STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

In the Matter Of:	Case No. 2022-A-0021
CITY OF NEW BRITAIN	DATE OF AWARD: November 15, 2022
And	HEARING DATE: August 15, 2022
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 4, AFL-CIO, LOCAL 1186	Hearing via ZOOM

APPEARANCES: Mary C. Pokorski, Attorney at Law (For the City)
Gary R. Brochu, Attorney at Law (For the Union)

I. ISSUE:

Is the matter arbitrable?

II. BACKGROUND:

The American Federation of State, County and Municipal Employees, Council 4, AFL-CIO, Local 1186 (hereinafter referred to as either "AFSCME" or the "Union") filed a grievance asserting that Aleksandra Knitowska and Iris Cedeno (hereinafter referred to as "Ms. Knitowska" and "Ms. Cedeno" and collectively as the "Grievants") were working in the higher classification of Accounting Assistant I. Both Grievants have been continuously employed as Administrative Assistants in the Police Department since the date of their employment. In its grievance, AFSCME claims that the City of New Britain

(hereinafter referred to as the "City") violated Article 11.1 (C) and any/all other articles of the Collective Bargaining Agreement (hereinafter referred to as the "CBA") by not paying the Grievants in the classification of Accounting Assistant I.

The grievance was denied during the prior steps of the grievance procedure. The City raised the issue of whether the matter was arbitrable. On August 15, 2022, an arbitration hearing was held via ZOOM. Exhibits were provided to the Panel in advance of the hearing which were admitted into evidence over the course of the hearing. The City called one witness who testified and was cross-examined. The Union did not call any witnesses. The City and the Union both filed post hearing briefs by the agreed upon due date of September 23, 2022. The Panel held an Executive Session on October 6, 2022.

The parties have complied with the grievance and arbitration provisions of the CBA. This grievance is properly before the Connecticut State Board of Mediation and Arbitration.

III. STATEMENT OF FACTS

Ms. Knitowska and Ms. Cedeno were both hired as Administrative Assistants in the Police Department in 2016. Ms. Knitowska began as a temporary employee and applied for a permanent position while Ms. Cedeno was hired as a permanent employee.

The City and the Union engaged in negotiations for a successor CBA in 2020. As part of those negotiations, the Union proposed that the Grievants each be reclassified from Administrative Assistant I to Accounting Assistant I. (City Ex. 1)

In support of its proposal, on December 9, 2020, David Polletta, Administrative Services Officer in the Police Department wrote a memorandum to Phil Pepin, President of the Union. Mr. Polletta indicated that he believed that the job description of Accounting Assistant I "more accurately reflects their current job duties and daily work." (Jt. Ex. 7).

The classification of Administrative Assistant I is Labor Grade 4 and the classification of Accounting Assistant I is Labor Grade 7. (Jt. Ex. 3)

On June 2, 2021, the City and the Union reached a tentative agreement on a successor agreement for the term July 1, 2020 to June 30, 2025. The agreement was ratified by the membership on June 18, 2021. The agreement did not contain a provision to reclassify the Grievants' positions from Administrative Assistant I to Accounting Assistant I. (City Ex. 2). The grievance was signed on June 16, 2021 and received in the Human Resources Department of the City on June 18, 2021. (Jt. Ex. 1).

IV. PERTINENT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE IV - SENIORITY

4.1 (C) A position may be filled on an acting basis for a period not to exceed six (6) months. This provision shall apply to any bargaining unit vacancy occurring after the signing of this Agreement. Any acting position beyond six (6) months must be agreed to by the City and the Union. Employees who are on their initial probation shall not be eligible to serve in an acting capacity until their initial probation has been completed unless no non-probationary employee is willing to accept the position.

ARTICLE XI – WAGES/LONGEVITY

11.1

(A) An employee temporarily required and assigned to work in a higher classification in an acting basis shall receive an adjusted rate while working in the higher classification in an acting basis. This adjusted rate shall be at least one full step (5% minimum) in the higher classification, provided that one exists.

(B) An employee who has been required and assigned to work in a higher classification in an acting basis outside the bargaining unit, after having served one year (12 months) in an acting basis in such higher classification, shall be advanced to the next step of the pay plan to which he/she has been temporarily assigned. In the event the employee continues to be assigned to such higher classification in an acting basis, step advances shall be made annually thereafter.

(C) An employee who has been required and assigned to work in a higher classification in an acting basis within the bargaining unit, after having served one year (12 months) in an acting basis in such higher classification, shall be advanced to the next step of the pay plan to which he/she has been temporarily assigned. In the event the employee continues to be assigned to such higher classification in an acting basis, step advances shall be made annually thereafter.

11.5 The Union may submit requests for upgrades and/or title changes to the Department Head who shall provide a recommendation to the Appointing Authority. Any upgrade and/or title change denied by

the Appointing Authority may be raised during negotiation of the successor collective bargaining agreement.

ARTICLE XIV – GRIEVANCE PROCEDURE AND ARBITRATION

14.0 A grievance shall mean a claim by an employee or class of employees or the Union that rights under a specific section of this Agreement has been violated, or that there has been a misinterpretation or misapplication of the specific provisions of this Agreement. As used in this Agreement, the term "Employee" shall mean either (1) an individual employee, or (2) a group of employees having the same grievance.

14.1 No grievance may be filed after fifteen (15) working days of the event giving rise to it.

14.4 Step IV. . . The arbitrator shall hear and decide only one grievance at a time and shall be bound by and must comply with all the terms of this Agreement. The arbitrator shall have no power to add to, delete from or modify in any way any of the provisions of this Agreement

V. DISCUSSION:

The City raises issues of both procedural and substantive arbitrability which will be discussed separately below.

Procedural arbitrability refers to whether the parties have complied with the terms of the arbitration procedure contained in the CBA. Arbitrators receive their jurisdiction from the CBA. Arbitrators are virtually unanimous in holding the procedural breaches totally defeat the right to arbitrate unless they are *de minimus* or there is some reason that the failure to comply with the language can be excused.

Substantive arbitrability on the other hand is generally a question where the Panel must determine if the parties agreed to make the arbitration process available under the terms of the grievance at issue. The inquiry is typically two-pronged in cases of substantive arbitrability: (1) has the subject matter of the dispute been specifically excluded from arbitration under the CBA; and (2) if not, is there other forceful evidence that the parties did not intend disputes over the subject matter to be arbitrated. The burden of proof is on the employer to prove the matter is not arbitrable.

As the Union correctly points out in its brief, there is a public policy favoring arbitration to settle disputes which has been articulated by Congress and the Supreme Court. The seminal case of ***Steelworkers* v. *Warrior & Gulf Navigation Co.***, 363 U.S. at 582 provides that arbitral review is appropriate, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes. Doubts should be resolved in favor of coverage".

The City argues that this matter does not constitute a grievance as defined in Sections 14.0 of the CBA. This argument is based on Grievants' claim that they have been performing the duties of the classification of Accounting Assistant I since their date of hire. The City argues that since no vacancy existed in the classification of Accounting Assistant I in the Police Department during the entirety of their employment, Section 4.1 (C) of the CBA was not violated. Therefore, the City argues, the grievance is not arbitrable.

The Union argues that Section 11.1 (C) of the CBA has been violated. The Union's brief is well written and the arguments well-articulated. It is true that question of whether the language of Section 11.1 (C) may or may not require there to be a vacancy in a classification in order for an employee to be appointed to such a classification is not one of arbitrability.

However, there are other factors that the Union cannot overcome in the City's claim of arbitrability argued in its comprehensive brief.

The Union submitted a request for an upgrade for the Grievants' classification which was denied by the Appointing Authority. The Union raised the upgrade of the Grievants' classification during the negotiation for the successor collective bargaining agreement as provided in Section 11.5 of the CBA. (City Ex. 1) The City and the Union reached an agreement for a successor CBA through June 30, 2025 (City Ex. 2) which was ratified by the membership. The agreement did not include the upgrade of the Grievants' classification. The Union cannot gain through arbitration what it failed to gain through negotiation.

During the grievance procedure, the Grievants' indicated that they had been performing the duties of the classification of Accounting Assistant I since they were first employed. This position was further articulated in the Union's brief. Section 14.1 of the CBA provides that a grievance must be filed within fifteen (15) working days "of the event giving rise to it." The Union in its brief argues that the grievance is timely as it represents a "continuing violation". At a minimum, the Union knew or should have known of the "event giving rise" to the grievance on October 13, 2020, the date of its Third Proposals for a successor CBA (City Ex. 1). The grievance was filed on June 18, 2021, well outside the fifteen (15) working day period and was, therefore, untimely.

VI. AWARD

For the reasons set forth herein, the Panel unanimously finds the matter not to be arbitrable.

BY THE ARBITRATION PANEL:

Linda J. Yelmini 10/23/2022
Linda J. Yelmini (Public Arbitrator & Chairperson)

Betty Martin Kuehnel
Betty Martin Kuehnel (Labor Arbitrator)

Michael C. Culhane, Sr.
Michael C. Culhane, Sr. (Management Arbitrator)