SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 3,

Plaintiff,

- v -

BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK, SUSAN J PANEPENTO, CITY OF NEW YORK

Defendant.

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INDEX NO. 159308/2022

MOTION DATE 05/04/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 15, 16, 20, 21, 22, 23, 24, 25, 28

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 26, 27

were read on this motion to/for DISMISS.

BACKGROUND

This Article 78 petition was filed by the New York City District Council of Carpenters ("DCC") and the International Brotherhood of Electrical Workers, Local 3 ("IBEW") (collectively "Petitioners") seeking to annul a decision and order of the New York City Board of Collective Bargaining ("Board") which dismissed the Petitioners' consolidated requests for arbitration and granted the City of New York's ("City") consolidated petitions challenging arbitrability, regarding two grievances filed by Petitioners alleging that the City's incentive payments for vaccination against COVID-19 were issued selectively in violation of the parties' various collective bargaining agreements requiring uniform compensation for bargaining unit members.

Respondents have moved to dismiss the petition, alleging that it fails to state a cause of action. For the reasons stated below, the motions are granted, and the petition is dismissed.

ALLEGED FACTS

On August 31, 2021, the Mayor issued Executive Order No. 78, mandating that by September 13, 2021, City employees be vaccinated against COVID-19 or submit to weekly testing. On October 20, 2021, the Mayor and the City's Commissioner of Health and Mental Hygiene issued separate orders stating that City employees no longer had the option of weekly testing and were instead required to be fully vaccinated. Employees were required to receive their first vaccine dose by October 29, 2021. The Mayor simultaneously announced that employees who were not yet vaccinated would receive a $500 incentive payment for receiving the first vaccine dose by October 29, 2021. City employees who received their first vaccine dose prior to October 20, 2021, or after October 29, 2021, received no such payments.

City employees in titles represented by the DCC and the IBEW were subject to the vaccine mandate, and some were eligible for the $500 incentive payments. Beginning in November 2021, Petitioners' bargaining unit members who produced proof of vaccination obtained between October 20 and 29 started receiving the $500 payment in their paychecks. The payment was reflected in the employees' paychecks as "gross pay" and "total earnings," subject to standard payroll tax withholdings and deductions.

On February 16, 2022, the DCC and the IBEW filed separate group grievances with the City's Office of Labor Relations ("OLR") alleging that Mayoral agencies and related City entities selectively paid the $500 vaccine incentive to some bargaining unit members, but not others. The grievances were brought on behalf of members who received a first vaccine dose prior to October 20, 2021, or after October 29, 2021. and were not paid the $500 bonus.

On March 9, 2022, an OLR review officer denied the Unions' grievances in separate decisions. Generally, the review officer found that there was nothing presented in the Unions' various agreements, memoranda of agreement ("MOAs"), or consent determinations that precluded the City, "during a global pandemic, from providing a $500 incentive payment to some employees who received a vaccination during a limited time frame." (NYSCEF Doc. No. 3, at 10). The review officer found that the cited documents are "silent on the issue" and contain no provision relevant to the incentive payments. (*Id.*) Moreover, the review officer explained that to the extent the Unions argued that the payments violated unspecified "rules, regulations, policies, and orders of the City," such a broad allegation, without identification of the specific policies violated, precluded review. (*Id.* at 11).

On March 29, 2022, the Unions filed separate requests for arbitration of their grievances, which were subsequently consolidated, alleging that the City selectively and arbitrarily issued incentive payments for vaccination against COVID-19 in violation of the parties' collective bargaining agreements requiring uniform and equitable compensation for bargaining unit members. On April 20, 2022, the City filed separate petitions challenging the arbitrability of the grievances, which were also subsequently consolidated. On September 28, 2022, the Board issued the Decision in this matter, NYDCC, 15 OCB2d 31 (BCB 2022). (See NYSCEF Doc. No. 2). In the Decision, the Board dismissed the Unions' requests for arbitration and granted the City's petitions challenging arbitrability, finding that the Unions failed to establish a reasonable relationship between the City's issuance of vaccine incentive payments and the parties' agreements.

DISCUSSION

The New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") was enacted by the New York City Council in the exercise of a local option set forth in § 212 of the Taylor Law, the state legislation which grants public employees the right to organize and to bargain collectively with their employer. Under NYCCBL § 12-309(a)(3), the Board has the "power and the duty . . . on the request of a public employer or a certified or designated employee organization which is party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance arbitration procedure established pursuant to section 12-312 of this chapter."

The Board lacks jurisdiction to enforce contractual rights, and thus, must not inquire into the underlying merits of the parties' dispute. *Doctors' Council, Local MD10*, 14 OCB2d at 8. The Board's role is confined to applying a two-pronged test to determine whether a dispute is arbitrable. The Board determines: (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. *Doctors ' Council, Local MD10*, 14 OCB2d at 8.

In an Article 78 proceeding, the court may only consider "whether [the] determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). It is well settled that a court may not overrule an agency's decision unless it is arbitrary under this standard. *See Arrocha v. Board of*

Educ., 93 N.Y.2d 361, 363 (1999); *see also Pell v. Bd. of Educ*., 34 N.Y.2d 222, 230 (1974); *District Council 37 v. City of New York*, 22 A.D.3d 279, 283 (1st Dep't 2005).

A decision is arbitrary or capricious if it is without sound basis in reason and in disregard of the facts. *See Century Operating Corp. v. Popolizio*, 60 N.Y.2d 483, 488 (1983); *Ador Realty, LLC v. Div. of Hous. and Cmty. Renewal*, 25 A.D.3d 128, 139-140 (2d Dep't 2005); Matter of *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009).

When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, courts presume that the agency has developed an expertise with regard to that statute and, accordingly, defer to the judgment of the agency. *See Matter of Chenango Forks Cent. Sch. Dist. v NYS Pub. Empl. Relations Bd*., 21 NY3d 255, 265 (2013); *Matter of Bd. of Educ. of City Sch. Dist. v NYS Pub. Empl. Relations Bd*., 75 NY2d 660, 666 (1990). Courts in New York have deferred to the expertise of the Board in applying and interpreting the provisions of the NYCCBL. *See, e.g., Matter of NYC Health + Hospitals v Organization of Staff Analysts*, 2019 Slip Op 30466(U) (Crane, J.), *affd*, 179 AD3d 573 (1st Dept 2020), *lv denied*, 35 NY3d 906, 909 (2020); *Matter of New York City Dept. of Sanitation v MacDonald*, 87 NY2d 650 (1996); *Matter of City of New York v Board of Collective Bargaining of the City of NY*, 107 AD3d 612 (1st Dept 2013).

Courts have afforded deference to the Board's decisions as to whether a specific dispute falls within the scope of agreements to arbitrate. *See Matter of New York City Dept. of Sanitation*, 87 NY2d at 655-56; *Matter of City of New York v Plumbers Local Union No. 1*, 204 AD2d 183, 184-85 (1st Dept 1994); *Matter of City of New York v Unif. Fire Off. Assn*., 95 NY2d 273, 284 (2000).

The Board properly applied the two-part test to determine whether a dispute is arbitrable and rationally concluded that Petitioners' grievances failed to establish the required nexus between the City's vaccine incentive payments and the parties' agreements. On appeal, Petitioners have not shown that the Board failed to use the applicable legal precedent or ignored or misconstrued any material facts in issuing its Decision. Therefore, the petition is properly dismissed. *See Pell v Board of Ed. of Union Free Sch. Dist*., 34 NY2d 222, 231 (1974); CPLR § 7804(f).

In considering whether Petitioners' grievances were arbitrable, the Board properly applied the two-part standard. The Board found that the first prong of the arbitrability test was successfully established because it was undisputed that the parties agreed to submit certain disputes to arbitration. With respect to the second prong of the arbitrability test, the Board noted that the incentive payments were "issued as compensation in employee paychecks." Although the Board has generally held that "disputes related to earned wages and the payment thereof are arbitrable," the Board explained in the Decision that "[t]he mere fact that the parties were required to and in fact did bargain regarding wages does not mandate, absent a claimed violation of the agreement reached in that bargaining process, that the bargained-for arbitration remedy applies to any claim the union subsequently chooses to bring concerning renumeration." (NYSCEF Doc. No. 2, at 15).

The Board noted that none of the various consent determinations, MOAs, and agreements cited by Petitioners contemplate incentive payments for employees who vaccinate. Moreover, Petitioners did not identify any wage rate, salary schedule, differential, adjustment, or other contractual benefit that the City failed to provide, nor did they allege that the payments violated any particular section or provision within the agreements. Instead, Petitioners argued that the

agreements require that compensation be "applied uniformly," with "uniform wages and benefits to be paid to each employee in a title." (See NYSCEF Doc. No. 7, at 27-28). However, the Board rationally found that the various agreements contain provisions applying compensation terms only in certain circumstances to certain employees within the same title, which it reasonably considered inconsistent with the theory that all employees within the same title are entitled to uniform compensation. The Board concluded that none of the specific contractual language offered by the Unions, such as the consent determinations' provision that the "basic rates of wages and supplemental benefits" are "due and payable to each and every employee," supported an entitlement to uniform compensation.

Petitioners failed to allege any specific provisions that were inequitably applied. To the extent Petitioners sought to arbitrate the alleged violation of additional unidentified City rules, regulations, written policies, and orders "governing uniform and equitable compensation of bargaining unit members," the Board explained that such claims, without citation to specific City rules, policies, and orders, were too vague to be considered. (See NYSCEF Doc. No. 2, at 17).

For these reasons, the Board reasonably held that Petitioners failed to establish a nexus between their grievances regarding the incentive payments and the parties' agreements. Therefore, it granted the City's petitions challenging arbitration and dismissed Petitioners' requests for arbitration. Since the Board acted within the scope of its statutory powers and rendered a decision that was rational, proper, and consistent with the facts and applicable law, the Court must defer to the Board's expertise in applying and interpreting the provisions of the NYCCBL and dismiss the Article 78 petition. *See MacDonald*, 87 NY2d at 655-56; *Matter of Roberts*, 33 Misc. 3d 1224(A). The Board reasonably concluded that although the parties' agreements contain wage provisions, nothing in those provisions referred to or provided for the

incentive payments at issue, nor did the Unions otherwise identify anything in those provisions that would entitle it to proceed to arbitration.

The court disagrees with Petitioners' argument that the Board impermissibly engaged in contract interpretation. Petitioners' argument that it is for the arbitrator to determine whether all employees within the same title are entitled to uniform compensation ignores the Board's statutory role to "make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure . . . ." See NYCCBL § 12-309(a)(3). Petitioners alleged that the agreements' various compensation provisions collectively contain a right to uniform compensation that was infringed upon when the City selectively issued the incentive payments, but they failed to provide evidence of this alleged right. They offered no contractual language in support in their requests for arbitration. Moreover, to the extent Petitioners cited general consent determination language regarding the "basic rates of wages and supplemental benefits" being "due and payable to each and every employee," applying to "[a]ny new employee who may be hired[,]" they failed to how such language supports an entitlement to uniform compensation. Accordingly, the Board reasonably concluded that there was no support for a right to uniform compensation and, therefore, properly declined to find a nexus between Petitioners' grievances and the parties' agreements.

CONCLUSION

WHEREFORE it is hereby:

ADJUDGED that the motion and cross-motion to dismiss the petition is granted and the petition is dismissed; and it is further

ORDERED that, within 20 days from entry of this order, Respondents shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.

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5/8/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**		**NON-FINAL DISPOSITION**			
	X	**GRANTED**	**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**		**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**		**FIDUCIARY APPOINTMENT**		**REFERENCE**	