

OSA, 11 OCB2d 16 (BCB 2018)
(Arb.) (Docket No. BCB-4267-18) (A-15451-18)

Summary of Decision: The City challenged the arbitrability of a grievance alleging that it violated the parties' collective bargaining agreement by failing to place Administrative Staff Analysts into the Union's bargaining unit. The City argued that the Union lacks standing to challenge the placement of managerial employees and that there is no nexus between the grievance and the cited contractual provisions as to employees hired as managers. The Board found that that the Union established the requisite nexus since the parties had negotiated a dispute resolution procedure regarding the placement of Administrative Staff Analysts not designated managerial or confidential by the Board of Certification. Accordingly, it denied the City's petition challenging arbitrability and granted the Union's request for arbitration. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS,

Respondent.

DECISION AND ORDER

On March 29, 2018, the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by the Organization of Staff Analysts ("Union"), alleging that the City violated the parties' collective bargaining agreement by failing to place Administrative Staff Analysts in managerial pay plan levels 2 and 3 into the Union's bargaining unit and welfare fund and by failing to apply dues or agency shop fee check off. The City argues that the Union

lacks standing to grieve on behalf of employees it has classified as managerial and that there is no nexus between the grievance and the cited contractual provisions as to employees hired as managers. The Board finds that the Union established the requisite nexus since the parties had negotiated a dispute resolution procedure regarding the placement of employees not designated managerial or confidential by the Board of Certification. Accordingly, it denies the City's petition challenging arbitrability and grants the Union's request for arbitration.

BACKGROUND

The Board of Certification has addressed the eligibility for collective bargaining and certified a bargaining representative for Administrative Staff Analysts in several decisions relevant here. In 1994, the Union filed a representation petition seeking to add employees in the title Administrative Staff Analyst (Title Code No. 10026) in managerial pay plan levels 1, 2, and 3 to its Staff Analyst bargaining unit.¹ The parties negotiated a settlement of that case in 2001. They agreed that the Union would represent Administrative Staff Analysts then placed in managerial pay plan level 1, who would be designated Administrative Staff Analysts (Non-Managerial) (Title Code No. 1002A), and that Administrative Staff Analysts in specified agencies or in certain positions would be designated managerial and/or confidential and, therefore, excluded from the bargaining unit. *See OSA*, 68 OCB 1, at 2-3 (BOC 2001). The Union agreed to withdraw its

¹The managerial pay plan provides a range of salaries at nine levels. Employees in the managerial pay plan are not necessarily ineligible for collective bargaining as "managerial" within the meaning of the Taylor Law. *See* NYCCBL § 12-305; NYCCBL §12-309(b)(4) (adopting the Taylor law definitions of managerial and confidential); *Local 621, SEIU*, 4 OCB2d 57, at 16 n. 16 (BOC 2011) (noting that inclusion in the managerial pay plan is not a factor considered by the Board of Certification in evaluating whether an employee is excluded from collective bargaining).

petition as to Administrative Staff Analysts in managerial pay plan levels 2 and 3 and not seek to represent these employees for three years.

Three years later, the Union filed a representation petition seeking to add Administrative Staff Analysts in managerial pay plan levels 2 and 3 to its bargaining unit. In 2010, the Board of Certification added Administrative Staff Analysts (Title Code No. 10026) then placed in managerial pay plan levels 2 and 3, with the exception of those employed in certain positions it designated managerial and/or confidential. *See OSA*, 3 OCB2d 33, at 2 (BOC 2010), *affd sub nom. Matter of City of New York v. Bd. of Certification of the City of NY*, 2011 NY Slip Op 32814(U) (Sup. Ct. New York Co. 2011).

In February 2013, the City changed the title code number of Union-represented Administrative Staff Analysts, formerly in managerial pay plan levels 2 and 3, from 10026 to 1002D and 1002E, respectively.² The City retained the title code number 10026 for Administrative Staff Analysts in managerial pay plan levels 1, 2, and 3 in positions that the Board of Certification designated managerial and/or confidential and for Administrative Staff Analysts in managerial pay plan levels 4 and above.³

On September 30, 2015, the parties signed the 2010-2017 OSA Staff Analyst Memorandum of Agreement (“MOA”) to continue the terms and conditions specified in the parties’ 2008-2010 Unit Agreement (“Agreement”) except as modified or amended. Section 3 of the MOA provides that Administrative Staff Analyst (Title Code Nos. 1002D and 1002E) and other newly certified titles shall be incorporated in the parties’ Agreement. Section 9 of the MOA

² Once represented by a union, employees are no longer included in the managerial pay plan.

³ In 2016, the Union filed a petition to represent Administrative Staff Analysts in managerial pay plan level 4. At the time of this decision, that case is still pending before the Board of Certification.

provides for implementation of a dispute resolution procedure regarding newly hired Administrative Staff Analysts, as set forth below:

- a) City and the Union agree that all employees hired, transferred or promoted in Administrative Staff Analyst, title codes 1002D and 1002E, and are placed into positions that were not found to be managerial and/or confidential in OCB decision *OSA*, 3 OCB2d 33 (B[OC] 2010) will be assigned the agency shop deduction code and plan. It is the intention of the parties that such enrollment will be automatic and proceed in the same manner as any other title represented by the Union. Following such enrollment, if the City deems any position to be managerial and/or confidential[,] it shall promptly advise the Union of the name, position and a job description. The Union shall promptly notify the City if it agrees or disagrees with the City's proposed managerial or confidential designation. If the Union disagrees with such designation, the employee shall remain enrolled in the agency shop and/or welfare fund until the Office of Collective Bargaining makes a determination as to the status of such employee, following a petition by the City for such a designation.

(City Ex. 1)

On January 10, 2018, the Union filed a "union grievance" pursuant to Article VI, §§ 1(a) and 7, of the Agreement.⁴ (City Ex. 1) The grievance alleges that the City violated Article I, § 1, and Article II of the Agreement and § 9 of the MOA by failing to place certain Administrative Staff Analysts in managerial pay plan levels 2 and 3 into its bargaining unit, failing to apply dues or agency shop fee check off, and failing to place the employees in its welfare fund.⁵ The Union

⁴ Article VI, § 1(a), of the Agreement defines a grievance as, among other things, "[a] dispute concerning the application or interpretation of the terms of this Agreement." (City Ex. 1) Article VI, § 7, provides, in relevant part, that "a grievance concerning a large number of employees and which concerns a claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement may be filed directly at STEP III of the grievance procedure." (*Id.*)

⁵ Article I, § 1, of the Agreement lists the bargaining unit titles for which "[the] Employer recognizes the Union as the sole and exclusive bargaining representative." (City Ex. 1) Article II provides that the Union shall have "the exclusive right to the check off and transmittal of dues" in § 1 and that "[t]he parties agree to an agency shop to the extent permitted by applicable law" in § 2. (*Id.*) Contributions to the Union's welfare fund is addressed in Article IV.

attached a list of employees for whom “no agreement has been reached to suggest that they are managerial or confidential” and who are not on agency fee/dues check-off and not in the welfare fund.” (*Id.*) The Union also asserted that the grievance covered additional employees to the extent that such employees were in the Administrative Staff Analyst title at managerial pay plan levels 2 and 3. As a remedy, the Union requested that all Administrative Staff Analysts in managerial pay plan levels 2 and 3 who have been “improperly excluded from the bargaining unit be found eligible for all the privileges of the collective bargaining agreement retroactive to their dates of appointment; that the City immediately commence agency fee/dues check-off; that the Welfare Fund be made whole in every way; and any other just and proper remedy.” (*Id.*)

On February 28, 2018, the Union filed a request for arbitration listing itself as the grievant and alleging a violation of Article I, §1, and Article II of the Agreement, § 9 of the MOA, and “any other applicable provisions, rules, or regulations.” (*Id.*) It attached a list of 20 employees “who may be covered by this grievance.”⁶ (*Id.*) The statement of the grievance was identical to what it previously submitted.

According to the City, fourteen of the employees listed in the request for arbitration are Administrative Staff Analysts who the City placed in title code number 10026 and managerial pay plan levels 2, 3, 4, or 5. Three employees on the list are not in the title Administrative Staff Analyst. Further, the remaining three employees listed in the request for arbitration are

⁶ According to the Union, the employees named in its request for arbitration were appointed off the 2016 lists of individuals who had passed the open-competitive and promotional examinations for the Administrative Staff Analyst title but were not placed into its bargaining unit.

Administrative Staff Analysts with title code numbers 1002D or 1002E and were or will be placed in the Union's bargaining unit.⁷

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's request for arbitration must be dismissed. First, it asserts that the Union has no standing to file a grievance on behalf of the 17 managerial employees who are not in its bargaining unit. According to the City, the Union cannot enforce the rights of employees whom it does not represent.

Second, the City claims that there is no nexus between the subject of the grievance and the contract provisions upon which the grievance is based. It frames the issue before the Board as the arbitrability of its alleged failure to place certain employees in Union-represented Administrative Staff Analyst positions. The City asserts that no provision in the Agreement grants the Union the right to challenge the City's classification of its employees through the grievance process.

The City contends that the Union failed to cite Article VI, which defines what types of disputes constitute a grievance, and that even if it did, the definitions contained there do not provide a basis for this grievance. As to 17 employees identified by the Union, the City asserts that there is no nexus between the grievance and Article II, which requires the City to deduct and remit dues for Union members. Similarly, Article IV, which relates to the welfare fund, is not applicable to

⁷The Union concedes that two of the listed Administrative Staff Analysts, who are enrolled in dues check-off and in the welfare fund, were identified in error. The City asserts that the third Administrative Staff Analyst is a recent hire who will be automatically enrolled in dues check-off and the welfare fund, but has not been in the title long enough for her enrollment to be reflected in the City's records.

these employees. The City asserts that there is clearly no duty to transmit union dues or agency shop fees or to contribute to the Union's welfare fund on behalf of non-bargaining unit employees.

Further, the City argues that § 9 of the MOA is not applicable to 17 named employees.⁸ It asserts that the plain language of the dispute resolution procedure is clearly limited to employees hired into the non-managerial title code numbers 1002D and 1002E, and the 17 employees were hired as managers into title code number 10026. Therefore, the City argues, the parties have not agreed to arbitrate the alleged controversy. Instead, the City contends, § 9 of the MOA only addresses the removal of an employee from Union representation after the employee has been placed in a represented title code number. Thus, the City claims that there is no nexus between the placement of employees into a managerial title code number and § 9 of the MOA. Moreover, the City asserts that there is no nexus with § 9 of the MOA since it has not invoked this provision to seek a managerial designation for these employees.

Union's Position

The Union requests that the City's petition challenging arbitrability be dismissed. Although § 9 of the MOA refers to title code numbers 1002D and 1002E, the Union contends that the parties understood that all Administrative Staff Analysts covered by *OSA*, 3 OCB2d 33, who were not designated managerial and/or confidential by the Board of Certification or by mutual agreement would be placed into title code numbers 1002D or 1002E. It claims that it was also understood that if the employer claimed that an Administrative Staff Analyst position was managerial and/or confidential, an employee would only be removed from the bargaining unit using the dispute resolution procedure set forth in § 9 of the MOA.

⁸ The City asserts that the Union's claims are moot with respect to the three employees in non-managerial title code numbers 1002D and 1002E because two of the employees are already enrolled in dues check-off and welfare fund contributions, and the City will enroll the third.

The Union asserts that its grievance meets the two-pronged test to determine arbitrability. First, the parties agreed in Article VI to arbitrate a claimed violation or misinterpretation of the Agreement. Second, it asserts that there is a reasonable relationship between its claim that the City has failed to place certain Administrative Staff Analysts in its bargaining unit and Article I, §1, Article II, § 2, and Article IV of the Agreement and §§ 3 and 9 of the MOA.⁹ The Union argues that the Agreement and the MOA require the City to place the identified individuals in the bargaining unit and follow agreed upon procedures if it desires them to be managers.

The Union argues that it has standing. It notes that this grievance is brought by and on behalf of OSA. The Administrative Staff Analysts added to its unit in *OSA*, 3 OCB2d 33, had the title code number 10026 at that time, and title code numbers 1002D and 1002E were created later to distinguish those found eligible for bargaining from all remaining ineligible and non-represented Administrative Staff Analysts. As a result, the Union asserts that title code number 10026, relied upon by the City, is a payroll code that should be applied only to Administrative Staff Analysts in positions that the Board of Certification has designated, or the parties have agreed, are managerial and/or confidential.

According to the Union, the City's argument that it can circumvent the requirement in § 9 of the MOA to get the Union's consent or a Board of Certification designation by unilaterally placing employees in title code number 10026 renders § 9 of the MOA meaningless. Section 9 expressly provides a mechanism for resolving disputes over the managerial or confidential status

⁹ Article IV of the Agreement, which addresses the Welfare Fund, and § 3 of the MOA, which incorporates newly certified titles into the Agreement, were not explicitly cited in the Union's request for arbitration. However, the Union notes that its request for arbitration referenced "any other applicable provisions," the inclusion of the employees in the bargaining unit, and the welfare fund. (City Ex. 1) In addition, Article IV of the Agreement and § 3 of the MOA were attached to its request for arbitration.

of new Administrative Staff Analysts. The Union contends that the City's argument would also nullify the rulings of the Board of Certification. Accordingly, the Union claims it is entitled to arbitrate the City's unilateral exclusion of Administrative Staff Analysts from its bargaining unit, irrespective of the title code number that the City unilaterally applied.¹⁰

DISCUSSION

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). As such, "the NYCCBL explicitly promotes and encourages the use of arbitration, and 'the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration.'" *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)).

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." However, it "cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties" in their collective bargaining agreements. *DC 37, L. 768*, 4 OCB2d 45, at 12 (BCB 2011). *See also CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L.371*, 69 OCB 34, at 4 (BCB 2002). The Board applies a two-pronged test to determine whether a grievance is arbitrable. This test considers:

- (1) whether the parties are obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so

¹⁰ To the extent that the City contends that there was a previous agreement between the parties or a Board of Certification managerial and/or confidential designation as to a particular Administrative Staff Analyst, the Union asserts that these are questions that can be decided by an arbitrator.

(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 (BCB 2012) (quoting UFOA, 4 OCB2d 5, at 9 (BCB 2011))

(citations and internal quotation marks omitted).

Here, it is undisputed that the parties agreed to resolve certain disputes, including the application or interpretation of the terms of the Agreement, through the Agreement's grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute or the constitution.¹¹ Accordingly, the first prong is satisfied.

“With respect to the second prong, the burden is on the Union to demonstrate a reasonable relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.” *OSA, 10 OCB2d 9, at 10 (BCB 2017)* (internal editing marks, quotations, and citations omitted); *see also Local 371, 17 OCB 1, at 11 (BCB 1976)*. The requisite 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)* (citation and internal editing mark omitted) (quoting *L. 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] [w]here 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

¹¹ We find that the Union has standing to enforce the terms of the Agreement and § 9 of the MOA. Contrary to the City's assertion, the grievance was not filed on behalf of managerial employees whom the Union does not represent. Rather, the grievance concerns employees that the Union asserts are properly placed in its bargaining unit.

internal editing marks omitted). *See also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

In addressing the second prong of our test, the Board must determine whether a nexus exists between § 9 of the MOA and the Union's claim that certain Administrative Staff Analysts should have been enrolled in agency fee deductions and its welfare fund prior to a determination of their managerial and/or confidential status. We find that such a nexus exists.

While the City may hire employees into whichever civil service title it chooses, the representational status of these employees is determined by the Board of Certification. *See* NYCCBL § 12-307(b)(4).¹² All Administrative Staff Analysts not in managerial pay plan level 4 or above are included in the Union's bargaining unit unless they serve in a position expressly designated managerial and/or confidential by the Board of Certification or by agreement of the parties.¹³ *See OSA*, 3 OCB2d 33; *OSA*, 68 OCB 1. As referenced in § 9 of the MOA, the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") provide a mechanism for employers to seek to exclude additional Administrative Staff Analysts from the unit. If the City hires an employee into a represented title but believes that the individual is working as a manager, the City can file petition for a managerial designation pursuant to OCB Rule § 1-02(v)(6).¹⁴ In this instance, the City has exercised its right to hire new employees

¹² NYCCBL § 12-307(b)(4) provides that the Board of Certification has the "power and duty ... to determine whether specified public employees are managerial or confidential within the meaning of subdivision seven of section two hundred one of the civil service law and thus are excluded from collective bargaining."

¹³ A managerial and/or confidential designation applies to successor employees "who perform substantially the same duties and functions as performed by their predecessors." *See DC 37*, 34 OCB 16, at 3 (BOC 1984).

¹⁴ OCB Rule § 1-02(v)(6) provides:

A determination by the Board [of Certification] made pursuant to

in the Administrative Staff Analyst title. By its grievance, the Union is not challenging that right, only the City's failure to place the new hires into its bargaining unit.

Here, there is a nexus between the issue the Union seeks to arbitrate and the parties' MOA. The parties agreed, as set forth in § 9 of the MOA, that certain Administrative Staff Analysts would be enrolled in agency fee deductions and the welfare fund pending resolution of any dispute regarding their managerial or confidential status. In addition, the MOA sets forth a process by which the parties would attempt to resolve disputes regarding the eligibility of such employees amongst themselves prior to the City's filing a managerial and/or confidential petition with the Board of Certification. To the extent that the grievance alleges that the City violated this provision by not enrolling employees that the Board of Certification found eligible for collective bargaining in agency fee deductions and the welfare fund, the Union's claim is reasonably related to the provision setting forth the dispute resolution procedure. *See, e.g., PBA*, 4 OCB2d 22. It is for the arbitrator to decide whether the City breached the MOA or the Agreement as to any particular employee.¹⁵

this subdivision regarding the managerial or confidential status of a title shall be final and binding and, subject to § 1-02(v)(2)(iii) of these rules, such determination shall preclude a petition to represent the title and employees or a petition to designate the title and employees managerial or confidential for a period of two years or until the period specified in § 1-02(v)(2)(i) above, whichever is later. A petition filed pursuant to this subdivision shall include a statement of facts demonstrating such a material change in circumstances subsequent to the Board's prior determination as to warrant reconsideration of the managerial or confidential status of the title or employee.

¹⁵ The arbitrator is empowered to enforce the Agreement and § 9 of the MOA, but not to make managerial/confidential determinations, which is within the exclusive jurisdiction of the Board of Certification. *See* NYCCBL §12-309(b)(4).

In reaching this conclusion, we note that the assigned title code number is not relevant to the Board of Certification's determination that employees in a particular title are eligible for collective bargaining. *See United Fed'n of Law Enforcement Officers*, 40 OCB 11, at 13-14 (BOC 1987) (finding that a mere change in title code number is "a ministerial change [that] does not affect the certification of a union as the collective bargaining representative of a group of employees"). Accordingly, the Union is the certified bargaining representative of Administrative Staff Analysts found eligible in *OSA*, 3 OCB2d 33, regardless of whether the City changes their title code number from 10026 to 1002D or 1002E. This paragraph is intended to underscore the role of title codes in a Board of Certification decision. It is for the arbitrator to determine the meaning of the parties' agreement, including references to title codes.

Accordingly, the request for arbitration is granted, and the petition challenging arbitrability is denied.

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, docketed as BCB-4267-18, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, docketed as A-15451-18, hereby is granted.

Dated: June 14, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER