SSEU, Local 371, 17 OCB2d 10 (BCB 2024)

(Arb.) (Docket No. BCB-4545-24) (A-16029-24)

Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the Department of Social Services violated the Citywide Agreement by refusing to allow employees in Union-represented titles to utilize compensatory time they earned during summer hours prior to 2023. The City argued that the Union failed to establish the requisite nexus between the subject of the grievance and the Agreement. The Board found that a nexus existed as to the Union's claims. Accordingly, the Board denied 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 NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

-and-

SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371, DISTRICT COUNCIL 37, AFSCME,

Respondent.

DECISION AND ORDER

On January 4, 2024, the City of New York ("City") and the Department of Social Services ("DSS") filed a petition challenging the arbitrability of a grievance brought by Social Services Employees Union, Local 371, District Council 37, AFSCME ("Union"). The Union's grievance alleges that the DSS violated Article VI § 8 of the Citywide Agreement ("Agreement") by refusing to allow employees in Union-represented titles to utilize compensatory time they earned during summer hours prior to 2023. The City argues that the Union has failed to establish the requisite

nexus between the subject of the grievance and the Agreement. The Board finds that a nexus exists as to the Union's claims. Accordingly, the Board denies the City's petition challenging arbitrability.

BACKGROUND

The Union is the certified bargaining representative for the Social Services bargaining unit, including certain DSS employees who are covered by the summer hours compensatory time ("Summer Hours") program. The City and Union are parties to the Agreement, dated July 1, 2001, to December 21, 2021, 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"). Article XV, § 1 of the Agreement defines the term "Grievance" as "a dispute concerning the application or interpretation of the terms of this Agreement."

The Summer Hours program provides that certain employees working in non-air-conditioned locations have the right to leave work one hour early on all days between July 1 and Labor Day. The program contemplates that, at times, staffing coverage needs will prevent employees from leaving early. In those instances, the program provides that employees will receive compensatory leave time equivalent to the extra time they were required to stay at work. Employees can accumulate and use a maximum of 3 days or 21 hours' worth of summer hour compensatory leave time ("Heat Comp Time").

A New York City Office of Labor Relations ("OLR") Memorandum, dated June 30, 2011, describes the Summer Hours program as follows:

> The summer hour procedure provides for employees in certain titles who work in non-air conditioned locations/areas to be released one hour prior to the end of their normally scheduled work-day. However, if staff coverage needs do not permit early release of an employee, the employee is to continue working until his/her regular

> departure time and credited with compensatory time for the "summer" hour. Employees who are entitled to receive compensatory time in lieu of shortened work[-]days shall receive a maximum of twenty-one (21) hours, or the hourly equivalent of three (3) such days. In no event will an employee be paid for more than the value of three (3) work[-]days of summer hours.

(Union Ex. B)

Article V § 18 of the Agreement sets forth the procedure for shortened work hours during summer months for certain employees as follows:

> a. Shortened workday schedules or heat days in lieu thereof for employees who have traditionally enjoyed shortened workday schedules or heat days in lieu thereof shall begin on July 1 and terminate on Labor Day. Employees who are entitled to receive heat days in lieu of shortened workdays shall receive three (3) such days.

Article VI of the Agreement sets forth time and leave procedures. Article VI § 8, at issue here, states:

> a. Employees who are otherwise entitled to receive heat days pursuant to Article V, [§] 18 of this Agreement shall receive compensatory time for said heat days. The number of hours credited for each heat day shall be equal to one-fifth (1/5) the number of hours in the respective employee's work week.
>
> b. Employees who are otherwise entitled to a shortened workday schedule pursuant to Article V, [§] 18 of this Agreement shall be credited with five (5) hours of compensatory time, in lieu of any shortened workday schedule, for each week actually worked while shortened schedules are in effect.

The Union claims that in July 2023, bargaining unit members employed at the Department of Homeless Services[1] and covered by the Summer Hours program were informed that Heat Comp Time earned prior to 2023 could no longer be used and was forfeited.

On October 30, 2023, the Union filed a Step I Grievance regarding the announced forfeiture

[1] The Department of Homeless Services is an administrative unit of DSS.

of accrued Heat Comp Time with DSS. No decision was issued for the Step I Grievance. On November 27, 2023, the Union filed a Step II Grievance with the DSS. No decision was issued for the Step II Grievance. On December 18, 2023, the Union filed a Step III Grievance request with OLR. No Step III Conference was scheduled, and no decisions were issued for the Step III grievance. The Union filed the instant request for arbitration on January 4, 2024, which described the nature of the grievance as follows:

> Violation of Article VI, § 8 of the [Agreement] by refusing to allow employees in Union-represented titles to utilize compensatory time hours earned by them for summer hours during the year 2022 and prior years.

The remedy sought was an "Award directing the Agency to allow said employees to utilize said accrued compensatory time hours, and all other appropriate relief." (Pet., Ex. 2)

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has failed to establish a nexus between the prohibition of employees from utilizing Heat Comp Time earned prior to 2023 and Article VI § 8 of the Agreement, which outlines how Heat Comp Time is earned. The City argues that the language cited merely outlines the rate at which Heat Comp Time is earned and does not address any procedure for how it is to be used once accrued. Thus, there is no nexus between the contractual provision and the Union's complaints regarding restrictions on how that Heat Comp Time is used. Alternatively stated, the City contends that there is no nexus between the act complained of and the source of the alleged right.

Union's Position

The Union argues that there is a direct nexus between its grievance challenging the July 2023 announcement that Heat Comp Time accrued prior to 2023 would be forfeited and unavailable for use and Article VI § 8, the contractual provision providing for the accrual of Heat Comp Time. It asserts that the forfeiture of contractual benefits creates a clear nexus with the provision providing for those benefits. The Union further notes that there is no contractual language providing for the forfeiture or loss of Heat Comp Time once earned and thus argues that the unilateral elimination of unused Heat Comp Time violates the Agreement.

DISCUSSION

It is the well-established policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures); *OSA*, 77 OCB 19, at 10 (BCB 2006).[2] In recognition of this policy, the Board has long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *COBA*, 8 OCB2d 30, at 7 (BCB 2015) (citations and quotation marks omitted); *see also CWA, L. 1182*, 77 OCB 31, at 7 (BCB 2006). Under NYCCBL § 12-309(a)(3), the Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." The Board,

[2] NYCCBL § 12-302 provides that:

> 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.

however, "cannot create a duty to arbitrate where none exists." *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *UFA, L. 94*, 23 OCB 10, at 6 (BCB 1979)); *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

To determine whether a dispute is arbitrable, the Board applies the following two-pronged test:

> (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.

COBA, 8 OCB2d 30, at 8; *see also UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011).

Here, it is undisputed that the parties agreed to resolve certain disputes through a grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute or the constitution. Therefore, the first prong of the test is satisfied.

With respect to the second prong, the burden is on the Union to establish a nexus between the Agreement and the grievance asserted. Establishing such a nexus "requires that the party demonstrate a 'relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *CCA*, 4 OCB2d 49, at 9 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 13); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). Such a 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) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . [as] where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator

to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

We find that a nexus exists between Article VI § 8 and the Union's claim that DSS denied bargaining unit members the ability to use accrued Heat Comp Time earned prior to 2023 pursuant to that provision. Article VI § 8 provides that employees shall receive Heat Comp Time in lieu of leaving work early under the Summer Hours program, and the Union claims that a refusal to allow employees to use that Heat Comp Time is a violation of that requirement. The Agreement clearly provides for accrual of Heat Comp Time under certain circumstances. The Agreement does not provide procedures for utilizing that time, but it also does not provide for the forfeiture of it. Thus, the Union's claim is that the City's action has deprived bargaining unit members of a contractual benefit. This question of whether the City's announcement that accrued unused Heat Comp Time was forfeited has denied or undermined a contractual benefit is an issue appropriate for arbitration. *See UFA, Local 94*, 15 OCB2d 33, at 13-14 (BCB 2022) (not allowing members on leave without pay to use accrued annual leave found arbitrable); *see also SSEU, L. 371*, 3 OCB2d 53, at 9-10 (BCB 2010) (denial of accrued annual leave following an employee's termination found to be arbitrable); *OSA*, 7 OCB2d 22, at 10 (BCB 2014) (denial of requested use of sick leave is arbitrable); *Local 237, CEU*, 69 OCB 6 (BCB 2002) (finding arbitrable a grievance challenging an employer policy foreclosing payment above the minimum salary in a negotiated salary range).

The Union has established a nexus between Article VI § 8 of the Agreement and its claims. Accordingly, we deny the City's petition challenging arbitrability as to these claims, and grant the 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, the petition challenging arbitrability filed by the City of New York and its Department of Social Services, docketed as No. BCB-4545-24, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Social Services Employees Union, Local 371, District Council 37, AFSCME, docketed as A-16029-24, hereby is granted.

Dated: May 9, 2024
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA SILVERBLATT
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER