# *OSA*, 13 OCB2d 16 (BCB 2020)

(Arb.) (Docket No. BCB-4376-20) (A-15711-20)

***Summary of Decision***: The City challenged the arbitrability of a grievance alleging that it violated the parties' collective bargaining agreement and Personnel Service Bulletins when it denied Grievant the right to return to his prior agency in his prior title after the agency to which he transferred terminated him during his probationary period. The City argued that the matter is not arbitrable because there is no nexus to the parties' collective bargaining agreement and because the Personnel Service Bulletins at issue were derived from the City's Personnel Rules and Regulations, which are not arbitrable. The Board found a nexus to one of the cited Personnel Service Bulletins, which included procedures not found in the Personnel Rules and, therefore, was arbitrable under the parties' collective bargaining agreement. Accordingly, the Board granted, in part, and denied, in part, the City's 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 KINGS COUNTY DISTRICT ATTORNEY,**

***Petitioners,***

***-and-***

**ORGANIZATION OF STAFF ANALYSTS,**
**on behalf of its member David Williams-Coard,**

***Respondent.***

---

## DECISION AND ORDER

On March 3, 2020, the City of New York ("City") and the Kings County District Attorney ("Kings DA") filed a petition challenging the arbitrability of a grievance brought by the

Organization of Staff Analysts ("Union") on behalf of its member David Williams-Coard ("Grievant"). The grievance alleges that the Kings DA violated the parties' collective bargaining agreement and Personnel Service Bulletins ("PSBs") when it denied Grievant, who had resigned from the Kings DA and transferred to another City agency, the right to return to the Kings DA in his prior title after the agency to which he transferred terminated him during his probationary period. The City argues that the matter is not arbitrable because there is no nexus to the parties' collective bargaining agreement and because the PSBs at issue were derived from the City's Personnel Rules and Regulations ("Personnel Rules"), which are not arbitrable under the parties' agreement. The Board finds a nexus to one of the cited Personnel Service Bulletins, which includes procedures not found in the Personnel Rules and, therefore, is arbitrable under the parties' collective bargaining agreement. Accordingly, the Board grants, in part, and denies, in part, the petition challenging arbitrability.

## BACKGROUND

The City and the Union are parties to a collective bargaining agreement dated April 30, 2009 ("Staff Analysts Agreement"), which remains in effect pursuant to § 12-311(d), the *status quo* provision of the New York City Collective Bargaining Law ("NYCCBL"). The Staff Analysts Agreement sets forth the applicable grievance procedure in Article VI, § 1, which provides that a grievance includes:

> (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 terms and conditions of employment; provided, disputes involving the

> [Personnel Rules] . . . shall not be subject to the grievance procedure or arbitration;
>
> * * *
>
> (f) Failure to serve written charges as required by [§] 75 of the Civil Service Law [("CSL")] . . . upon a permanent Employee covered by [CSL § 75(1)] . . . where any of the penalties (including a fine) set forth in [CSL § 75(3)] have been imposed.

(Pet., Ex. 1)[1] Employees in the Associate Staff Analyst ("ASA") title represented by the Union are also covered by the 1995-2001 Citywide Agreement ("Citywide Agreement").[2] *See OSA*, 7 OCB2d 8, at 9 (BCB 2014) (citing NYCCBL § 12-307(a)(2)); *see also* Citywide Agreement, Appendix A, n.1.

Grievant began his service with the City in July 1991. On October 17, 2005, Grievant was appointed to the ASA title while at the Department of Homeless Services. He began working for the Kings DA in the ASA title on September 28, 2014. He submitted a resignation email in May 2017 that states, in pertinent part: "Please note, effective 11:59 pm, May 6th, 2017, I am resigning from my position as Director of Office Services in the [Kings DA's] Office." (Pet., Ex. 6) A screenshot from the Payroll Management System indicates that effective May 7, 2017, Grievant was on "OTHER LEAVE WITHOUT PAY" (Pet., Ex. 2) On or about May 8, 2017, Grievant

[1] CSL § 75 is titled "Removal and other disciplinary action." (Ans., Ex. D) CSL § 75(1) provides that covered employees "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." (*Id.*) CSL § 75(1)(a) provides that covered employees include those "holding a permanent appointment in the competitive class of the classified civil service." (*Id.*)

[2] We take administrative notice of the Citywide Agreement, which remains in full force and effect pursuant to the *status quo* provision of NYCCBL § 12-311(d).

began working at the City's Department of Housing Preservation and Development ("HPD") in the in-house title of Director of Operations. He was provisionally appointed to the civil service title Administrative Project Manager.

The City asserts that on May 7, 2018, the Kings DA "terminated the Grievant's underlying civil service title of ASA." (Pet. ¶ 25) An undated NYCAPS Job Data Form states that effective May 7, 2018, Grievant's job had "ceased." (Pet., Ex. 2) The City further asserts, and the Union denies, that between May 7, 2017, and March 1, 2019, "Grievant made no request with regard to movement or maintenance of his ASA civil service title."[3] (Pet. ¶ 27)

On or about March 1, 2019, HPD terminated Grievant for "failing probation."[4] (Pet. ¶ 26) The Union asserts that Grievant "promptly applied to be reinstated to his permanent competitive ASA line at [the Kings DA]" and "was told, for the first time, that [the Kings DA] had terminated his ASA line."[5] (Ans. ¶ 36)

On or about April 16, 2019, the Union filed this grievance with the Kings DA at Step I,

[3] According to the Step I determination, the Kings DA informed Grievant at his exit interview on May 5, 2017, that it "would keep his line open for three months and that if he wished to transfer his title to his new employer he would need to advise [Kings DA] of such." (Pet., Ex. 2)

[4] The record does not reveal why Grievant's probationary period was so long, but there is no dispute that he was on probation at the time of his termination from the HPD.

[5] According to the Step III determination, Grievant claimed that when he inquired about his ASA position a few weeks prior to his termination from HPD, he was informed that his ASA title was never sent to HPD because he had resigned from the Kings DA. The Step III determination further states that Grievant asserted that when he contacted the City's Department of Citywide Administrative Services to restore his position, he was "told to go through the grievance process." (Pet., Ex. 5)

alleging violations of Article VI, § 1(b) or (f), of the Staff Analysts Agreement and/or PSB 200-4 "in that [G]rievant's permanent civil service title was improperly ceased without notification, justification or explanation." (Pet., Ex. 2) PSB 200-4 concerns the termination of employees for being absent without leave ("AWOL"). It reads, it in pertinent part:

> City Personnel Director Rule 6.4.3 provides that if an employee is [AWOL] for a period of twenty consecutive work days and fails to communicate with his/her employing agency in a manner prescribed by that agency, then such an absence shall be considered a resignation unless the appointing officer accepts an explanation. The rule also provides an employee absent without leave who is covered by [CSL § 75] is entitled to certain disciplinary rights. Section 75 applies to permanent, competitive class employees. It may also apply, under limited circumstances, to employees serving in positions in other classes of the classified service. In addition, employees not covered by [CSL § 75] may be entitled to disciplinary rights under their collective bargaining agreements.

(Pet., Ex. 3)

On April 18, 2019, the Kings DA issued a Step I determination denying the grievance and finding that there was no relationship between the subject matter of the grievance and Article VI, § 1(b) or 1(f), of the Staff Analysts Agreement or PSB 200-4. In the Step I determination, the City stated that PSB 200-10, the subject of which is "Rights to Former Positions for Probationary Employees," governs when a City employee resigns a permanent civil service title to assume a new position at another agency. (Pet., Ex. 2) The determination found that, pursuant to PSB 200-10, "[the Kings DA] was not required to retain [Grievant's] line."[6] (Pet., Ex. 2)

[6] It also found that the grievance was time-barred since it was filed more than 120 days after the alleged violation.

A resignation pursuant to PSB 200-10 is described within the document as conditional since the employee is placed on leave from his prior position for the duration of his or her probation in the new position. PSB 200-10 also provides that, should an employee who is granted leave pursuant to PSB 200-10 fail to satisfactorily complete the new probationary period, the "employee shall be returned to his/her former title and agency, provided said employee continues to meet the qualification and residence requirements applicable to his/her former title. If such requirements are met, **there is no discretion on the part of the former agency with respect to this matter.**" (Pet., Ex. 2(C)) (emphasis in original)

