MEBA, 15 OCB2d 5 (BCB 2022)

(Arb.) (Docket No. BCB-4443-21) (A-15820-21)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that DOT's practice of retaining employees in temporary "step up" positions for longer than three months violated the parties' collective bargaining agreement. The City argued that there was no nexus between the agreement's cited provisions and the duration of "step up" placements. The Board found that the Union did not establish the requisite nexus. Accordingly, the City's petition challenging arbitrability was granted, and the Union's request for arbitration was dismissed. ***(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-

MARINE ENGINEERS BENEVOLENT ASSOCIATION, AFL-CIO,

Respondent.

DECISION AND ORDER

On June 2, 2021, the Marine Engineers Benevolent Association ("MEBA" or "Union") filed a request for arbitration alleging that the City of New York ("City") and the Department of Transportation ("DOT") violated the Ferryboat Titles (Licensed) collective bargaining agreement ("Agreement") by retaining employees in temporary "step up" positions for longer than three months. On August 3, 2021, the City filed a petition challenging the arbitrability of the grievance. The City argues that the duration of time an employee remains in a step up position is not specified

in the Agreement and does not constitute a grievable issue. It claims that the Union has failed to establish a nexus between the grievance and any provisions of the Agreement. The City further argues that the Union initiated the grievance at Step III without either moving through the underlying grievance steps or substantiating that the claim qualifies as a group grievance. The Union contends that a nexus exists between its grievance and Article I, Union Recognition and Unit Designation, and Article III, Dues Check-Off, of the Agreement. The Board finds that the Union did not establish the requisite nexus. Accordingly, the petition challenging arbitrability is granted, and the request for arbitration is dismissed.

BACKGROUND

The City and the Union are parties to an Agreement covering employees in the Civil Service titles of Captain, Assistant Captain, Mate, Marine Engineer, Chief Marine Engineer, Chief Marine Engineer (DC), Marine Engineer (DC), and Mate (DC) (collectively "Licensed Officers"). The Agreement runs from November 7, 2008, to November 6, 2010, and remains in effect pursuant to the *status quo* provision of New York City Collective Bargaining Law ("NYCCBL"), § 12-311(d).

Article I of the Agreement is titled Union Recognition and Unit Designation. Article I, § 1 recognizes the Union as the exclusive collective bargaining representatives of all Licensed Officers in a series of listed titles. Article I, § 2 defines "Licensed Officers" as ferryboat personnel whose duties require them to hold a license. Article I, § 3 reads as follows: "For purposes of this Agreement, per annum shall mean per annum paid employees, both permanent and provisional. Temporary means hiring-hall employees. Step up employees are per annum employees of the Ferry or DC operating service assigned to work in a higher title." (Pet., Ex. 1) Article VII of the

Agreement, entitled "STEP UP OR TEMPORARY REPLACEMENT HOURLY, DAILY HOLIDAY & OVERTIME RATES OF PAY" provides for various wage rates applicable to step up employees.

Step up positions are intended to be temporary. The City describes the use of step ups as a process "wherein DOT temporarily steps up an employee to a higher civil service title, so that employee can gain the requisite experience to be promoted to that title, so that employee can gain the requisite experience to attain pilotage, and so that DOT can fill appropriate vacancies on its ferryboats." (Pet. ¶ 26) The Union agrees that step up positions are temporary, and avers they should be limited to three months, but that they "are routinely long-term, *de facto* permanent and/or quasi-permanent." (Ans. ¶ 26) It is undisputed that DOT often assigns employees to step up positions for longer than three months, and sometimes longer than two years. It is the duration of the step up assignments that is the crux of the parties' disagreement.

Article XVI, § 1(a) of the Agreement defines the term "grievance" as "[a] dispute concerning the application or interpretation of the terms of this Agreement." (Pet., Ex. 1) Article XVI, § 1(b) defines the term "grievance" as "[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] shall not be subject to the grievance procedure or arbitration." (*Id*.) Article XVI, § 5 of the Agreement provides for group grievances "concerning a large number of employees which concerns the claimed misinterpretation, inequitable application or failure to comply with the provisions of the Agreement." (*Id.*) Group grievances may be filed at Step III of the grievance procedure.

On May 10, 2021, the Union filed a grievance at Step III with the City's Office of Labor Relations ("OLR") on behalf of its unit members. The grievance claimed that the DOT was violating the terms of the Agreement by employing step up employees in its bargaining unit titles for more than three months. The Union received no response to its Step III grievance from OLR through June 2, 2021, at which point it filed a request for arbitration at the Office of Collective Bargaining.[1] The request for arbitration described the nature of the grievance as follows:

> The New York City Department of Transportation has been employing, and continues to employ, step up employees as ferry boat Captains, Assistant Captains, Mates, Chief Marine Engineers and Marine Engineers who have served in such capacity for more than three months, in violation of Article I, §§ 1, 2 and 3 and Article III, §§ 1 and 2 of the CBA and Civil Service Law § 64,[2] which is incorporated into the CBA as an implied term under New York law.

(Pet., Ex. 2)

Article III of the Agreement is titled Dues Check-Off and gives the Union the exclusive right to the checkoff and transmittal of dues on behalf of each employee covered by the Agreement.[3] (Pet., Ex. 1) MEBA members working at the Ferry pay 1.5% of their base wages as

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[1] OLR issued a Step III Reply on September 7, 2021, in which it deemed the matter to be the subject of arbitration and closed its review of the grievance.

[2] Civil Service Law ("CSL") § 64 provides that "A temporary appointment may be made for a period not exceeding three months when the need for such service is important and urgent."

[3] Agreement Article III – Dues Check-Off provides:

> Section l.
> a. The Union shall have the exclusive right to the checkoff and transmittal of dues on behalf of each employee in accordance with the Mayor's Executive Order No. 98, dated May 15, 1969 entitled "Regulations Relating to Checkoff of Union Dues" and in accordance with the Mayor's Executive Order No. 107, dated December 29, 1 986 entitled "Procedures for Orderly Payroll Checkoff of Union Dues and Agency Shop Fees."

dues, which are collected by the City and passed along to MEBA pursuant to Article III of the Agreement. Step up employees are paid at the level of their stepped up position but pay dues to the union that represents them in their underlying title, and have dues deducted based on the salary of that underlying title. The underlying titles are members of the MEBA bargaining unit, with the exception of Deckhands, who are in a bargaining unit represented by the Atlantic Maritime Group ("AMG"). As a result, dues collected for Deckhands stepped up into MEBA titles are remitted to AMG. For Licensed Officers under the Agreement that are stepped up into higher titles, dues are collected and remitted to MEBA based on the lower salary of the underlying title. The Union maintains that irrespective of union membership, MEBA enforces the Agreement for all employees stepped up into MEBA's Licensed Officer titles, including Deckhands stepped up into titles covered by the Agreement.

On June 4, 2021, two days after the Union submitted its request for arbitration, the Chief Review officer at OLR sent the Union a Request for Information that stated the following:

> This will acknowledge receipt, on May 10, 2021, of your request for a Step III review of the above-entitled matter. As the information submitted is insufficient to review the claim, it is necessary to request that you submit the following materials to this office within fifteen (15) business days of receipt of this notice:

> b. Any employee may consent in writing to the authorization of the deduction from his or her wages and to the designation of the Union as the recipient thereof. Such consent, if given, shall be in a proper form acceptable to the Employer, which bears the signature of the employee.
>
> Section 2.
> The parties agree to an agency shop to the extent permitted by applicable law, the provisions of which are contained in a supplemental agreement hereby incorporated by reference into this Agreement.

> * Statement of the specific allegation concerning the grievance, such as dates, names, events, duties assigned, etc. with explanation of how it represents a violation, misinterpretation or misapplication of contractual provision.
>
> * Names and titles of all grievants[.]
>
> Submit the specified materials to Akime Brown by email: abrown@olr.nyc.gov or by fax: (212) 306-7223. Please note that, if the information is not received as requested, OLR will not be able to review the claim and the file will be closed.

(Ans., Ex. A)

Union counsel responded that the Union had already filed a request for arbitration with OCB, initiating the instant case, and did not provide further information to OLR. (Pet., Ex. 3) On September 7, 2021, OLR issued a Step III Reply to the Union closing the OLR's case on the matter and deeming it a subject of arbitration.[4]

POSITIONS OF THE PARTIES

City's Position

First, the City argues that the instant grievance must be dismissed because there is no nexus between the act complained of, i.e., retaining employees in stepped up positions for longer than three months, and the provisions of the Agreement cited by the Union in its request for arbitration. The City argues that Article I lists the titles that MEBA represents and defines the term "step up" which is used elsewhere in the Agreement, and that Article III sets forth the Agreement's dues check-off provisions. The City notes that the definition of "step up" in Article I does not set forth

[4] On September 8, 2021, the Union emailed a copy of the Step III Reply to OCB to add to the record in this matter. The City responded to the email, denied that the letter constituted an admission that the request for arbitration was a proper subject of arbitration and objected to its admission into the record. The Union did not assert that the Step III Reply was an admission that the grievance was arbitrable. We overrule the City's objection and accept the Step III Reply letter into the record.

any limitation on the duration of such positions, Article III contains no reference to the remittance of dues for step up employees, and that there is no claim that the City is not abiding by the other provisions of the Agreement, which set forth the wages and benefits of step up employees. The City argues that there can be no violation of Article III based on the duration of a step up position because there is no explicit time limit set forth in that provision, or elsewhere in the Agreement. The City contends that the Union is effectively requesting that the Board treat the Agreement's Union Recognition clause as a grant of exclusive work jurisdiction, which Board precedent does not allow for. Inasmuch as the Union has not alleged that the City failed to recognize the Union's status as the representative of its bargaining unit titles nor failed to abide by its dues check-off obligations, the Union cannot establish a relationship between the grievance and the cited provisions of the Agreement.

Second, the City argues that that under Board precedent there is no right under the Agreement to grieve a violation of the CSL. Here, the Union's request for arbitration alleges that the City has violated New York State CSL § 64, and that claim is not arbitrable.

Third, the City claims that the Union failed to comply with the Agreement's grievance procedures because the grievance was improperly filed at Step III, and that the Union did not submit to OLR adequate proof that its claim qualified as a group grievance. The City argues that the Step III hearing office requires a list of at least three impacted employees for a grievance to be initiated at Step III, and that the Union has supplied no such list. As such, the City claims the Union's request for arbitration is procedurally deficient and must be dismissed.

Union's Position

The Union argues that the City violated Article I and Article III of the Agreement by stepping up employees into bargaining unit titles for longer than three months and that as a result, the Union lost significant dues income and its right to exclusive representation has been breached.

Article I of the Agreement recognizes the Union as the "exclusive bargaining representatives of … all persons employed" in the Licensed Officer titles. (Pet., Ex. 1) The Union asserts that Article I "recognizes the existence of a 'step up' category or assignment or worker." (Ans. ¶7) The Union argues that although the duration of a "step up" is not specified in the Agreement's definition of a "step up," there is no dispute that these assignments are temporary in nature. The Union points to the City's petition, which admits that step ups are used to "temporarily [step] up an employee into a higher civil service title." (Pet., ¶ 26) It also cites legal authority supporting its position that use of step ups is a "limited right" and that the Agreement does not allow for the utilization of step ups for more than a limited or temporary basis.[5] (Ans. ¶ 11)

The Union argues that although the duration of a step up is not explicitly stated in the Agreement, the parties understand that term to mean it is a temporary appointment. The Union notes that "[u]nder New York law, a covenant of good faith and fair dealing is implied in all contracts" and that the Agreement is violated where, as here, the City has acted in a manner that, although not expressly forbidden by any contractual provision, deprives them of their contractual

[5] In support of this argument, the Union cites to CSL § 64, which limits temporary assignments to three months, and legal authority regarding principals of contract interpretation which provide that "relevant statutes and regulations are incorporated into each contract as implied terms" and "a contract should not be construed in a manner that would render their terms illegal." (Ans. ¶ 9) Thus the Union argues that "arbitrators may base their awards upon reasonable implied terms, as well as express terms, of a collective bargaining agreement, including the obligation to carry out the Agreement's terms." (Ans. ¶ 8)

benefits. (Ans. ¶ 8) The Union claims that the City's utilization of step ups beyond temporary appointments violates its right under Article I to the exclusive representation of titles covered by the Agreement.[6] The Union further argues that fundamental principles of contract interpretation dictate that the duration of temporary step up appointments provided for in the Agreement must be reasonable. It is for the arbitrator to interpret the Agreement to determine whether the City's use of temporary step ups is reasonable.

The Union further argues that the lengthy step up appointments also undermine the Union's ability to collect dues pursuant to Article III of the Agreement beyond what the parties contemplated in providing for step up appointments. Stepped up employees pay dues to the union that represents their underlying title and have dues deducted based on the lower salary of that title. Thus, the Union asserts, for those who hold Licensed Officer titles and are stepped up, it receives lower dues payments than it does from members who permanently hold the higher titles and do that same work. Similarly, the Union loses the benefit of dues collection from those employees who are represented by another union, are stepped up to Licensed Officer positions and continue to pay dues to the other union. It calculates that the amount of dues lost exceeds $20,000 per year. (Ans. ¶ 66)

In response to the City's argument that the Union is seeking to arbitrate a violation of the Civil Service Law, the Union states that its claim asserts only violations of the Agreement, and that its citation to CSL § 64 is in support of its interpretation of the Agreement. Specifically, it argues that pursuant to CSL § 64, temporary appointments are limited to a maximum duration of

[6] The Union enforces the Agreement for all employees, including Deckhands stepped up into MEBA titles. As stepped up Deckhands remain members of AMG, the Union asserts that appointments that are not reasonably considered temporary violate its right to the exclusive representation of titles covered by the Agreement.

three months, and thus the City's step up appointments in excess of three months are unlawful. Further, to the extent the Agreement is open to two constructions, one lawful and another unlawful, an arbitrator should interpret the Agreement to give it the lawful construction.

The Union claims that arbitration of the grievance should not be denied on procedural grounds. It argues that designation of the grievance as a group grievance and filing it at Step III was appropriate because it is bringing the grievance on its own behalf and on behalf of the membership as a whole, rather than specific individuals. The Union notes that impairing the Union's ability to collect the full amount of dues goes beyond harming any particular member but denies the Union and its entire membership of the benefit of those resources. The Union further argues that OLR waived any right to insist on more information regarding the grievance, such as a list of impacted employees, by failing to make such a request within the fifteen-day contractual deadline for issuing a decision regarding a grievance.

DISCUSSION

In considering the City's challenge to arbitrability based on the Union's filing at Step III of the grievance process or progressing the grievance to Step IV, it is well-settled that questions of procedural arbitrability are reserved for the arbitrator. *See OSA*, 7 OCB2d 22 at 6 (BCB 2014) (procedural objections to arbitrability are not subject to the Board's review); *CSBA & IBT*, 67 OCB 43, at 6 (BCB 2001) (matters of procedural arbitrability must be determined by an arbitrator). Therefore, the City's claims that the Union improperly filed its grievance at Step III, or improperly proceeded from Step III to Step IV arbitration, are not subject to Board review.

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "to make a final determination as to whether a dispute is a proper subject for the grievance and arbitration procedure

established pursuant to [§] 12-312 of this chapter." 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 matter 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 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.

SBA, 3 OCB2d 54, at 7 (BCB 2010) (citations and internal quotation marks omitted); *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). Rather, our determination is limited to whether there exists a "relationship between the act [or omission] complained of and the source of the alleged right" to

warrant arbitration. *CEA*, 3 OCB2d 3, at 13 (BCB 2010); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371, AFSCME, AFL-CIO*, 17 OCB 1, at 11 (BCB 1976).

In the instant case, there is no dispute that the Agreement provides for arbitration procedures. Article XVI, § 1(a) defines the term "grievance" as "[a] dispute concerning the application or interpretation of the terms of this Agreement," and Article XVI, § 5 provides for group grievances "concerning a large number of employees which concerns the claimed misinterpretation, inequitable application or failure to comply with the provisions of the Agreement." (Pet., Ex. 1) Thus, the Board's inquiry turns to whether the Union has shown a reasonable relationship between the act complained of and the source of the alleged right.

Here, the relevant inquiry is whether the claim that the City is keeping employees in step up assignments for more than three months has a nexus to Articles I and III of the Agreement. For the following reasons, we do not find a reasonable relationship between the act complained of and the Agreement, and we therefore find the grievance is not arbitrable.

The Union's grievance concerns employees who are assigned to positions outside their civil service title. These are referred to as step up assignments and were addressed by the parties in their Agreement, which acknowledges that steps ups occur and that these employees are considered *per annum.* The Agreement also sets certain terms and conditions that apply while bargaining unit members serve in the step up positions. The Union's claim is that step up assignments that exceed three months deprive it of certain enforceable rights under Articles I and III. However, the Union concedes that the Agreement does not expressly limit the of step up assignments to three months or any specific duration. Thus, on its face the Agreement does not establish a source of right, and therefore, we do not find that the Union has shown that its claim has a nexus to any provision of the Agreement. *See, e.g., UFOA*, 15 OCB 2. In reaching this

conclusion, we acknowledge that in certain instances, courts have found arbitrable claims that allege a party's conduct, while not expressly forbidden by the agreement, deprives the other party of rights under the contract. *See Miller v. Great Lakes Med. Imaging, LLC*, 527 F. Supp. 3d 492, 500 (W.D.N.Y. 2021) (quoting *Williamson Acquisition, Inc. v. PNC Equity Mgmt. Corp.*, Nos. 03–CV–6666T, 04–CV–6259T, 2010 WL 276199, at *7 (W.D.N.Y. Jan. 15, 2010), *affd. sub nom, Argilus, LLC v. PNC Fin. Servs. Grp., Inc.*, 419 Fed. Appx. 115 (2d Cir. 2011).[7] Nevertheless, here the demand for arbitration is to enforce a specific three-month duration of these assignments, and the Union has not shown any provision in the Agreement to support such claim. *See SBA*, 3 OCB 2d 54 at 7 (BCB 2010) (no nexus found where no reasonable relationship has been demonstrated between the asserted claim and a provision of the contract). Accordingly, we find no nexus and find the claim is not arbitrable. Therefore, we grant the City's petition challenging arbitrability and dismiss the grievance.

[7] *See A&A Maint. Enter., Inc. v. Ramnarain*, 982 F.3d 864, 869 (2d Cir. 2020) (adopting the same concept when confirming an arbitration award under a collective bargaining agreement finding improper use of temporary employees); *see also Forman v. Guardian Life Ins. Co. of Am.*, 76 A.D.3d 886, 888 (2010); *Skillgames LLC v. Brody*, 1 A.D.3d 247, 252 (1st Dept. 2003) (citing *Jaffe v. Paramount Communs*., 222 A.D.2d 17, 21 (1st Dept. 1996)).

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 Department of Transportation, docketed as BCB-4443-21 is hereby granted; and it is further

ORDERED, that the request for arbitration filed by the Marine Engineers' Beneficial Association, docketed as A-15820-21, is hereby dismissed.

Dated: February 9, 2022
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