STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ITHACA POLICE BENEVOLENT ASSOCIATION, INC.,

Petitioner,

- and -

CITY OF ITHACA,

Respondent.

CASE NOS. – IA2014-002/ M2013-105

JOHN M. CROTTY, ESQ., for Petitioner

ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING, ESQ., of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Ithaca Police Benevolent Association, Inc. (PBA) to a December 23, 2016 letter ruling by the Director of Conciliation (Director) denying the PBA's petition for interest arbitration with the City of Ithaca (City) for the period from January 1, 2012 through December 31, 2013, on the basis that the PBA was not eligible for interest arbitration for that time period.

EXCEPTIONS

The PBA excepts to the Director's ruling on four grounds. First, the PBA contends that the Director erred in refusing the PBA's request to file a memorandum of law responding to the City's demand that the Director decline to process the PBA's petition for interest arbitration. Second, the PBA claims that the Director exceeded his authority and erred in addressing the merits of the City's claims that the PBA did not have the right to proceed to interest arbitration for an award covering 2012-2013. As its third exception, the PBA asserts that the Director erred on the merits by denying the petition for interest arbitration. Finally, the PBA maintains that the Director erred by

refusing to designate an interest arbitration panel.

The City filed a response supporting the Director's letter ruling.

For the reasons that follow, we reverse the Director's ruling.

FACTS

Background

In March, 2012, the PBA and the City began negotiations for a successor to their collective bargaining agreement that expired on December 31, 2011. The PBA filed a declaration of impasse on or about July 10, 2013, and, after conciliation efforts failed to resolve the impasse, on or about May 12, 2014, the City filed a petition for interest arbitration pursuant to § 209.4 of the Public Employees' Fair Employment Act (Act) and § 205 of PERB's Rules of Procedure (Rules). The next day, the PBA acknowledged receipt of the petition, but refused to consent to submit to interest arbitration, choosing instead, to stand on its right to *status quo* under § 209-a.1 (e) of the Act.[1] Accordingly, the PBA requested the Director not process the City's petition for interest arbitration. The Director granted that request, and no public arbitration panel was designated.

Subsequently, the City attempted to commence a new round of negotiations for a successor agreement with a starting date of January 1, 2014. The PBA responded by requesting negotiations for a successor agreement covering 2012 and 2013, the same two-year period as the City's May 12, 2014 petition for interest arbitration in which the PBA declined to participate. Then, the City filed an improper practice charge, claiming that the PBA violated § 209-a.2 (b) of the Act by refusing to negotiate with the City for a successor agreement with a starting date of January 1, 2014. The City alleged that the

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[1] *Cf., City of Kingston*, 18 PERB ¶ 3060 (1985).

PBA had no right to insist on negotiations for the same period that it previously stood on its rights under § 209-a.1 (e), arguing that the PBA's refusal to participate in the interest arbitration for which the City petitioned in May 2014, constituted a waiver of its right to rekindle negotiations for the same period. In addressing that dispute in *City of Ithaca (Ithaca I)*, we rejected the City's "waiver" argument, but found that the City's "duty to negotiate in good faith over the *status quo* period, here 2012 and 2013, ha[d] been satisfied."[2]

The instant dispute

On December 2, 2016, the PBA filed the instant petition for interest arbitration, seeking an award to cover the period January 1, 2012 through December 31, 2013 – the same period at issue in our previous decision. The City objected to the PBA's petition. The Director's December 23, 2016 letter ruling under review declined to process the petition, stating:

> I have carefully reviewed and considered all submissions by the representatives of both parties as well as the Board decision in this matter. First and foremost, the Board has already ruled in this case and held that the City has fulfilled its bargaining obligation for the very period of time for which the PBA seeks interest arbitration. It is a fundamental principal that the same parties are precluded from re-litigating the same matter. Thus, to effectuate the decision of the Board, it is unnecessary to further analyze the parties' arguments regarding merits. The central ruling by the Board is that the City cannot be compelled to participate in interest arbitration for the period in question. The petition filed by the City in 2014 was denied in order to uphold the rights of the PBA. Now the City asserts the corollary defense. Accordingly, I find the union is not eligible to pursue interest arbitration for changes in terms for the period of January 1, 2012 through December 31, 2013. The petition for interest arbitration filed by the PBA on December 2, 2016 is hereby

[2] *City of Ithaca*, 49 PERB ¶ 3030, 3097 (2016).

denied.[3]

The City filed an improper practice charge, alleging that the PBA's demands for 2012 and 2013 are not arbitrable.[4] That charge is currently pending before an ALJ.

DISCUSSION

In *City of Rensselaer*, we recently reaffirmed that:

> There is no question that we have delegated discretion to the Director in order for him to make necessary determinations involving the dispute resolution provisions of the Act and Rules, subject to our review of those determinations. A determination concerning the processing of a petition for compulsory interest arbitration is one specific example of such delegated discretion. In particular, the Board has expressly reaffirmed its delegation, subject to review, to the Director of "determinations on jurisdictional questions such as whether an impasse in negotiations exists and substantive questions such as whether a petitioning party is entitled to interest arbitration," as well as "procedural disputes regarding the striking procedure."[5]

We concluded that "[i]t is well-settled that the necessary eligibility determination is within the exclusive province of the Director, subject to the Board's review."[6]

However, pursuant to § 205.6 of our Rules, "[o]bjections to the arbitrability of any matter set forth in the petition or response may only be raised by the filing of an improper practice charge or a declaratory ruling petition pursuant to the requirements of

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[3] Director of Conciliation Letter Ruling, December 23, 2016, at pp. 1-2.
[4] Charge U-35450.
[5] 49 PERB ¶ 3016, 3064 (2016) (footnotes omitted), *citing* Act, §§ 205.4 (a) and 205.5 (k); *Bd of Educ of the City Sch Dist of the City of New York,* 34 PERB ¶ 3016 (2001); *Patrolmen's Benevolent Assn of the City of New York, Inc.,* 40 PERB ¶ 3010 (2007).
[6] *City of Rensselaer*, 49 PERB ¶ 3016, at 3066, citing *Patrolmen's Benevolent Assn of the City of New York, Inc.,* 40 PERB ¶ 3010, at 3033-3034; *see also, County of Monroe*, 39 PERB ¶ 3018 (2006); *Yates County,* 16 PERB ¶ 8001 (1983). As our quotation from *City of Rensselaer* makes clear, procedural and other ancillary or supplemental issues relating to the arbitration process or eligibility also fall within the jurisdiction of the Director.

this section."[7] Thus, under *City of Rensselaer* threshold questions of *eligibility* for interest arbitration and related procedural and substantive issues are delegated to the Director, while § 205.6 of the Rules directs that questions of substantive *arbitrability* are to be decided through an improper practice or a declaratory ruling proceeding. Section 205.6 of the Rules further provides that "[t]he public arbitration panel shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge or a declaratory ruling petition, until final determination thereof by the board or withdrawal of such charge or petition; the panel may make an award on other issues."[8] Simply put, if the Director determines that the eligibility requirements are not met, no interest arbitration panel need be designated. Where, however, arbitrability is properly challenged, the Director shall designate the panel, but the panel cannot rule on the matters alleged to be improperly submitted to it until the arbitrability challenge is resolved.

The only issue before us is whether the City's objection to the PBA's petition for interest arbitration covering the two-year period at issue in *Ithaca I* raises a question of arbitrability, cognizable under § 205.6 of the Rules, or a question of eligibility or of procedure, which the Director is authorized to answer.

We have not had occasion to distinguish between eligibility for interest arbitration and arbitrability for purposes of § 205.6 (a) of the Rules. Thus, this case presents a question of first impression.

For the reasons that follow, we conclude that the question presented here is one of arbitrability, not of eligibility. Accordingly, we find that the Director did not have the

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[7] Rules, § 205.6 (a).
[8] Rules, § 205.6 (d).

authority to dismiss the PBA's petition for interest arbitration.

We first examine § 205.6 of our Rules. To the extent that the policies of the Act are not inconsistent, norms of regulatory construction can usefully supplement our knowledge of policies and practices under the Act over the last 50 years. As in *City of Watertown*,[9] also decided this day, we note that "[t]he tenets of statutory construction apply equally to administrative rules and regulations," and can assist in filling in gaps in the Rules where the policies of the Act or the text of the Rules do not dictate a particular result.[10] Accordingly, we begin with the plain meaning of the text.[11]

Section 205.6 expressly addresses objections to "the arbitrability of any *matter* set forth in the petition or response."[12] While the term "arbitrability" is not defined in the Rules, the specification that such challenges are properly addressed to any "matter" frames the scope of any challenge. The use of the term "matter" denotes that a challenge to arbitrability comprehends a claim that the "subject" or "substance" of the dispute for which arbitration is sought is not properly subject to arbitration.[13]

Likewise, the expressly non-exclusive list of objections to arbitrability in § 205.6 reinforces our conclusion that objections to arbitrability are directed at whether the

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[9] 50 PERB ¶ 3006 (2017).
[10] *Springer v Bd of Educ of the City Sch Dist of the City of NY*, 27 NY3d 102, 107 (2016), *citing Matter of Cortland–Clinton, Inc v New York State Dept of Health*, 59 AD2d 228, 231 (4th Dept 1977).
[11] *Id* ("We construe the regulation in accordance with its plain language").
[12] *Id* (emphasis added).
[13] This definition of "matter" is employed in both non-technical and technical contexts. *See* WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY (1966) at 1394; James A. Ballentine, SELF-PRONOUNCING LAW DICTIONARY (2d Ed. 1948) at 523 ("A fact or facts constituting the whole or a part of a ground of action or defense"); William S. Anderson, BALLENTINE'S LAW DICTIONARY (3d Ed. 1969) at 783 (same; citing cases); Bryan A. Garner, BLACK'S LAW DICTIONARY (8th Ed. 2004) at 999 ("A subject under consideration. . . .an allegation forming the basis of a claim or a defense").

subject matter of the dispute sought to be submitted to compulsory arbitration falls within the scope of interest arbitration. As § 205.6 (a) of the Rules further provides, "[o]bjections as to arbitrability may include, but not be limited to, the following circumstances:

> (1) a matter proposed is not a mandatory subject of negotiations;
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> (2) a matter proposed was not the subject of negotiations prior to the petition;
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> (3) a matter proposed had been resolved by agreement during the course of negotiations.[14]

Each of these objections is predicated on the subject matter of the proposed claim to be submitted to arbitration. While the list is not exclusive, under the rule of construction known as *ejusdem generis*, "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series."[15]

Thus, the use in § 205.6 of the Rules of the word "matter" in defining the challenge and in the non-exclusive listing of several exemplary challenges suggest that other challenges to arbitrability would in the main likewise constitute proposed "matters." In other words, a challenge to arbitrability is generally an objection on the basis that the

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[14] *Id.* While not dispositive, we note that the understanding of arbitrability in the labor law community and in analogous legal contexts in New York law is consistent with this characterization. *See, eg*, Katharine Seide, A DICTIONARY OF ARBITRATION (1970) at 22 (defining arbitrability as "[t]he concept that an issue in dispute between parties is subject to arbitration . . ."); Jerome Lefkowitz, et al, PUBLIC SECTOR LABOR AND EMPLOYMENT LAW (3d Ed. Rvd. 2015) at 1136, 1137-1143 (Arbitrability analysis in public sector cases requires courts "to examine the subject matter of the dispute in an effort to determine whether it is arbitrable under the [Act]"; discussing cases.

[15] *Matter of Riefberg,* 58 NY2d 134, 141 (1983); *Lend Lease (U.S.) Const. LMB Inc. v Zurich American Ins. Co.*, 136 AD3d 52, 57 (1st Dept 2015); *see generally,* Statutes, § 239.

subject of the demand does not fall within the appropriate scope of interest arbitration.[16] Eligibility, on the other hand, involves the question of whether the parties or those whom they represent have the right to invoke interest arbitration, regardless of the specifics of the individual dispute for which arbitration is sought.[17] In sum, eligibility determinations, which have been delegated by the Board to the Director, are questions of *who* is entitled to or may properly petition for interest arbitration, while arbitrability questions concern *what* may be submitted to interest arbitration, and are to be determined under the Rules through the vehicle of an improper practice or declaratory ruling proceeding. Arbitrability goes to the character of the substance of the dispute, while eligibility goes to the character of the parties.

We next examine the issues raised by the PBA's interest arbitration petition. As explained below, we find that these issues do not fall within the Board's delegation to the Director to determine eligibility. There is no question that the employees represented by the PBA are within the ambit of § 209.4 of the Act and § 205.3 of the Rules, and thus eligible for compulsory interest arbitration. Rather, the objections stated by the City fundamentally concern the content of the PBA's specific demands, and whether the City's satisfaction of its duty to negotiate for the period in question renders these particular demands inappropriate for arbitration between these parties for the hiatus period. Had, for example, the demands submitted been made for the two-year period following the hiatus (i.e. 2014-2015) during which the PBA asserted its right to stand on the *status quo*, such a petition would have been processed and submitted to

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[16] *Id.*

[17] See, *eg, City of Rensselaer*, 49 PERB ¶ 3016, at 3066, citing cases.

a panel. In this instance, the basis for the ruling was the Director's conclusion that the subjects of the demands were not ones properly submitted to an interest arbitration panel, and therefore one of arbitrability to be resolved through an improper practice proceeding.

Nor do the issues fall within the sort of procedural, ancillary, or supplemental issue that has been delegated to the Director by the Board. Because the issues presented in this matter are so intertwined with those decided in our recent decision between the same parties concerning the same time period, the matter could reasonably be mistaken to be such an issue, and we cannot fault the Director for finding such to be the case absent prior guidance from the Board. However, the text of § 205.6 of the Rules makes clear that disputes as to whether the subject matter of a particular demand renders that demand outside of the permissible scope of interest arbitration fall within that rule's ambit, regardless of whether the basis for the objection is expressly contemplated by § 205.6 of the Rules or not.

Although we find that the Director lacked the authority to dismiss the PBA's petition for interest arbitration, we express no opinion on the propriety of the PBA's petition itself, and we do not address the exceptions, the response to the exceptions, or the submissions of *amici* to the extent they address the merits of the arbitrability of the at issue demand. The question of the arbitrability of the PBA's demands is before the ALJ in the pending improper practice proceeding. In this regard, however, we note that § 205.6 (d) of the Rules provides that the public arbitration panel "shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge . . . until final determination thereof by the board or withdrawal of such charge or

petition . . . ."

Finally, we note that, as in *City of Rensselaer*, the PBA through its counsel has chosen to speculate about the motives and probity of the Director, without any evidentiary or factual basis. Such argumentation is both inappropriate and unpersuasive.

Accordingly, the Director's letter ruling is reversed, and the matter remanded to the Director for proceedings consistent with this opinion.

DATED: April 10, 2017
Albany, New York

John F. Wirenius, Chairperson

Allen C. DeMarco, Member

Robert S. Hite, Member