IUOE, L. 211, 15 OCB2d 22 (BCB 2022)

(Arb.) (Docket No. BCB-4477-22) (A-15881-22)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that DOB violated the parties' collective bargaining agreement by failing to increase the grievants' salaries after they were assigned to the Emergency Response Team night shift, consistent with past practice. The City argued that there is no nexus between the grievance and the agreement's cited provisions because they provide no right to a salary increase. It also argued that past practices are not arbitrable because the agreement's definition of a grievance does not include claimed violations of a past practice. The Board found that the Union did not establish the requisite nexus and that the parties' agreement does not allow for the arbitration of past practices. 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
NEW YORK CITY DEPARTMENT OF BUILDINGS,

Petitioners,

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 211,
on behalf of NICHOLAS DEL PONTE, et al.,

Respondent.

DECISION AND ORDER

On January 21, 2022, the International Union of Operating Engineers, Local 211 ("Union") filed a request for arbitration on behalf of Nicholas Del Ponte and other similarly situated employees ("Grievants") alleging that the City of New York ("City") and New York City Department of Buildings ("DOB") violated the parties' collective bargaining agreement

("Agreement") by failing to increase Grievants' salaries after they were assigned to the Emergency Response Team ("ERT") night shift, consistent with past practice. On March 1, 2022, the City filed a petition challenging the arbitrability of the grievance. The City argues that that there is no nexus between the grievance and the Agreement's cited provisions because they provide no right to a salary increase. It also argues that past practices are not arbitrable because the Agreement's definition of a grievance does not include claimed violations of a past practice. The Board finds that the Union did not establish the requisite nexus and that the Agreement does not allow for the arbitration of past practices. Accordingly, the City's petition challenging arbitrability is granted, and the Union's request for arbitration is dismissed.

BACKGROUND

Grievants are employed by DOB as Inspectors (Construction) Level II assigned to the ERT night shift, and the Union represents employees in this title.[1] The ERT is DOB's primary emergency response unit and handles high priority and after-hours construction, plumbing, and stability incidents Citywide. The Union and the City are parties to the Building and Construction Inspectors Agreement, which 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").[2] Article VI of the Agreement sets forth the applicable grievance procedure. Article VI, § 1 defines a "grievance" as:

> a. A dispute concerning the application and interpretation of the terms of this Agreement;

[1] Grievants transferred to the ERT in 2016 or 2017 and were subsequently assigned to the night shift.

[2] Provisions of the Agreement cited here are taken from the parties' last published complete collective bargaining agreement, which expired in 2009 and has been modified by a memorandum of agreement for the term of May 10, 2017 through April 2, 2021.

> 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; . . . .

(Pet., Ex. 1)

Article V, § 1 of the Agreement, "Performance Levels," provides that:

> The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise performance standards or norms notwithstanding the existence of prior performance levels, norms or standards. Such standards, developed by usual work measurement procedures, may be used to determine acceptable performance levels, to prepare work schedules and to measure the performance of each employee or group of employees. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of performance standards or norms hereunder.
>
> Employees who work at less than acceptable levels or performance may be subject to disciplinary measures in accordance with applicable law.

(*Id.*)

Article V, § 3 of the Agreement, "Performance Compensation," provides that:

> The Union acknowledges the Employer's right to pay additional compensation for outstanding performance.
>
> The Employer agrees to notify the Union of its intent to pay such additional compensation.

(*Id.*)

On March 2, 2021, the Union filed a group grievance at Step III with the City's Office of Labor Relations ("OLR") alleging that DOB violated Article V, §§ 1 and 3 of the Agreement and past practice by failing to increase Grievants' salaries after they were assigned to the ERT night shift. At the Step III hearing, the Union asserted that historically, Inspectors assigned to the ERT

night shift receive an 8% increase in salary. The Union alleged that despite this precedent, Grievants received no salary increase after they were assigned to the night shift. Moreover, the Union asserted that Article V, § 3 of the Agreement provides DOB the "ability" to pay the requested salary increase. (Pet., Ex. 4)

On January 18, 2022, an OLR review officer denied the Union's grievance. In the denial, the review officer found that there was no nexus between the grievance and Article V, §§ 1 and 3 of the Agreement, "which grants [DOB] the right, but not the duty, to pay additional compensation." (Pet., Ex. 4) Further, the denial explained that general allegations of violations of a past practice "fail to meet the definition of grievance" under the Agreement and that the grievance was untimely. (*Id.*)

Subsequently, on January 21, 2022, the Union filed a request for arbitration alleging that Grievants were "deni[ed] [a] salary increase upon joining the Emergency Response Night Shift" in violation of Article V, § 1 of the Agreement and the parties' past practice.[3] (Pet., Ex. 2) As a remedy, it sought "back pay from date of joining [the ERT night shift] and adjustment of current pay." (*Id.*)

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 matter of the grievance and the cited provisions of the Agreement. Specifically, the City asserts that Article V, § 1 of the Agreement is irrelevant to the Union's claim because the right to establish or change performance levels is

[3] The request for arbitration did not allege a violation of Article V, § 3 of the Agreement, and the Union did not advance an argument regarding Article V, § 3 in its answer.

completely unrelated to salary increases. Moreover, it contends that Article V, § 3 of the Agreement merely acknowledges the employer's right to pay additional compensation for outstanding performance, which "cannot reasonably be argued to infer a right of the employees to receive a salary increase." (Pet. ¶ 27)

The City also argues that arbitration cannot be compelled on the basis of alleged violations of a past practice unless such claims are within the scope of the definition of the term "grievance" in the contract. In this case, the City avers that the Agreement's definition of a grievance does not include claimed violations of a past practice, and the parties have not otherwise agreed to arbitrate such claims. Accordingly, the City contends that the Union's request for arbitration must be dismissed and that its petition challenging arbitration should be granted.

Union's Position

The Union argues that the petition challenging arbitrability should be denied. It concedes that "[c]learly, a review of [the Agreement] . . . finds no specific provision requiring [the City] to grant a[] [salary] increase to Grievants." (Ans. ¶ 3) However, it asserts that there is an arbitrable past practice of DOB granting a salary increase to all Inspectors assigned to the ERT night shift. The Union contends that this past practice would be an "obligation of the Grievants to prove after a hearing before an arbitrator." (*Id.* at ¶ 5) Indeed, it avers that it is the role of the arbitrator to "decide whether there is a reasonable relationship between the dispute and the general subject matter of the CBA." (*Id.* at ¶ 8) In support of its position, the Union cites state court precedent which it asserts holds that arbitrators and courts act within their authority when relying on past practices to interpret the provisions of collective bargaining agreements.

The Union also argues that a "unilateral change of a past practice involving payment" is a mandatory subject of bargaining, which "must be arbitrable" because it affects Grievants' terms and conditions of employment. (Ans. ¶ 6) Accordingly, it 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).[4] 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 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

[4] 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.

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).

In this case, it is undisputed that the parties have agreed to submit certain disputes to arbitration. Article VI, § 1 of the Agreement contains a grievance procedure that provides for final and binding arbitration, and the City does not argue the existence of any court-enunciated public policy, statutory, or constitutional restrictions on that obligation. *See OSA*, 13 OCB2d 16, at 12 (BCB 2020) (citing *SSEU, L. 371*, 9 OCB2d 10, at 9 (BCB 2015)). Therefore, the first prong of the arbitrability test has been established.

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 OCB2d 22, at 9 (BCB 2014) (quoting *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990)) (internal editing marks omitted).

Here, the Union concedes that the Agreement does not contain a specific provision requiring a salary increase for the ERT night shift assignment. Moreover, the Union does not otherwise argue that there is a reasonable relationship between any other section of the Agreement and DOB's failure to increase Grievants' salaries after they were assigned to the ERT night shift. Indeed, the only provision cited by the Union in its request for arbitration, Article V, § 1,

recognizes DOB's right to "establish and/or revise performance standards or norms[,]" but bears no relationship to DOB's failure to provide the salary increase.[5]

Instead, the sole basis for the Union's claim is that there is an arbitrable past practice of DOB providing the requested salary increase. However, the Board has consistently held that "past practices are not arbitrable where they are not included in the definition of a grievance." *Int'l Org. of Masters, Mates & Pilots*, 9 OCB2d 20, at 17 (BCB 2016) (citing *SBA*, 3 OCB2d 54, at 9-18 (BCB 2010); *Local 333, UMA*, 43 OCB 35, at 13-14 (BCB 1989)); *see also DC 37, L. 2507*, 6 OCB2d 9, at 15 (BCB 2013); *SBA*, 79 OCB 15, at 7-8 (BCB 2007).[6] In this case, the Agreement's definition of a grievance in Article VI, § 1 makes no mention of alleged violations of a past practice. Indeed, the Union does not argue that alleged violations of a past practice are within the scope of the Agreement's definition of a grievance in Article VI, § 1. The Union asserts only that arbitrators have the authority to rely on past practices to interpret the provisions of collective bargaining agreements. However, this assertion ignores the Board's well-established precedent that it will not compel arbitration on the basis of an alleged violation of a past practice unless it is within the scope of the contract's definition of a grievance. *See District No. 1, MEBA/NMU*, 49 OCB 24, at 16-17 (BCB 1992) (recognizing that although a party may seek to offer evidence of a past practice at arbitration to "clarify the parties' intent" as to the meaning of arbitrable contract provisions, an alleged violation of a past practice cannot serve as an independent basis for arbitration unless it is within the scope of the definition of a grievance); *Int'l Org. of Masters,*

[5] Because the request for arbitration did not allege a violation of Article V, § 3 and the Union did not advance an argument regarding Article V, § 3 in its answer, we do not address that claim.

[6] We note that the Board does consider the discontinuation of alleged past practices in improper practice proceedings alleging a unilateral change to a mandatory subject of bargaining. *See SSEU*, 14 OCB2d 2d 20, at 11-12 (noting that a party may establish a violation of the duty to bargain over a mandatory subject by showing a departure from a past practice) (citing *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2008)).

Mates & Pilots, 9 OCB2d 20, at 17 (citations omitted); *cf. CIR*, 61 OCB 39, at 8 (BCB 1998) (permitting arbitration of an alleged violation of a past practice where the agreement's definition of a grievance broadly included claimed violations of "existing" as opposed to merely "written" policy). The caselaw cited by the Union does not support the proposition that an alleged violation of a past practice can serve as an independent basis for arbitration in this case. Instead, it merely acknowledges that arbitrators can rely on past practices to interpret arbitrable contract provisions, which is not at issue here. *See, e.g.*, *Professional Firefighters Assn. of Nassau County v. Village of Garden City*, 119 A.D.3d 803 (2d Dept. 2014); *Rochester City School Dist. v. Rochester Teachers Assn.*, 41 N.Y.2d 578 (1977).[7]

Accordingly, we find that no nexus exists between the Agreement and the alleged violation of a past practice regarding a salary increase for Inspectors assigned to the ERT night shift. Therefore, the City's petition challenging arbitrability is granted, and the Union's request for arbitration is denied.

[7] Additionally, the Union appears to rely upon *Matter of Detectives' Endowment Assn. v. City*, Index No. 100946/2012 (Sup. Ct. N.Y. Co. May 17, 2013) (Wright, J.), for the proposition that the alleged past practice in this matter should be arbitrable. However, we note that the Supreme Court's decision was overturned on appeal in *Matter of Detectives' Endowment Assn. v. City*, 125 A.D.3d 475 (1st Dept. 2015). In reversing the Supreme Court's determination, the Appellate Division found that the Board's underlying decision granting the City's petition challenging arbitrability was rational because the Union's past practice claim was not "'relevant to the parties' contractual rights and responsibilities,' in the absence of [a] contractual provision requiring the continuation of past practices . . . ." *Id.* at 475-76.

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 New York City Department of Buildings, docketed as BCB-4477-22, is hereby granted; and it is further

ORDERED, that the request for arbitration filed by the International Union of Operating Engineers, Local 211, docketed as A-15881-22, is hereby dismissed.

Dated: August 3, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER