCHA are parties to a letter agreement ("Letter Agreement") that covers the Grievant's title. The Letter Agreement specifically addresses the topics of accrued leave, night shift differentials, and floating holidays. In addition, the Letter Agreement states that "[p]ursuant to an election entered pursuant to the New York City Collective Bargaining Law [("NYCCBL")], [NYCHA] is bound by the terms of the Local 300/City CBA [("Local 300 Unit Agreement")] with respect to wages, salaries, and contributions to union welfare funds for the non-unique titles represented by Local 300." (Pet., Ex. B)

The referenced election pertains to a 1968 letter that the Chairman of NYCHA wrote to

then-Mayor Lindsey ("Election Letter") stating, in relevant part:

> With respect only to matters relating to wages, salaries, contributions to union welfare funds and pensions, for employees of the Authority in non-unique titles, the Authority consents to be bound by the results of collective bargaining between the City and certified representatives of employees of the City, including employees of the Authority. The bargaining unit for employees in City-wide titles will include Authority employees in such titles. It is understood that negotiations concerning pensions will be had solely with the Union representing more than fifty per cent (50%) of all employees eligible to be included in the pension system involved.
>
> In addition to the foregoing matters, the Authority also agrees to be bound with respect to any other matter of a fiscal nature consented to by the Authority and which is legally permissible for the City to bargain.
>
> With respect to all other matters not mentioned herein, the Authority will undertake its own negotiations and negotiate directly with Unions certified by the Office of Collective Bargaining (Board of Certification) as representatives of the employees of the Authority in non-unique titles.

(Pet., Ex. C) It is undisputed that the Election Letter remains in effect.

The Union claims, and NYCHA denies, that all Local 300 titles at NYCHA receive benefits pursuant to the Local 300 Unit Agreement as well as the Citywide Agreement. The Citywide Agreement is negotiated between the City and District Council 37, AFSCME, AFL-CIO ("DC 37"). It covers "citywide matters which must be uniform" for various different categories of employees. (Citywide Agreement)[1] Included in these categories are "[e]mployees of the . . . New York City Housing Authority pursuant and limited to the extent of their respective elections to be covered by the NYCCBL." (*Id.*) NYCHA, however, asserts that it has not agreed to be bound by the Citywide Agreement. In support of this argument, NYCHA points

[1] The Board takes administrative notice of the Citywide Agreement, of which only a portion was attached as an exhibit to this proceeding.

to DC 37's website, which lists NYCHA as an agency that is not covered by the Citywide Agreement. (*See* Pet., Ex. A) The Union disagrees, and argues that the Election Letter "adopts the Citywide [Agreement] with respect to non-unique employees whose titles are similar to those employees at mayoral agencies with respect to wages, salaries, and fiscal matters." (Ans. ¶ 20)

On December 12, 2014, the Union filed a Step I grievance on behalf of the Grievant, seeking either compensatory time or paid overtime for hours that the Grievant worked beyond her regular 35 hour work week. The Step I grievance was denied by the Grievant's supervisor on February 15, 2015. On February 17, the Union filed a Step II grievance. In the February 27 denial letter, NYCHA's Director of Human Resources found that the grievance was untimely.[2] The denial letter further stated that even if the grievance were not time-barred, it would still have failed because the Union did not "identify any applicable contract provision, rule or regulation that [NYCHA] has allegedly violated" and, therefore, the claim did not meet the definition of a grievance. (Ans., Ex. A) Additionally, the letter specified that APA is a salaried position, and that Article IV of the Citywide Agreement, which the Union attached with its grievance form, was not applicable because NYCHA was not bound by its provisions.

In four separate but identical letters, dated between March 11 and April 27, 2015, the Union requested that a Step III hearing be held. On May 13, 2015, the Director of Human Resources denied the request for the same reasons as articulated in the Step II denial letter. Furthermore, the Step III denial letter stated: "As there is no agreement between NYCHA and SEIU Local 300 that contains a grievance procedure, and NYCHA is not bound by another agreement that contains such a procedure, the grievance procedure contained in the NYCHA

[2] NYHCA does not pursue its argument regarding timeliness in its petition challenging arbitrability and, therefore, we do not address it here.

Human Resources Manual ("NYCHA's Rules"), Chapter I, VII., governs (copy attached)."[3] (*Id*.) Additionally, in response to the Union's assertion that APA is a non-managerial title and that federal law requires such titles to be paid overtime, the denial letter stated that "[a]n alleged violation of federal labor laws does not meet the definition of 'grievance'" in NYCHA's Rules. *(Id*.) The denial letter further stated that APA positions are "bona fide administrative positions that are exempt from the [FLSA] pursuant to Section 13 (a)(1) thereof." (*Id*.)

On June 23, 2015, the Union filed a request for arbitration, stating that the issue was the "[d]enial of overtime compensation for non-managerial title." (Ans., Ex. A) On July 8, 2015, the Union supplemented its filing with a copy of Article IV of the Citywide Agreement, entitled "Overtime" and claimed that § 4 of this Article formed the basis of its grievance. (Pet., Ex. E) Article IV states, in relevant part:

> Section 3.
>
> a. Ordered involuntary overtime which results in an employee working in excess of forty (40) hours in any calendar week shall be compensated in cash at time and one half (1-1/2 times).
>
> b. For those employees whose normal work week is less than forty (40) hours, any such ordered involuntary overtime worked between the maximum of that work week and forty (40) hours in any calendar week, shall be compensated in cash at straight time (1x).

[3] This provision of NYCHA's Rules defines a grievance, in relevant part, as:

> 1. A dispute concerning the application and interpretation of the terms of:
>
> a. Written collective bargaining agreements and written rules or regulations.
>
> ***
>
> 2. A claimed violation, misinterpretation, or misapplication of the rules and regulations of the Authority affecting the terms and conditions of employment.

(Pet., Ex. D) (emphasis in original)

> For employees granted a shortened work day under Section 18 of Article V, compensatory time for work performed between thirty (30) and thirty-five (35) hours a week when such shortened schedule is in effect shall be granted at the rate of straight time (1 time), but such work shall not be considered overtime.
>
> c. Upon the written approval of an employee's request by the agency head or designee, an employee who works ordered involuntary overtime shall have the option of being compensated in time off at the applicable rates provided in Sections 3(a) and 3(b) provided that the exercise of such option does not violate the provisions of ("FLSA").
>
> d. There shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation. Any work performed on a scheduled day off shall be covered by this Article.
>
> e. Employees who are paid in cash or who are compensated in time at the rate of time and one-half (1½X) for overtime pursuant to subsection c of this Section or the Fair Labor Standards Act may not credit such time for meal allowance.
>
> Section 4
> a. Authorized voluntary overtime which results in any employee working in excess of the employee's normal work week in any calendar week shall be compensated in time off at the rate of straight time (l x).
>
> b. For employees covered by the provisions of FLSA, voluntary overtime actually worked in excess of forty hours in a calendar week shall be compensated at the rate of time and one-half (1½ x) in time provided that the total unliquidated compensatory hours credited to an employee pursuant to this provision may not exceed 240 hours. If an employee has reached the 240 hour maximum accrual for FLSA compensatory time, all subsequent overtime earned under this provision must be compensated in cash at time and one-half (1½ x).

(*Id*.)

Additionally, NYCHA's Rules contain a provision for overtime. Chapter 1 § II. F. of NYCHA's Rules ("NYCHA's Overtime Rule") states:

> Employees authorized to work more than their regular number of assigned hours per week shall accumulate overtime. When

> applicable, such overtime shall be calculated in accord with any union contract(s) relevant to the employee.

(Ans., Ex. D)

POSITIONS OF THE PARTIES

NYCHA's Position

NYCHA argues that the Union has not established the requisite nexus between its actions and the Citywide Agreement because NYCHA has never become a party to the Citywide Agreement, nor is it bound by any of its terms under the 1968 Election Letter. NYCHA notes that its Election Letter pertains only to agreements related to wages, salaries, and welfare fund contributions with respect to Citywide titles, and argues that the Citywide Agreement "is devoid of said provisions" and, therefore, has not been adopted by NYCHA. (Rep. ¶ 7) NYCHA contends that the overtime provision of the Citywide Agreement relates to the credit of time and is a non-economic term outside of the Election Letter because the provision lists overtime under the category of "Hours" rather than "Wages."[4] Furthermore, the Letter Agreement does not include an overtime provision and does not contain a grievance procedure.

NYCHA points to prior Board cases in support of its argument that there is no nexus to the Citywide Agreement in this case. In particular, it argues that *CEU, L. 237*, 67 OCB 31 (BCB 2001) and *DC 37, L. 768*, 3 OCB2d 7 (BCB 2010), both stand for the proposition that if an employer is not a signatory to a particular agreement, that agreement may not be used to establish the requisite nexus to the dispute at issue.

NYCHA also contends that there is no nexus between its Letter Agreement and the overtime issue raised in the request for arbitration because the Letter Agreement does not contain

[4] In support of this argument NYHCA also points to NYCCBL § 12-307, which categorizes overtime as hours, rather than wages.

an overtime provision.[5] Regarding the Union's claim that there is a nexus between the grievance and NYHCA's Rules, which contains a grievance procedure and a provision for overtime, NYCHA argues that its Overtime Rule "provide[s] for employees to be credited with overtime only in accordance with applicable union contracts," and none of the contracts relied upon by the Union are applicable here. (Rep. ¶ 8) Thus, NYCHA contends that its Overtime Rule does not independently confer an obligation to calculate and credit overtime. To the extent that Local 300 employees have been credited for overtime in the past, NYCHA denies that such payments were made pursuant to the Citywide Agreement, any other collective bargaining agreement, or NYHCA's Rules. Finally, NYCHA claims that the Union has never attempted to bargain the issue of overtime and, thus, it cannot attempt to obtain in arbitration what it has failed to obtain at the bargaining table.

Union's Position

The Union argues that the petition should be denied because the Grievant's claim is "related to and required" by the overtime and arbitration provisions in the Citywide Agreement, the Local 300 Unit Agreement, and NYCHA's Rules. (Ans. ¶ 19) Pursuant to NYCHA's Election Letter, NYCHA has adopted the Citywide Agreement with respect to wages, salaries, and fiscal matters for employees in non-unique titles. The Grievant's APA title is a non-unique Citywide title, and the Union contends that her overtime grievance is a wage, salary and fiscal dispute.

Furthermore, NYCHA's Overtime Rule expressly provides that "[e]mployees authorized to work more than their regular number of assigned hours per week shall accumulate overtime.

[5] NYHCA also argues that the Local 300 Unit Agreement does not contain an overtime provision and, even if it did, such a provision and any arbitration provision contained therein does not apply to NYCHA.

When applicable, such overtime shall be calculated in accord with any union contract(s) relevant to the employee." (Ans., Ex. D) The Union argues that Article IV of the Citywide Agreement is such a union contract, and it also sets forth the requirement to pay overtime. Additionally, the Local 300 Unit Agreement, which is also adopted by NYCHA for wage, salary, and fiscal matters, sets forth the salary and payroll schedules. According to the Union, NYCHA has "recognized, acknowledged, and settled payroll/salary grievances and did not assert that there was no collective bargaining agreement covering these issues." (Ans. ¶ 23)

Finally, the Union argues that the Local 300 Unit Agreement, the Citywide Agreement, and NYCHA's Rules all provide for arbitration of grievances and constitute enforcement mechanisms for the Grievant's right to be paid overtime. Consequently, the Union contends that NYCHA is required to arbitrate this overtime grievance.

DISCUSSION

"The policy of this Board, as is made explicit by § 12-302 of the NYCCBL . . . is to favor and encourage arbitration to resolve grievances." *OSA*, 7 OCB2d 28, at 8 (BCB 2014) (quoting *OSA*, 1 OCB2d 42, at 15 (BCB 2008)) (internal quotation marks omitted).[6] In recognition of this policy, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)) (internal quotation marks omitted).

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

> 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.

The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test considers:

> (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.

DC 37, L. 420, 5 OCB2d 4, at 12 (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). The Board lacks jurisdiction to enforce contractual rights and, therefore, it will generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citations omitted); *see also* N.Y. Civ. Serv. Law § 205(5)(d).

Regarding the first prong, the parties disagree as to which agreement, and therefore which grievance procedure, applies to the instant dispute. Although NYCHA argues that the grievance arbitration provisions of the Citywide Agreement and the Local 300 Unit Agreement are not applicable in this instance, it is undisputed that NYCHA's Rules do apply to the grievance and that they contain a grievance procedure. That grievance procedure expressly provides for final and binding arbitration of specific matters, including disputes concerning the application or interpretation of terms of a written collective bargaining agreement or a written rule or regulation of the Authority. Thus, prong one of the test is established.

With respect to the second prong, "[w]hen a public employer challenges the arbitrability of a grievance based on a lack of nexus, the burden is on the Union to establish an arguable relationship between the public employer's acts and the contract provisions it claims have been breached." *DC 37, L. 1549*, 6 OCB2d 7, at 12 (BCB 2013) (quoting *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000)) (internal quotation and editing marks omitted). "If the Union's interpretation is plausible[,] the conflict between the parties' interpretations presents a

substantive question of interpretation for an arbitrator to decide." *OSA*, 7 OCB 2d 22, at 9 (BCB 2014) (quoting *Local 3, IBEW*, 45 OCB [59], at 11 (BCB 1990)) (internal quotation marks omitted).

The relevant inquiry in this case is whether there is a reasonable relationship between the Union's claims and the applicable contractual provisions or rules and regulations. NYCHA's Overtime Rule clearly provides that employees who are authorized to work more than their regular number of assigned weekly hours "shall accumulate overtime." (Pet., Ex. D) The Grievant claims that she performed work outside of her regular work hours and is entitled to compensation for overtime work performed. Therefore, on its face there is a direct relationship between the claim and NYCHA's Overtime Rule. The Overtime Rule also expressly states that, where applicable, authorized overtime work shall be paid in accordance with relevant union contracts. It is therefore a matter of contract interpretation to determine what, if any, rights the Grievant has to overtime compensation under NYCHA's Overtime Rule and if the Citywide or Unit Agreements can be applied pursuant to this Rule. Similarly, whether the Citywide or Unit Agreements may provide the Grievant with the right to overtime compensation independent of NYCHA's Overtime Rule is also a matter of contract interpretation for the arbitrator to determine.

It is true, as NYCHA asserts, that it is not a signatory to the Citywide Agreement. However, by virtue of its Election Letter, NYCHA has consented to be bound by certain terms of the Citywide Agreement, specifically with respect to matters concerning wages, salaries, contributions to union welfare funds and pensions, and other matters of a fiscal nature. It is a proper question for an arbitrator to determine whether the overtime provision in the Citywide Agreement falls within one of these subjects. The overtime provision in the Citywide Agreement refers not only to hours but also to "compensation," both in terms of cash and

compensatory time, depending on the type of overtime performed. (Pet., Ex. E) Consequently, we find plausible the Union's argument that the Citywide Agreement's overtime provision relates to wages, salaries, and fiscal matters.[7] *See DC 37, L. 1549*, 6 OCB2d 7, at 12; *see also OSA*, 7 OCB2d 28, at 10 (noting that Article IX of the Citywide Agreement, titled "Personnel and Pay Practices," dealt with issues of both salary and leave and finding it plausible that § 8 of that article applied to the recoupment of both).

We are not persuaded that the cases cited to by NYCHA require a different conclusion. While we held in *CEU, L. 237*, 67 OCB 31 (BCB 2001), that NYCHA was not a signatory to the Citywide Agreement and therefore there was no nexus to it, the parties in that case did not advance arguments regarding the Election Letter or which provisions of the Citywide Agreement NYCHA had agreed to be bound by and, thus, this question was not presented or analyzed.[8] More importantly, the more recent case cited to by NYCHA, *DC 37, L. 768*, 3 OCB2d 7 (BCB 2010), does not stand for the proposition that there can be no nexus to an agreement that the employer is not a signatory to. In that case, the Board examined the substance of a subcontracting provision of the Municipal Coalition Memorandum of Economic Agreement ("MCMEA") that the parties had incorporated by reference into their unit agreement in order to determine whether there was a nexus to the dispute. The Board found no nexus to the unit agreement incorporating the MCMEA because, as a factual matter, no contracting in or out had

[7] We note that NYCCBL § 12-307(a)(2) provides that "matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules" shall be negotiated on a Citywide basis. While that provision also notes that public employers have the ability to negotiate a variation of Citywide provisions, NYCHA does not assert that any variations have been negotiated with the Union, only that the Citywide Agreement's terms do not apply. *See also SSEU*, 1 OCB 11, at 7 (BCB 1968) (determining that overtime rules, including compensation, are an appropriate subject for Citywide bargaining).

[8] It is possible that this argument was not advanced because it was not relevant to the dispute. Although the decision did not list the grievants' particular titles, the vast majority of the titles cited to in the parties' unit agreement were titles that are unique to NYCHA.

occurred. Here, on the other hand, it is clear that the dispute concerns overtime and that the overtime provision of the Citywide Agreement relates to the factual circumstances at issue. Thus, it is for an arbitrator to determine whether overtime concerns wages, salaries or other fiscal matters, as set forth in the Election Letter, such that NYCHA has agreed to be bound by the overtime provision of the Citywide Agreement.

In light of the above, we find that the Union has established the requisite nexus between the denial of payment for overtime performed by the Grievant and Chapter 1 § II. F of NYCHA's Rules, as well as Article IV § 4 of the Citywide Agreement. We therefore deny NYCHA's petition challenging arbitrability and grant the Union's request for 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 New York City Housing Authority, docketed as BCB-4138-15, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Service Employees International Union, Local 300 on behalf of Betty Gonzalez, docketed as A-14927-15, hereby is granted.

Dated: February 23, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER