SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Roberts

- v -

NYC Office of Collective Bargaining

INDEX NO. 103458/10

MOTION DATE

MOTION SEQ. NO. 001 and 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion to dismiss are granted, the petition is denied and this Article 78 proceeding is dismissed in accordance with the accompanying memorandum decision.

OFF. OF COLLECTIVE BARGAINING RECEIVED 2011 NOV 17 P 2:12

Dated: NOV 14 2011

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

FG-motion
VG
SD

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

LILLIAN ROBERTS, as Executive Director of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, FAYE MOORE, as President of Social Services Employees Union, Local 371, of District Council 37, AFSCME, AFL-CIO and FITZ REID, as President of Local 768 of District Council 37, AFSCME, AFL-CIO,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

Index No. 103458/10
Motion Seq. No. 001

NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, BOARD OF COLLECTIVE BARGAINING, Marlene A. Gold, as Chairperson, and THE NEW YORK CITY HOUSING AUTHORITY, John B. Rhea, as Chairman, THE CITY OF NEW YORK, Michael R. Bloomberg, as Mayor, THE MAYOR'S OFFICE OF LABOR RELATIONS, James Hanley, as Commissioner, and the NEW YORK CITY DEPARTMENT OF YOUTH AND COMMUNITY DEVELOPMENT, Jeanne B. Mullgrav, as Commissioner,

Respondents.

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SCHLESINGER, J.:

Petitioner District Council 37 and its named affiliates (the Union) are the certified bargaining representatives for well over 100,000 workers in the City of New York, approximately 450 of which were employed at the time in question by respondent New York City Housing Authority (NYCHA) in various community centers located in NYCHA housing developments throughout the City. The employees performed various duties in the titles of Community Assistant, Community Associate, Community Service Aide, and Community Coordinator.

On January 2, 2009, after much discussion between the parties, the Union received a notice which indicated that, effective February 20, 2009, NYCHA intended to lay off approximately 240 Union members working at the centers. Rather than provide funding to allow NYCHA to continue to operate the centers with the existing Union employees, the City decided to fund its own Department of Youth and Community Development (DYCD) to operate the centers using private contract employees.

The Union promptly filed a Request for Arbitration and grievance alleging that respondents NYCHA and the City of New York had violated Section 11 of the 1995 Municipal Coalition Memorandum of Economic Agreement (MCMEA) between the Union and the City, which had been incorporated by reference in the Union's agreement with NYCHA. NYCHA and the City each filed a petition to challenge arbitrability before the Board of Collective Bargaining (the Board). The Board granted both petitions and denied the Union's request for arbitration by Order dated February 10, 2010, with one dissent. The Union timely commenced this Article 78 proceeding challenging the Board's decision and seeking an order directing the parties to proceed to arbitration. NYCHA has opposed, and the City and the Board have cross-moved to dismiss.[1]

The Decision and Order of the Board of Collective Bargaining

In a highly detailed nineteen-page decision, followed by a two-page partial dissent, the Board set out the relevant facts and the competing arguments of the

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[1] At the joint request of the parties, this matter was held in abeyance pending the determination of *Roberts v Bloomberg.* In that case, Justice Walter Tolub dismissed the Union's Article 78 proceeding, finding that the Union's request to arbitrate the layoffs included a waiver of the right to commence a judicial proceeding based on purported violations of certain sections of the City Charter and the New York State Constitution. The Appellate Division affirmed [83 AD3d 457 (1st Dep't 2011)], and the Court of Appeals denied leave to appeal (17 NY3d 706).

various parties, most of which were repeated in this proceeding. Of particular significance is the fact that NYCHA is a public benefit corporation, which is a separate legal entity from the City and not a mayoral agency. NYCHA and the Union are parties to a Memorandum of Agreement, dated March 30, 2001. Pursuant to ¶2, the Agreement incorporates by reference Section 11 of the 1995 Municipal Coalition Memorandum of Economic Agreement (MCMEA) between the Union, the City, the NYC Board of Education and the New York City Health and Hospitals Corporation; NYCHA is not a party to the 1995 MCMEA. The relevant Section 11 of the MCMEA provides as follows:

> **Privatization/Contracting-Out/Contracting-In**
>
> a. the parties have recognized appropriate processes and procedures involving privatization, contracting-out and contracting-in. During the period of this1995 MCMEA when the job security provisions are in effect, no employee will be involuntarily displaced by the above. Once the Job Security provision has expired, it is not the City's intention to utilize privatization as a means to involuntarily displace employees. In the event such circumstances do arise the Unions and the City reserve their rights.

Section 11 also contains subsections b-e, which set up a detailed procedure whereby the Union must be notified in advance of any proposed privatization/contracting-in/contracting-out and given an opportunity to discuss alternatives that may avoid the layoff of any Union members.[2]

NYCHA has community centers located throughout its housing developments that provide activities and programs for children and seniors. At the time of the instant

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[2] The 1995 MCMEA was apparently superceded by the 2008 version, which contains a provision similar to Section 11 quoted above.

dispute, some of the centers were funded and staffed by NYCHA employees and others were funded and staffed by other agencies or private organizations. The Union represents only those employees who worked in the centers funded and staffed by NYCHA.

As early as the fall of 2008, NYCHA alerted the Union that it was planning to close 19 community centers and lay off the member employees due to a reduction in federal funding. Discussions began and continued until January 2, 2009 when NYCHA informed the Union that it intended to cease operating the community centers. Shortly thereafter, on January 13, 2009, a joint press conference was held by NYCHA, the City, and DYCD (a mayoral agency) where it was announced that the 19 community centers would remain open. However, DYCD would operate the centers in place of NYCHA with funding from the New York City Council, and the centers would be staffed by employees of private contractors in place of the Union employees.

The Union promptly filed a Request for Arbitration, dated January 29, 2009, listing NYCHA, DYCD and the City as the employer. In the Request, the Union indicated that it was relying on both the Agreement between NYCHA and the Union and the MCMEA between the Union and the City, both of which were discussed above. The grievance was stated as follows:

> Whether [NYCHA], [DYCD], and the [City] violated the terms of Section 11 of the MCMEA regarding the letting of contracts to community-based organizations to provide community services presently performed by DC 37 [Union] represented City employees, in that:
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> 1) the City has caused DC 37 represented employees of NYCHA to be involuntarily displaced, or will be displaced, as

a result of contracting-out services to community centers previously provided by the affected employees ...[3]

In addition, in February 2009 the Union commenced an Article 78 proceeding against the City, DYCD and NYCHA alleging that the City's actions violated certain sections of the City Charter and the New York State Constitution. (See n. 1, *supra*). That same month, NYCHA ceased operating the community centers and laid off at least 200 Union employees. Beacon Community Centers, a private organization, began providing services at the centers with $12.25 in funding from the City's DYCD.

In its Petition to the Board challenging the Union's Request for Arbitration, the City primarily asserted that it was not a proper party because NYCHA, and not the City, was the employer. The City further claimed that the Union members employed by NYCHA had no rights under the 2008 MCMEA because NYCHA was not a party to that agreement. In any event, the City argued, there was "no nexus" between the MCMEA and NYCHA's decision to lay off the community center employees because the City was "was not privatizing or contacting out any work that affects [Union] employees," but was instead "expanding existing contracts to fill a void in services that occurred as a result of NYCHA's closing of its community centers."

NYCHA in its Petition primarily claimed that the Union's Request for Arbitration was not covered by the Agreement between the parties because NYCHA had not contracted out any work, but had only laid off employees due to economic necessity. Further, NYCHA claimed it was not obligated to arbitrate matters involving the City and

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[3] In subsections 2, 3 and 4, the Union also claimed that the City had failed to comply with the various procedures in Section 11 regarding notice and an opportunity to be heard as to alternatives that might avoid layoffs.

DYCD who were not parties to the Agreement between NYCHA and the Union and who had no employment relationship with the subject employees. Lastly, NYCHA asserted that since the cited Section 11 pertaining to privatization/contracting-out/contracting-in did not apply to layoffs based on economic necessity, "no nexus" existed between the allegedly violated contractual provision and the offending layoffs.

In response, the Union insisted that a clear nexus existed between the contract and the layoffs based on the allegation that "NYCHA, with assistance from the City of New York and the [DYCD], contracted out bargaining unit work without meeting its obligations under Section 11 of the 1995 MCMEA." As evidence, the Union pointed to the City's funding of the community centers through its agency DYCD, rather than through NYCHA, and its decision to contract out the services previously provided by Union members. And while acknowledging that the affected employees were employed by NYCHA, the Union asserted that issues of fact existed "regarding control the City and DYCD had over requiring NYCHA to contract out/privatize these community centers," as demonstrated by the joint news conference held by the City, DYCD and NYCHA announcing that the centers would remain open with City funding.

The Union also firmly disputed NYCHA's characterization of the dispute as being limited to layoffs for economic reasons, emphasizing that the effect of the decision was to allow a private organization to perform the work previously performed by Union members using funding that the City had chosen to provide to DYCD instead of NYCHA. In addition, while recognizing that the City and NYCHA are separate legal entities, the Union asserted that both were covered by Section 11 of the MCMEA, as NYCHA had incorporated that section by reference into its own Agreement with the

Union. Lastly, the Union urged that any issue should be decided in favor of arbitrability based on the strong public policy favoring the resolution of disputes by arbitration.[4]

The Board began its own analysis by recognizing the public policy favoring arbitration and then turned to its two-prong test used to determine "whether there is a nexus ... between the subject matter of the dispute and the general subject matter of the [collective bargaining agreement]." (Decision p 13, citing *OSA*, 1 OCB2d 42, at 16 (BCB 2008). The two-prong test was described as follows:

> (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.

Addressing the first prong, the Board held that NYCHA clearly had a contractual relationship with the Union providing for arbitration of disputes, but the City did not. The Board rejected the Union's argument that the City should be included in any arbitration based on its involvement in the events related to the layoffs and its contractual relationship with the Union based on the MCMEA, finding that "the City has no collective bargaining agreement with the union covering the employees formerly employed in NYCHA's community centers." Although the MCMEA did apply to certain Union members such as those employed by the Department of Education, it did not apply to those members employed by NYCHA, as that entity was not a signatory to the MCMEA. The Board therefore concluded that the Union had established the first prong

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[4] The parties also disputed whether the Union had completed a valid waiver of its right to commence a judicial proceeding relating to the issues raised, which is a precondition of a Request for Arbitration, an issue that need not be determined here.

of the test as to NYCHA only, and it dismissed the Request for Arbitration as against the City.

But while NYCHA did have a duty to arbitrate, the Board found that the duty did not include the grievance at issue: "we find that the Union's agreement with NYCHA does not encompass the particular controversy presented here, and thus fails to satisfy the second prong of our arbitrability test." The Board rejected the Union's claim that arbitration was mandated based on the purported violation of Section 11 concerning privatization/contracting-out/contracting-in:

> given that NYCHA terminated the affected employees after its decision to cease operating the community centers and has never resumed operating the centers or hired employees to perform similar functions, we are unable to find any relation between the contractual provision cited by the Union and the factual circumstances of this case. NYCHA's decision to allow the City to operate community centers on NYCHA property does not permit, let alone require, a finding that NYCHA is the operator of the centers. Absent anything more, we are unable to find any issue arising under the applicable agreement between NYCHA and the Union.

The Board therefore denied the Union's Request for Arbitration in its entirety. The Board also noted that, in light of the decision in *Roberts v Bloomberg* (n 1, *supra*), it was leaving open the question whether the alleged statutory and constitutional claims raised there were arbitrable. Interestingly, one of the seven members dissented in part and concurred in part. Pointing to public policy, the dissent urged a finding of arbitrability regarding the NYCHA layoffs, and he concurred that the Board should leave open the issue of the arbitrability of the Union's statutory and constitutional claims in light of the decision in *Roberts.*

Discussion

In this proceeding, the Union argues that the Board's determination was arbitrary and capricious and contrary to well-established law and public policy favoring the arbitration of disputes. In analyzing that claim, this Court must defer to the Board's expertise in interpreting the provisions of the New York City Collective Bargaining Law, absent clear error. *See, Matter of NYC Dept. of Sanitation v MacDonald*, 87 NY2d 650 (1996); *District Council 37 v City of New York*, 22 AD3d 279, 284 (1st Dep't 1996). Based on the limited arguments presented to the Board and the specific facts presented for consideration, this Court declines to find that the Board's determination was arbitrary and capricious or contrary to law.

All parties agree that the two-prong test applied by the Board was the proper test to apply in this case. The Union argues instead that the Board erred in its determination as to each prong applied. Regarding the first prong, the Union asserts that the Board erred in determining that the City had no collective bargaining agreement with the Union regarding the NYCHA employees and therefore had no duty to arbitrate the issues raised in connection with the layoffs.

The Union has failed to persuade the Court that the Board's determination on this point was erroneous. The Union first argues that the City is a proper party to any arbitration as it has control over NYCHA and its decision making because the Mayor appoints all NYCHA board members and can discharge them at will. As further evidence, the Union notes that NYCHA is subject to the City's April 7, 2009 Manual regarding layoff procedures and guidelines to be followed. Most vigorously, though, the Union argues that the City's control is demonstrated by the fact that it was the City that decided to provide funds to DYCD to allow that mayoral agency to hire private contract

employees to staff the community centers after NYCHA lost its federal funding, when the City could have chosen instead to provide those funds to NYCHA so that NYCHA could continue to operate the centers with the Union members on staff.

Citing *Rizzo v NYS Div. of Housing & Comm. Ren.*, 6 NY3d 104, 110 (2005), the Board maintains in response that this Court may not consider the Union's arguments regarding the City's "control" over NYCHA, as the precise arguments were not raised before the Board. Nevertheless, the Board does acknowledge in its Memorandum of Law to this Court (at p 23) that the Union did argue that "there are issues of fact regarding control the City and DYCD had over requiring NYCHA to contract out/privatize these community services."

To the extent the Union did offer specific facts and arguments on this point, this Court agrees with the Board that the evidence was insufficient to establish control. NYCHA is an agency independent of the City of New York, and its members presumably act with independence and integrity, despite the Mayor's power to discharge them. *See Torres v New York City Hous. Auth.*, 261 AD2d 273, 275 (1st Dep't 1999)(NYCHA is a "distinct municipal entity not united in interest with [the] City"). Nor does NYCHA's duty to comply with certain City procedures regarding layoffs establish control. This relationship, without more, does not obliterate the separate identities of NYCHA and the City.

On the record presented here, it was NYCHA that determined that it was compelled to close the centers and layoff Union members due to the withdrawal of federal funding. The City presumably could have decided to provide City funds to maintain the status quo, rather than decide to fund its own agency DYCD to take over the centers with private contract employees. Even assuming that is true, that reality

does not establish "control" so as to trigger a duty on the part of the City to arbitrate, when the City had no collective bargaining agreement with the NYCHA members. The collective bargaining agreement requiring the arbitration of disputes between NYCHA and the Union members named NYCHA only, and not the City. The incorporation by reference of Section 11 from the City contract did not make the City a party to the separate agreement between NYCHA and the Union. As the Board properly argues, a non-party to an agreement cannot be compelled to arbitrate a dispute, even where the establishment of the contractual employer's liability may give rise to derivative liability against the non-party. *See Wonder Works Construction Corp. v R.C. Dolner, Inc.*, 73 AD3d 511 (1st Dep't 2010)(subcontractor not entitled to arbitrate dispute when its contract provided no such right, even though it was bound by results of arbitration included in the separate contract between the general contractor and the owner).[5]

Regarding the second prong of the Board's test, the Union contends that the Board erred in finding that NYCHA — a clear party to the collective bargaining agreement — had no duty to arbitrate the particular controversy. According to the Union, this decision departed from the legion of cases and public policy favoring the arbitration of disputes when the parties' contract includes a broad arbitration clause.

In addition, the Union urges that the Board engaged in improper and inaccurate fact-finding when it stated in its decision as follows: "However, given that NYCHA terminated the affected employees after its decision to cease operating the community

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[5] The Court declines to address the Union's separate but related argument that the City is a proper party as it was a "joint employer' with NYCHA. The phrase "joint employer" is a term of art that the Board did not directly address in its decision, thereby depriving this Court of the ability to address it here in any detail. *See, Rizzo, supra.*

centers and has never resumed operating the centers or hired employees to perform similar functions, we are unable to find any relation between the contractual provision cited by the Union and the factual circumstances of this case." According to the Union, the facts demonstrate that the centers were never closed. Rather, the City decided to keep them open using funding it provided to DYCD and so as to allow DYCD to operate the centers in place of NYCHA using private contract employees in place of Union employees. That decision was announced at a joint press conference held by NYCHA, the City and DYCD.

In response, the Board emphasizes that this case does not fall within the confines of the "privatization/contracting-out" provision of the contract because NYCHA did not decide to continue service at the centers with private contractors. Nor did NYCHA hire substitutes for the Union employees or provide funding for such hires. Instead, it was the City that made those decisions, while NYCHA merely decided to lay off the Union members employed at the centers due to the loss of federal funding. Citing to various Board decisions, the Board reiterates that layoffs for economic reasons fall outside the scope of mandatory bargaining, and urges that the public policy favoring arbitration is not enough to counter that well-established principle and bring this dispute within the scope of the contract.

The question is a close one, particularly in light of the strong public policy favoring arbitration and as evidenced by the fact that one Board member dissented. However, as the Board repeatedly emphasized at oral argument, the Union presented limited arguments that failed to persuade based on the limited set of facts presented. What is more, the Board did not engage in improper fact-finding, as the inferences drawn from the evidence were not unreasonable.

Further, the determination was limited to the record before it, as the Board indicated when it stated: "NYCHA's decision to allow the City to operate community centers on NYCHA property does not permit, let alone, require, a finding that NYCHA is the operator of the centers. *Absent anything more*, we are unable to find any issue arising under the applicable agreement between NYCHA and the Union" (emphasis added). Also emphasizing the limits of its findings, the Board indicated in its decision, and confirmed at oral argument, that the decision in *Roberts v Bloomberg* suggested that the Union might well bring another claim before the Board alleging statutory and constitutional violations, and the Board was taking no position on those issues.

Nor is this decision intended to paint any broad strokes. On the contrary, the narrow issue presented is whether the Board's decision was arbitrary and capricious based on the record before it. While finding that petitioner has failed to establish that the Board's decision is arbitrary, this Court takes no position on other related matters that may now be pending, or that may be filed in the future by the Union, related to the issues related to the layoff of members previously employed at the NYCHA centers.

Accordingly, it is hereby

ORDERED that the motions to dismiss by the various City respondents and by the Board of Collective Bargaining are granted; and it is further

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements to any party.

November 14, 2011

NOV 14 2011

J.S.C.

ALICE SCHLESINGER