Section 3 of PSB 200-10 specifies procedures that the employee and agency are to follow when the employee resigns from one City agency to begin working at another. Prior to the employee's last day at the agency he or she is leaving, the employee submits a form requesting a conditional resignation and leave of absence. If the employee is eligible, the leave of absence is granted for the duration of the employee's probationary period in the new position. If the agency finds that the employee is not eligible for leave, it must inform the employee of this in writing. Should the employee not complete the probationary period, PSB 200-10 provides that the "employee may apply to the Personnel Director of his/her former agency for reappointment to his/her former title. Upon receipt of such application for reappointment, the Personnel Director of the former agency shall remove the leave and reappoint the employee to his/her former title . . . ." (*Id.*)

PSB 200-10 lists as its source the Citywide Agreement and the Personnel Rules.[7] PSB 200-10 quotes Personnel Rule 5.2.3, which is titled "Status of Former Position Upon Promotion," as providing that "[u]pon promotion, the position formerly held by the person promoted shall be held open for the promotee, and shall not be filled, except on a temporary basis, pending completion of the probationary term." (*Id*.)

On April 23, 2019, the Union advanced the grievance to Step II. The Union, according to the Step II determination, argued that Grievant "resigned his job but not his civil service title." (Pet., Ex. 2) On June 19, 2019, the Kings DA issued a Step II determination, denying the grievance for the reasons stated in the Step I determination.

On June 20, 2019, the Union advanced the grievance to Step III. According to the Step III determination, at the Step III conference the Union argued that when Grievant resigned from the Kings DA, he never intended to resign his ASA title and only resigned his position. Further, the Union asserted that the Kings DA never gave Grievant any notice that it considered him to have resigned his ASA title or that it "would terminate his permanent civil service title." (Pet., Ex. 5)

---

[7] Appendix G, § 2 of the Citywide Agreement provides to an employee who transfers from one City agency to another and begins a new probationary term the right to return to the former agency and title. It reads in pertinent part:

> Effective November 26, 1999, employees serving permanently in a competitive, non-competitive, or labor class title in an agency covered by the Citywide Agreement and the [Personnel Rules] ("covered position") who are appointed to another covered position in the competitive, non-competitive, or labor class that requires serving a new probationary period, shall have the right to return to their former agency and title if they do not satisfactorily complete the new probationary period.

On January 31, 2020, the Union filed the request for arbitration. The grievance was described as follows: "There is a violation, misinterpretation or misapplication of the [Staff Analysts Agreement] Article VI, [§] 1b, 1f, and [PSB] 200-4, in that the [G]rievant's permanent civil service title was improperly ceased without notification, justification or explanation." (Pet., Ex. 2) The remedy requested is that "[G]rievant be made whole in every way, including being reinstated to his permanent civil service title of an [ASA] with no break in service and, where applicable, all earned benefits restored."[8] (*Id.*) The Step determinations and their attachments, including PSB 200-10, were appended to the request for arbitration.

## POSITIONS OF THE PARTIES

### City's Position

The City argues that the request for arbitration must be dismissed because the Union has failed to establish the requisite nexus between the subject of the grievance and the cited provisions of the Staff Analysts Agreement. It argues that that there is no nexus to Article VI, § 1(f), because the Grievant resigned and was not the subject of discipline. It further argues there is no nexus to PSB 200-4 because Grievant resigned from his position; he was not AWOL, was not disciplined for going AWOL, and was not deemed to have resigned as a result of being AWOL. The City argues that the citation to the provision of a collective bargaining agreement that defines a grievance, alone, is inadequate to allow for arbitration.

[8] On or about February 19, 2020, the City issued a Step III determination, closing the grievance as the matter had already moved to a request for arbitration.

The City acknowledges that PSB 200-10 addresses City employees resigning from one City agency to accept a position at another. However, it argues that alleged misapplication of that PSB is not arbitrable, because the PSB is derived from Personnel Rule 5.2.3, and disputes regarding the Personnel Rules are explicitly excluded from arbitration under Article VI, § 1(b), of the Staff Analysts Agreement. According to the City, only where an agency adopts its own set of rules that reflect the Personnel Rules are those agency rules subject to arbitration and the Union has cited to no such provision. Since the Kings DA did not "adopt or implement any of its own rules or regulations which mirror [Personnel Rule] 5.2.3 or PSB 200-10" the City contends that "the subject matter of [Personnel Rule] 5.2.3 is clearly barred from arbitration."[9] (Pet. ¶ 38)

**Union's Position**

The Union argues that there is a nexus between the grievance and PSB 200-10. The Union acknowledges that the "statement of the grievance unintentionally omits mention of PSB 200-10" but argues that Board precedent holds that the failure to cite to the explicit provisions prior to an answer "is not fatal where sufficient notice of the underlying issue was provided." (Ans. ¶ 47 n.1) The Union notes that PSB 200-10 has been discussed at every step of the grievance process.

According to the Union, PSB 200-10 is a written policy applicable to the Kings DA that grants rights beyond those granted by the Personnel Rules and is thus a proper subject for arbitration. The Union states that PSB 200-10, unlike the Personnel Rules, explicitly requires the Kings DA to grant a leave of absence to covered employees, such as Grievant, who accept

[9] The City did not argue in its petition that the request for arbitration was untimely but "reserves the right to argue timeliness at arbitration, should this matter proceed." (Pet. ¶ 15 n.1)

appointments to other City positions, to keep their position open for the full duration of their probation, and to promptly reinstate them upon request if they fail probation. (Ans. ¶ 51) It argues that the Kings DA violated PSB 200-10 when it "terminated" Grievant's ASA position and refused to reinstate him upon his termination by HPD for failing probation. (Ans. ¶ 60)

The Union also argues there is an arbitrable nexus to PSB 200-4 because, like PSB 200-10, it is a written policy applicable to the Kings DA which does more than merely restate the Personnel Rules. According to the Union, PSB 200-4 concerns arbitrable rights under CSL § 75, and provides that the Kings DA could not "terminate the line" without following the notice and due process requirements of CSL § 75 and PSB 200-4. (Ans. ¶ 39) According to the Union, CSL § 75 provides that an employee holding a permanent, competitive civil service title cannot be disciplined or terminated except for reasons of misconduct or incompetence and, before termination can be imposed, the employee must be given notice of the charges against them and an opportunity for a hearing. PSB 200-4, the Union argues, provides procedures for terminating employees who have been AWOL for 20 days or more, and specifies that employees must be given notice and a hearing before they can be terminated. The Union argues that Grievant was on leave from his ASA title and that, even if the Kings DA considered Grievant to be on unauthorized leave, under PSB 200-4, he was entitled to notice, charges, and an opportunity to be heard before the Kings DA "terminated his ASA line." (Ans. ¶ 69)

## DISCUSSION

The City challenges the arbitrability of a grievance alleging violations of the Staff Analysts Agreement and PSBs 200-4 and 200-10. The Board finds that a nexus exists between PSB 200-10 and the subject of the grievance.

The statutory policy, under NYCCBL § 12-302, is to favor the use of impartial arbitration to resolve disputes and the "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted); *see also DC 37, L. 983*, 12 OCB2d 13, at 6-7 (BCB 2019). The "Board is charged with the task of making threshold determinations of substantive arbitrability." *DEA*, 57 OCB 4, at 9-10 (BCB 1996); *see also* NYCCBL § 12-309(a)(3). However, the Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also DC 37, L. 983*, 12 OCB2d 13, at 7; *ADW/DWA*, 4 OCB2d 21, at 10; *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). Accordingly, the Board "cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties." *DC 37*, 5 OCB2d 4, at 12 (citing *CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002)).

The Board employs a two-pronged test to determine whether a grievance is arbitrable:

> (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. 983*, 12 OCB2d 13, at 7; *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). "This inquiry does not require a final determination of the rights of the parties . . . [and] the Board generally will not inquire into the merits of the dispute." *DC 37*, 5 OCB2d 4, at 12 (citations omitted); *see also NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010); *DC 37*, 27 OCB 9, at 5 (BCB 1981).

The City does not dispute "that the parties agreed to resolve certain disputes through a grievance procedure." *SSEU, L. 371*, 9 OCB2d 10, at 9 (BCB 2015). Nor does the City claim "that this arbitration would violate public policy or that it is restricted by statute or the constitution." *Id.* Accordingly, we find that the first prong of the test is satisfied.

We next address the City's argument that a claimed misapplication of PSB 200-10 cannot be arbitrated because that PSB is derived from the Personnel Rules, which are excluded from arbitration under Article VI, § 1(b), of the Staff Analysts Agreement. . "The arbitrability of PSBs, just like their predecessor P[ersonnel] P[olicy] and P[rocedures] cannot be determined in a categorical manner, but rather turns upon the nature of the PSB in question." *OSA*, 1 OCB2d 42, at 17 (BCB 2008). *See also SSEU, L. 371*, 9 OSCB2d 10, at 12; *SSEU, L. 371*, 37 OCB 1, at 14-15 (BCB 1986). Where a PSB "merely restates the cognate provisions" of the Personnel Rules, it falls within the exclusion from arbitration set forth in the grievance provision of the parties' agreement. *OSA*, 1 OCB2d 42, at 18 (citations omitted). Where the PSB sets forth rules and regulations beyond the Personnel Rules, on the other hand, there exists a "potential source for rights subject to arbitration." *Id*. at 19. *See also SSEU, L. 371*, 9 OSCB2d 10, at 12; *DC 37*, 39 OCB 28, at 25 (BCB 1987). The grievance at issue in *OSA*, 1 OCB2d 42, concerned a claimed

misapplication of a PSB that stated that it was derived from several sources, including the Personnel Rules and the Citywide Agreement. The Board found the PSB at issue in *OSA*, 1 OCB2d 42, arbitrable because it contained procedures not found in the Personnel Rules. *See also DC 37*, 39 OCB 28, at 24-25 (BCB 1987) (finding a Personnel Policy and Procedure a potential source of rights subject to arbitration where "the document on its face appears to be more than simply a compilation of rules from other sources.").

PSB 200-10, like the PSB at issue in *OSA*, 1 OCB2d 42, cites as sources the Citywide Agreement and the Personnel Rules. However, it also contains procedures not found in either. For example, PSB 200-10 provides that the agency must notify the employee in writing if he or she is not eligible for a leave of absence, and it provides that an employee who does not complete the probationary period in a new position may apply for reappointment to his or her former title. The Union's claim that those procedures "create rights enforceable through arbitration" are, under our precedent, "outside of the exclusion from arbitration of claims arising under the Personnel Rules in Article VI, § 1(b)." *OSA*, 1 OCB2d 42, at 20 (citing *DC 37*, 39 OCB 28, at 25; *DC 37, L. 1407*, 75 OCB 7, at 15 (BCB 2005)).[10]

We find a nexus to PSB 200-10, which addresses the circumstances and procedures under which an employee with a permanent civil service title in one covered agency, who transfers to another covered agency and is terminated during the probationary period, is entitled to return to his or her former agency and title. Here, the grievance concerns claims regarding the denial of

[10] The grievance provision at issue in *OSA*, 1 OCB2d 42, was also Article VI, § 1(b), of the Staff Analyst Agreement.

Grievant's request to return to his former title and the Kings DA's failure to provide notice that it had "terminated" or "ceased" his position. (Pet. ¶ 25; Pet., Ex. 2) Accordingly, we find a nexus to PSB 200-10 and the alleged misapplication of PSB 200-10 is arbitrable. We find no nexus between PSB 200-4 and the grievance because the City has never considered, or treated, Grievant as AWOL.[11]

Therefore, we deny the petition challenging arbitration and grant the request for arbitration with respect to the claimed misapplication of PSB 200-10,which is arbitrable under Article VI, § 1(b), of the Staff Analysts Agreement. We note that the "determination as to the nature and scope of rights, if any, created by [PSB 200-10] and their application to the instant case are matters to be decided by an arbitrator and not this Board." *OSA*, 1 OCB2d 42, at 20-21. *See also DC 37*, 39 OCB 28, at 25.

[11] We also find no nexus to Article VI, § 1(f), of the Staff Analysts Agreement, which the Union cited in its grievance but did not advance an argument in support thereof. There is no indication that the City was required to serve written charges upon Grievant, since the facts do not demonstrate that he was the subject of discipline.

**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 Kings County District Attorney, docketed as BCB-4376-20, hereby is granted as to Article VI, § 1(f), of the Staff Analysts Agreement and PSB 200-4, and denied as to Article VI, § 1(b), of the Staff Analysts Agreement and PSB 200-10; and it is further

ORDERED, that the Request for Arbitration filed by Organization of Staff Analysts, docketed as A-15711-20, hereby is granted as to Article VI, § 1(b) of the Staff Analysts Agreement and PSB 200-10.

Dated: August 3, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER