Doctors Council, L. 10MD, S.E.I.U., 14 OCB2d 5 (BCB 2021)

(Arb.) (Docket No. BCB-4401-20) (A-15753-20)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that it violated a DOHMH policy when it failed to pay overtime compensation to two FLSA non-exempt titles. The City asserts that there is no nexus between the grievance and the Agreement. The Board found 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 HEALTH AND MENTAL HYGIENE,

Petitioners,

-and-

DOCTORS COUNCIL, LOCAL 10MD, S.E.I.U.,
on behalf of YASEMIN MURAD,

Respondent.

DECISION AND ORDER

On September 24, 2020, Doctors Council, Local 10MD, S.E.I.U. ("Union") filed a request for arbitration on behalf of Dr. Yasemin Murad ("Grievant"), alleging that the City of New York ("City") and its Department of Health and Mental Hygiene ("DOHMH") failed to pay overtime compensation to two Fair Labor Standards Act ("FLSA") non-exempt bargaining unit titles in

violation of two memos and the parties collective bargaining agreement ("Agreement").[1] On October 22, 2020, the City filed a petition challenging the arbitrability of the grievance. The City asserts that there is no nexus between the grievance and the Agreement because the gravamen of the claim is DOHMH's alleged failure to comply with FLSA overtime rules. The City also argues that the two memos are not written policies and that simply citing the general definitional grievance provision of the Agreement is insufficient to establish the requisite nexus to proceed to arbitration. The Board finds that the Union established the requisite nexus between its claimed violation of the memos and the Agreement. Accordingly, the City's petition challenging arbitrability is denied, and the Union's request for arbitration is granted.

BACKGROUND

The Union represents employees in the City Clinician (Part-Time) and City Medical Specialist (Part Time) titles. Grievant is employed by DOHMH as a City Clinician. The parties' Agreement sets forth the applicable grievance procedure in Article VIII, § 1 which provides that a grievance includes:

> 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 terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the [City] or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure

[1] The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting certain employees in the private sector and in federal, state, and local governments. Covered non-exempt employees must receive overtime pay for hours worked over 40 per workweek at a rate not less than one and one-half times the regular rate of pay. *See* 29 USCS § 201.

> or arbitration; . . . .

(Pet., Ex. A; Ans., Ex. C)[2]

In 2016, the United States Department of Labor published the final rule revising the "white collar" FLSA overtime exemption regulations. (*See* Ans. Ex. A) In February 2017, the City announced its intention to comply with the new rule in a memo from the Deputy Commissioner of Human Capital of the City's Department of Citywide Administrative Services ("DCAS") to "Agency Personnel Officers" with the subject "FLSA Reclassifications" ("DCAS Memo").[3] (Ans., Ex. A) The DCAS Memo states that "[n]otwithstanding [a district] court's decision preventing the implementation of the salary threshold increase, the [City] is reclassifying FLSA-exempt employees earning below the threshold set forth in the final rule" and that the reclassifications "will be effective retroactively to December 1, 2016." (*Id.*) The City Clinician and City Medical Specialist titles are included in the list of "titles that will be reclassified as FLSA non-exempt (i.e., FLSA-covered)."[4] (*Id.*)

---

[2] The Agreement was extended through June 27, 2021, by a Memorandum of Agreement dated May 1, 2020.

[3] According to the DCAS Memo:

> Following the issuance of this final rule, the [City] began the process of reviewing current salary levels for all FLSA-exempt employees to determine whether the new salary requirements were met. However, in connection with a lawsuit filed by 21 states challenging the final rule, a district court in Texas granted the states' motion to prevent the implementation of the FLSA salary threshold increase on a nationwide basis.

(Ans., Ex. A)

[4] Additionally, the DCAS Memo states that:

> As a reminder, any employee that is classified as FLSA-covered – including those titles that are being reclassified – may not work

In response, DOHMH issued a memo in May 2017 implementing these changes retroactive to December 1, 2016.[5] (*See* Ans., Ex. B, "DOHMH Memo.") It is undisputed that, in accordance with the DOHMH Memo, the City Clinician and City Medical Specialist titles received the new FLSA designation of "Non-Exempt," meaning they "now may receive FLSA overtime." (*Id*.) Additionally, the DOHMH Memo states, in relevant part:

> The provided titles above include all titles at DOHMH affected by the new reclassification. Those employees who are now eligible for FLSA overtime, may now collect their overtime as cash or time. The agency's requirement that an employee must seek approval before working overtime remains unchanged. Accordingly overtime will remain subject to the supervisors' approval.
>
> As DOHMH policy requires approval for overtime, in limited circumstances where it is not possible to request approval, the employee must advise the supervisor as soon possible, to provide the supervisor with: (1) the amount of time worked; (2) the reason the employee performed the overtime; and (3) the reason the employee could not obtain prior approval.
>
> Employees eligible to receive overtime compensation under the FLSA and/or Collective bargaining agreements are only authorized to work during their regularly scheduled hours. Any work performed before or after their regularly scheduled hours must be approved in accordance with the agency's policy.

(*Id*.)

> outside of their regularly scheduled work hours unless the employee receives approval to do so in accordance with your agency's policy. Therefore, FLSA-covered employees may not perform any tasks related to their assigned duties and responsibilities before or after their regular schedule (including work from home) or during their dedicated meal break without receiving approval to perform such work in accordance with your agency's policy.

(Ans., Ex. A)

[5] The memo was from the DOHMH Senior Director of Labor Relations Bureau of Human Resources and Labor Relations to Administrative Assistant Commissioners and Designated Human Resource Liaisons.

During the week of November 25, 2018, Grievant worked 40 hours plus an additional 30 minutes of overtime. Grievant was compensated at the straight time rate for those 30 minutes instead of at a rate of time and a half.

The Union filed the grievance at Steps I and II, but no responses were issued.[6] After the Step III hearing, the City's Office of Labor Relations issued a decision denying the grievance.[7]

The Union subsequently filed the instant request for arbitration stating the grievance to be arbitrated is the "improper failure and refusal of the Employer to implement its policy providing that two bargaining unit titles are FLSA-exempt and to pay overtime compensation in accordance with that policy to [Grievant] among others." (Pet., Ex. B; Ans., Ex. G). As a remedy, it sought "[c]ompliance with the relevant policy, prospectively and retroactively, and payment of overtime compensation in accordance with that policy;" that the City make whole all affected employees

[6] On September 16, 2019, the Union filed the grievance at Step III alleging that "[t]he Employer has violated the contract and department policy, including but not limited to Article VIII of the [Agreement], the [DCAS Memo], and the [DOHMH Memo]." (Ans., Ex. E)

[7] The Step III decision states in pertinent part:

> Addressing the Agency's statement that there is an agreement to compensate Clinicians using straight time, the Union stated that it was unaware of any such agreement and further stated that there should be no discrepancy between FLSA and the contract.
>
> At the Step III Conference, the Agency stated that there was no contractual violation. The Agency stated that it relied on the February 6, 2017 DCAS memorandum ("Agency Exhibit 1"). Further, the Agency stated that meetings were held with both the Office of Payroll Administration ("FISA-OPA") and OLR for guidance in drafting the memorandum before it was sent out on May 9, 2017. The Agency also stated that there is a long-standing agreement and practice to compensate the [City Clinician] title using straight time. Further, the Agency enters an employee's hours worked into Citytime which then calculates an employee's pay based on the employee's title with no further input from the Agency.

(Pet., Ex. E; Ans., Ex. F)

with interest; and such other relief as may be appropriate. (Pet., Ex. B; Ans., Ex. G)

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 Agreement. The City asserts that the gravamen of the Union's grievance is DOHMH's alleged failure to comply with the overtime rules of the FLSA, a federal statute. However, the City also argues that the Union has failed to cite any section of the Agreement that demonstrates that the parties are obligated to or intended to arbitrate issues concerning the FLSA, or any federal law. According to the City, there are no specific sections in the Agreement that either entitle the Grievant to overtime pay in this situation or demonstrate that the parties intended to include alleged violations of the FLSA within the scope of the grievance procedure. Thus, it argues that arbitration is not the appropriate forum to resolve this dispute.

The City also asserts that the request for arbitration must be dismissed because the Union only cites the general definitional grievance provision of the Agreement. Citing Board cases, the City contends that failing to cite specific substantive provisions of the Agreement has been found to be insufficient to establish the nexus required to proceed to arbitration.

Further, the City argues that the Memos are not written policies or rules of the agency, but rather they advise individuals of rights that they are granted under federal law. It asserts that a document issued by an agency will not be accorded the status of a written policy or rule unless it has been addressed generally to the agency and has set forth a general policy applicable to affected employees. Moreover, it asserts that documents couched in general and precatory language are generally not grievable. Here, it asserts that the Memos "merely mention employee's rights to

FLSA overtime compensation" and "[r]eference to FLSA overtime compensation in such brief and general terms in a memo most certainly cannot be misconstrued as creating individual substantive rights to overtime compensation independent of the FLSA." (Rep. ¶ 23) As such, the City asserts that the request for arbitration must be dismissed.

Union's Position

The Union argues that the petition challenging arbitrability should be denied because it has established a nexus. Contrary to the City's argument, the Union asserts that it does not allege a violation of the FLSA or any other federal law. It contends that the grievance concerns DOHMH's violation of its own policy affecting the terms and conditions of employment. Specifically, it asserts that DOHMH failed to pay Grievant for overtime that she worked, in violation of the Memos.

The Union argues that it is clear from Article VIII, § 1(b) of the Agreement, that the parties have agreed to arbitrate, among other things, a claimed violation of a written policy of the Employer. Thus, it asserts that there is a nexus between the Union's allegation that DOHMH violated its written policy concerning the reclassification of the titles as FLSA non-exempt and Article VIII, § 1(b) of the Agreement. Accordingly, the Union contends that it is not required to cite to another provision of the Agreement.

Moreover, the Union argues that the issue of whether the Agreement provides it with the ability to arbitrate a policy violation is a matter of contract interpretation for the arbitrator pursuant to Article VIII, § 1(a) of the Agreement. Thus, the Union contends that the petition challenging arbitrability should be denied.

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).[8] 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 broad enough in its scope to include the 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).

---

[8] 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.

Regarding 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, the parties have agreed to submit certain disputes to arbitration. Article VIII of the parties' Agreement contains a grievance procedure, which provides for final and binding arbitration. The definition of a grievance includes disputes concerning 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. . ." (Pet., Ex. A; Ans., Ex. C)

The Board has "consistently emphasized that a policy promulgated by the City and made enforceable at each of its agencies may constitute a predicate for arbitration." *CEU, L. 237, IBT*, 5 OCB2d 10, at 10 (BCB 2012) (finding a nexus to a City Vehicle Driver Handbook created by DCAS and the Mayor's Office for use by all City agencies); *See, e.g., OSA*, 1 OCB2d 42, at 17 (BCB 2008) (finding Personnel Services Bulletin issued by DCAS arbitrable under the grievance provision); *DC 37*, 39 OCB 28, at 24-26 (BCB 1987) (finding Personnel Policy and Procedure "about the rules governing the probationary period" a potential source of rights subject to arbitration); *L. 924, DC 37*, 1 OCB2d 3, at 10-12 (BCB 2008) (finding Mayoral Executive Orders

subject to arbitration). Here, the DCAS and DOHMH Memos were widely distributed. Additionally, the Memos on their face state that the decision has been made to reclassify the titles listed and that those titles are to be treated as FLSA non-exempt. *cf. DC 37, L. 2507*, 6 OCB2d 9, at 13 (BCB 2013).

Although worded with reference to the FLSA, the essence of the Union's claim is that DOHMH failed to compensate Grievant, an FLSA non-exempt/eligible employee, for overtime that employee worked in accordance with the Memos.[9] Neither memo simply restates or summarizes federal law. *See MLC*, 4 OCB2d 51 (BCB 2011). Indeed, the City acknowledges that the DCAS Memo "speaks specifically to a decision by the [City] to reclassify certain civil service titles as covered by the FLSA," and "lists the titles now covered under the FLSA, procedures that one must follow in order to receive approval to work overtime, and background information about the FLSA."[10] (Rep. ¶ 26) Significantly, both Memos clearly assert that the City has chosen to reclassify the titles even though "a district court in Texas granted the states' motion to prevent the implementation of the FLSA salary threshold increase on a nationwide basis." (Ans., Ex. A) Thus, the memos do not just announce compliance with the FLSA or a court, but rather set forth the terms of the City's compliance with those laws including its decision to reclassify certain titles. Additionally, the Memos describe the application of overtime rules for these reclassified

---

[9] We note that the Board has found that grievances alleging an employer failed to pay grievants for overtime worked were arbitrable. *See SEIU, L. 300*, 9 OCB2d 4 (BCB 2016) (grievance alleging that the employer violated the Citywide Agreement when it denied the grievant compensation for overtime work performed found arbitrable); *NYSNA*, 2 OCB2d 32 (BCB 2009) (finding that the Union's grievance alleging employer's failure to pay grievants for overtime they allegedly worked was reasonably related to the collective bargaining agreement, including, but not limited to the Citywide Agreement, Article IV, Overtime, and/or the unit agreements).

[10] We note that the City's only position on the failure to pay overtime to the employee in issue has been to state in its Step III denial that the payment of straight time was based on a long-standing agreement or practice, which the Union allegedly disputed.

employees. For example, the Memos reiterate the agency's requirement that an employee must seek approval before working overtime and outline the procedures for approval. (Ans., Exs. A & B) In light of the above, we find that a nexus exists between the grievance alleging a violation of the Memos/policy and Article VIII, § 1(b) of the Agreement.

We are not persuaded that the cases relied upon by the City require a different conclusion. *See PBA*, 3 OCB2d 41 (BCB 2010) (finding that rather than seeking the interpretation or application of the employer's procedures that were drafted to ensure compliance with the FLSA, the request for arbitration sought the rate of pay mandated by a federal court order, which was not arbitrable); *DEA*, 57 OCB 4 (BCB 1996) (denying an arbitration request concerning whether the City and the department had complied with the FLSA where disputes based on federal statutes were not expressly arbitrable under the parties' contract); *see also COBA*, 35 OCB 28 (BCB 1985) (denying an arbitration request to the extent it asserted a violation of military law). These cases are distinguishable from the instant matter because the Union here is not alleging a violation of the FLSA or any other federal law, but rather the Union is claiming a violation of the Memos. *See MLC*, 4 OCB2d 51 (BCB 2011) (finding arbitrable the issue of whether, in seeking to comply with the federal statute, the employer had properly interpreted the collective bargaining agreement regarding substance abuse and mental health coverage mandated by the Parity Act); *PBA*, 21 OCB 8 (BCB 1978) (misapplication of Patrol Guide is arbitrable under contractual definition of grievance even if consideration of conflict between agency's Patrol Guide and Public Officers Law is necessary).

Accordingly, we hold that the DCAS and DOHMH Memos arguably support the claim for arbitration here; any further determination as to the nature and scope of rights, if any, would be matters to be dealt with by an arbitrator. We therefore deny the City'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 City of New York and its Department of Health and Mental Hygiene, docketed as BCB-4401-20, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Doctors Council, Local 10MD, S.E.I.U., docketed as A-15753-20, hereby is granted.

Dated: February 2, 2021
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