COBA, 12 OCB2d 31 (BCB 2019)

(Arb.) (Docket No. BCB-4335-19) (A-15586-19)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that it violated a DOC regulation when it failed to credit Grievant for compensatory time for the period of time between the end of his disciplinary suspension and the date he was permitted to return to work. The City argued that the grievance concerns issues related to Grievant's suspension, which is a disciplinary matter that is specifically excluded from the definition of a grievance. The Union argued that it is not seeking to arbitrate a disciplinary matter and that it established the requisite nexus between its claim and the cited regulation. The Board found that the grievance did not concern a disciplinary matter and that the Union established the requisite nexus. Accordingly, the City'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 CITY OF NEW YORK, and
THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Petitioners,

-and-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On May 10, 2019, the Correction Officers' Benevolent Association ("Union") filed a request for arbitration on behalf of Gregory Grabowski ("Grievant"), alleging that the City of New York ("City") and its Department of Correction ("DOC" or "Department") violated DOC Operations Order 23/90 ("OO 23/90") when, following Grievant's return to duty, he was not credited for compensatory time for the period following his 60-day suspension and prior to the

date he was permitted to return to work.[1] On June 14, 2019, the City filed a petition challenging the arbitrability of the grievance. The City asserts that the grievance concerns issues related to Grievant's suspension, which constitutes a disciplinary matter that is specifically excluded from the definition of a grievance. The Board finds that the grievance does not concern a disciplinary matter and that the Union has established the requisite nexus. Accordingly, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

BACKGROUND

Grievant is employed by the DOC as a Corrections Officer ("CO"), and the Union represents employees in this title. The parties' Agreement covers the period of November 1, 2011, through February 28, 2019, and currently remains in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

On June 17, 2012, Grievant was suspended from duty without pay in connection with charges and specifications alleging that he "engaged in conduct unbecoming an officer when he was involved in a physical altercation and made unnecessary physical contact with a visitor at a DOC facility and [when] he subsequently made inaccurate and incomplete verbal and written reports regarding the interaction . . . ."[2] (Pet. ¶ 8) Grievant was also arrested in connection with these alleged actions and charged with various criminal offenses, as well as harassment in the second degree and disorderly conduct. After a trial, Grievant was found guilty only of the violation

[1] The request for arbitration also alleged that the DOC violated Article VIII of the parties' collective bargaining agreement ("Agreement") when it failed to pay Grievant longevity pay at the appropriate rate. However, for reasons that are discussed below, this claim is now moot.

[2] The alleged actions took place between December 23, 2011, and May 9, 2012.

of harassment in the second degree. Grievant was then returned to duty on or about March 7, 2016.

On September 28, 2018, Grievant, the Union, and the DOC signed a Negotiated Plea Agreement ("NPA"), in which the disciplinary charges against Grievant were resolved with a 60-day suspension without pay, which represented time that Grievant had already served. Grievant then submitted an "Affidavit of Back Pay," in which he stated that he sought backpay for the period of his suspension "including medical benefits, vacation time, uniform allowance, holiday pay, night differential, seniority, pension allowances and all other contractual benefits."[3] (Pet., Ex. E ¶ 5) The backpay sought by Grievant excluded the 60 days' pay forfeited as a result of his disciplinary suspension as well as the amount of unemployment benefits Grievant collected.

The Union asserted that sometime thereafter, Grievant received all of his backpay and contractual benefits except for longevity pay and compensatory time. Consequently, on September 14, 2018, the Union filed a Step I grievance seeking these remaining benefits.[4] The DOC provided no response at Step I or II, and the grievance proceeded to a Step III hearing on February 28, 2019.

At the Step III hearing, the Union asserted that "based on [Grievant's] assignment to a 5 x 2 tour (five days working and two days off)," he was eligible for 495 hours of compensatory time

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[3] The Union alleges that this is the practice followed when an officer has served an unpaid suspension longer than the disciplinary penalty imposed.

[4] Article XXI §1(b) of the parties' Agreement is titled "Grievance and Arbitration Procedure" and defines a "grievance," in relevant part, as:

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

(Pet., Ex. A at 30)

from August 8, 2012, until March 7, 2016. (Step III Decision, RFA attachment)[5] The Union relied upon and cited to OO 22/90, entitled "Appearance Days and Compensatory Time for Uniformed Staff." (OO 22/90, RFA attachment) Section II(B) of OO 22/90 states, in relevant part, that "certain non-rotating employees assigned to such institutions who work five (5) days per week at eight hours and thirty-one minutes (8:31) per day shall continue to be credited with eleven hours and twenty-one and one-third minutes (11:21:20) compensatory time per month."

In a May 3, 2019 letter from an Office of Labor Relations review officer, the grievance was denied.[6]

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union "is attempting to avail itself of arbitration seeking enforcement of a disciplinary settlement negotiated at [the Office of Administrative Trials and Hearings ("OATH")]." (Pet. ¶ 24) As such, the City claims that the Union seeks to arbitrate a disciplinary matter, which is not arbitrable under the Agreement, since disciplinary matters are specifically excluded from the definition of a grievance.

The City contends that no nexus exists between the NPA and the Agreement because the Agreement does not contain a provision relating to compensatory time or longevity pay based on time spent on disciplinary suspension. Instead, the City argues that "Grievant is, in effect, seeking

[5] The Board takes administrative notice of the request for arbitration ("RFA") and its attachments, which are not labelled.

[6] The letter noted that the DOC had agreed to properly adjust Grievant's longevity pay and that, therefore, by e-mail dated March 28, 2019, the Union withdrew the portion of its grievance regarding this claim.

to enforce terms contained in an Affidavit of Back Pay on which the City is not a signatory." (Pet. ¶ 28) The City claims that such issues are solely within the jurisdiction of OATH. Additionally, the City argues that Grievant specifically waived his right to appeal the NPA.[7] Furthermore, the request for arbitration seeks a benefit that the DOC does not award— that is, compensatory time for hours not actually worked. Accordingly, the City requests that its petition challenging arbitrability be granted.

Union's Position

The Union argues that the petition should be denied because it has established a nexus between its claim and the DOC's rules and regulations.[8] First, the Union contends that it has not alleged that the City violated the terms of the NPA. While the NPA relates to the history of this case, it is not the source of right under which the Union seeks redress. At issue in the request for arbitration is whether the City violated OO 22/90 by failing to pay Grievant compensatory time, yet the City does not address this provision whatsoever. The Union contends that, because the request for arbitration claims that there has been a violation of the DOC's rules and regulations, it fits squarely within the definition of a grievance under the Agreement.

[7] The NPA states, in relevant part:

> I am fully aware that if the Commissioner of Correction approves the penalty, this waiver of my right to a Section 75 hearing is final and irrevocable and that this waiver will be placed in my permanent personnel file, as a disposition of the Disciplinary Charges and specification.

(Pet., Ex B)

[8] We find the issue of longevity pay moot. The Union concedes in its answer that the issue of longevity pay was resolved at Step III of the grievance process. We therefore do not address this issue.

Citing Board precedent, the Union contends that the Board has found that a grievance alleging a violation of a collective bargaining agreement's pay and benefits provisions based on a member's years of prior service is arbitrable, since there is a nexus between the agreement and the pay and benefits dispute. The Union argues that the result should be the same here, as the Union seeks to correct a pay error that it believes the City has made. Consequently, the Union contends that the City is required to arbitrate this 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 and editing marks omitted).[9] 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).

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

[9] 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.

> 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).

Here, it is clear that the parties have agreed to submit certain disputes to arbitration. Article XXI of the Agreement contains a grievance procedure, which provides for final and binding arbitration. The definition of a grievance in Article XXI §1(b) includes disputes concerning the interpretation or application of the rules, regulations, or procedures of the DOC affecting terms and conditions of employment. The Union seeks to arbitrate whether Grievant is entitled to retroactive compensatory time for the period in which he was suspended from duty pending disciplinary action. Eligibility for compensatory time is addressed in OO 22/90, which constitutes a DOC rule, regulation, or procedure.

We find no merit to the City's argument this case concerns a disciplinary matter that is specifically excluded from the contractual definition of a grievance. The NPA resolved Grievant's disciplinary charges with a two-month suspension. The Union does not seek to challenge that suspension, or any terms of the NPA which, on its face, does not address the issue of back pay or benefits. Rather, it is clear that the instant controversy concerns whether Grievant is entitled to receive compensatory time, and the Union has identified OO 22/90 as the source of the right to such. As the parties have agreed to arbitrate disputes concerning the interpretation or application of DOC regulations, we find that the first prong has been established.

With regard to the second prong, in order to establish a nexus "a party need only

demonstrate a *prima facie* 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 (BCB 2011) (quoting *PBA* 3 OCB2d 1, at 11 (BCB 2010)) (internal quotation marks omitted). 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) (quotation omitted); *see also* CSL § 205.5(d). "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 editing marks omitted).

Here we find that the second prong has been established as there is a nexus between the instant dispute and OO 22/90. OO 22/90 "govern[s] appearance days and compensatory time for the Department's uniformed staff" and sets out formulas for how much compensatory time employees are entitled to depending on which schedule they are assigned to work. (OO 22/90, RFA attachment). The Union seeks to arbitrate whether Grievant is entitled to compensatory time. Although the City argues that the DOC does not award compensatory time for hours not actually worked, this statement is not set forth in OO 22/90. Moreover, the argument that Grievant was ineligible for compensatory time while disciplinary charges were pending and he did not work goes to the merits of the dispute and is a question of interpretation for an arbitrator to determine.

Thus, we find arbitrable whether Grievant is entitled to compensatory time for the period of time following his 60-day suspension during which disciplinary charges were pending and Grievant was not returned to work.

Consequently, for the reasons stated above, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

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 its Department of Correction, docketed as BCB-4335-19, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers' Benevolent Association, docketed as A-15586-19, hereby is granted.

Dated: October 2, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER