New York City Mayor's Office of Labor Relations Bulletin

Noteworthy Arbitration and BCB Cases

ARBITRATION CASES

Termination for submission of fraudulent medical notes is upheld despite evidence that the employee saw a doctor on the dates in question. *DC37, Local 983 and DOT,* OCB Case No. A-14770-14.

The Grievant was a Seasonal Highway Repairer with seven years of service. The Agency charged Grievant with submitting fraudulent medical notes for three absences to qualify for sick leave. The doctor's notes were suspect; but for the dates, the notes were identical to a medical note previously presented for a full day's absence for physical therapy. DOT conducted an investigation that included an interview with the director of the medical office, who confirmed that they had not issued the suspect notes. The treating physician told the investigator that he saw the Grievant on two of the dates in question but treated him "off the books" for high blood pressure, which the Grievant verified in his testimony. Despite the fact that the Grievant saw the doctor on two of the three dates in question, based on his finding that the notes were fraudulent, the arbitrator found the Grievant guilty of the charges and sustained the discharge. Here, the discharge was justified because the arbitrator found the forged notes did not reflect the true nature of the visits and did not justify full day absences from work.

Employee terminated for making over $350 of international calls on his Agency-issued smartphone is reinstated without back pay because of lack of prior discipline. *SSEU, Local 371 and Comptroller,* OCB Case No. A-14903-15.

The Grievant worked as a Community Coordinator in the Comptroller's office. The Grievant's duties required him to perform extensive fieldwork for which he was issued an Agency smartphone to communicate by email and voice. On April 1, 2013, the Grievant reported to the Agency that the previous day the smartphone had been stolen from him while on the subway to work. In fact, two weeks earlier the Agency's IT department discovered more than $350 of unauthorized international calls on the Agency-issued smartphone and disconnected service. In the course of the Agency's investigation of the calls, the Grievant denied he made the calls and gave inconsistent explanations of how this could have happened, undermining the Grievant's credibility. The arbitrator held the Grievant responsible for the calls because he failed to timely report the loss of the smartphone and he attempted to mislead the investigation. However, based on the Grievant's clean disciplinary record, the arbitrator awarded reinstatement without back pay, contingent on his repayment of the full cost of the calls made.

Employee's termination upheld based on disciplinary history and incoherent testimony. *SSEU, Local 371 and ACS,* OCB Case No A-14808-14.
The Grievant, an Associate Juvenile Counselor at a juvenile center, was pre-disciplinary suspended for thirty (30) days and subsequently terminated. The Agency charged the Grievant with serious misconduct, including: exposing his chest and stomach to his coworkers as he used profanity and racial slurs loudly and within earshot of juvenile residents, being out of uniform, and failing to make required logbook entries. The City called eyewitnesses whose testimony was corroborated by contemporaneous incident reports and by prior documented discipline of the Grievant for using racial slurs. Additionally, the arbitrator found that the Grievant lacked credibility; Grievant's denials as to his misconduct were unconvincing due to Grievant's vague and confusing testimony and selective memory about the dates and events in question. This case illustrates the importance of precise, detailed and clear testimony; the City's witnesses to the racial slurs and other bizarre behavior were all credited over the Grievant because they testified well to facts that made sense. The penalties were found to be appropriate in light of Grievant's long and well-documented disciplinary history and the serious and recent nature of the discipline.

Termination upheld for brief sexual contact with member of the public while on duty. *SSEU, Local 371 and HRA,* OCB Case No. A-14388-13.
The Grievant, a Caseworker with HRA, was accused of sexual assault by a member of the public who was renting a part of her apartment to one of his clients. The Grievant was terminated from employment, and was subsequently acquitted of all charges in the criminal case. In a motion for summary judgment in the arbitration, the City argued that the conduct the Grievant admitted to in his trial testimony, namely putting his mouth on the women's breast in what he claimed was a consensual encounter, was sufficient cause for termination even ignoring the more serious sexual assault charges. The Union argued that the encounter lasted mere seconds and was consensual because the woman had told the Grievant she would engage in sexual behavior with him for money, and thus not cause for termination. The arbitrator denied the grievance, holding that the Grievant's use of his position of power over a financially vulnerable woman, while on duty, to satisfy his prurient desires was misconduct sufficiently serious to warrant termination.

BOARD OF COLLECTIVE BARGAINING CASES

Agency's rejection of employee for position despite placement on civil service list did not violate collective bargaining law - independent analysis of an adverse action can break the causal connection in a retaliation case. *Local 376, DC37 v. The City of New York & DEP, 9 OCB 2d 21 (BCB 2016)* (Docket No. BCB-4131-15).
The Union alleged that DEP retaliated against a provisional Construction Laborer who scored 100 on the civil service exam for this title by not appointing him to permanent status. DEP used the "One-in-Three" civil service rule to deny the promotion. Thereafter, DEP terminated the employee's employment in the face of the civil service list for this title. DEP argued that its decision not to grant permanent status was based upon the employee's disciplinary record. The Union alleged DEP retaliated against the employee, who was previously part of another improper practice petition against DEP. The Board determined the Union demonstrated a causal connection between protected activity and anti-Union animus that motivated the

decision to have DEP review the employee's personnel file before deciding whether to appoint him off the list. However, the Board went on to say that the City/DEP established a legitimate business reason for terminating his employment; an independent review was done of his disciplinary history, which led to the decision not to appoint him and then terminate him in the face of the civil service list. The Board held that such an independent analysis can break the causal connection. Since the Agency had legitimate business reasons for its decision, it did not violate the New York City Collective Bargaining Law and the improper practice petition was dismissed.

Employee's improper practice petition based on a claim of retaliation for requesting a transfer is dismissed on a finding that there was no anti-Union animus*. Leiva, 9 OCB2d 11 (BCB 2016)* (Docket No. BCB-4128-15).

DOHMH filed disciplinary charges against a Computer Aide for various acts of insubordination and neglect of duty. In response, Petitioner filed a *pro se* claim of retaliation and argued that DOHMH retaliated against her for protected Union activity by disciplining her, denying her request for a transfer, and failing to honor her direct deposit request. Petitioner claimed that the timing of the disciplinary charges was related to a letter from her private attorney requesting a transfer because of alleged harassment from her supervisor. The City demonstrated that the disciplinary charges had been initiated many months before the attorney's letter and were founded on similar misconduct for which the employee had been disciplined two years earlier – the earlier charges were sustained at OATH. The Board found that the temporal proximity between the transfer request and the issuance of charges was not sufficient, by itself, to support a finding of retaliation. In addition, because the Union had no involvement in any of her transactions with the employer, the Board found her actions to be personal in nature and could not establish that she was engaged in protected activity within the meaning of the New York City Collective Bargaining Law. The Board found that Petitioner had not established a prima facie case of retaliation and that the City demonstrated legitimate business reasons for DOHMH's actions. Accordingly, the improper practice petition was dismissed.

Agency must bargain with Union before issuing policy which changes the equitable distribution of overtime, as it is a mandatory subject of bargaining*. UFA, Local 94 (IAFF) and FDNY, 9 OCB2d 19 (BCB 2016)* (Docket No. BCB-4155-16).

FDNY implemented a new minimum staffing overtime policy for Marine Engineers, Pilots and Wipers. The policy's purpose was to promote equitable distribution of overtime the same way it is distributed amongst Firefighters, and FDNY asserted that it was a *de minimis* change from the prior policy. The Union filed an improper practice charge challenging FDNY's implementation of the new policy alleging that it was done without bargaining during a *status quo* period. The Board concluded that the policy was not a *de minimis* change, as it "altered procedures for the distribution of overtime and impacted employees' eligibility to work overtime." Additionally, the Board held that the policy was not within FDNY's managerial prerogative, since it did not impact the issue of when and how much overtime is deemed necessary by FDNY. Therefore, FDNY had a duty to bargain the implementation of the policy during a *status quo* period.

Agency's refusal to allow employee to work assignment that affords overtime is subject to arbitration. MMP and City/DOT, 9 OCB2d 20 (BCB 2016) (Docket No. BCB-4171-16) (A-15104-16). The Union filed a Request for Arbitration alleging that DOT failed to comply with the arbitrator's decision in a previously decided grievance and violated the Agency's past practice of awarding assignments on the basis of seniority. The City filed a petition to challenge arbitrability, arguing that the claims were already adjudicated by the prior arbitrator to completion, and that any claims concerning past practices do not meet the definition of a grievance under the collective bargaining agreement. The Union argued that the Grievant was being wrongfully disciplined again for the same charges already decided by the prior arbitrator, and was punitively denied overtime opportunities. While the Board determined that the Union's claim that past practices were violated and its desire to have the past arbitration award "confirmed" by a new arbitrator were both NOT arbitrable (and thus dismissed), the Board did find that the Union's claim that Grievant has been wrongfully disciplined anew and improperly denied overtime are both subject to arbitration.

OUT-OF-TITLE CASE UPDATES

Out-of-title cases at arbitration are very fact-specific and frequently the difference between winning and losing a case depends on what work/task the employee was assigned, the level of supervision (daily, weekly, from remote location), and the details contained in the employee's tasks and standards. Below are some recent cases, reviewed at both regular and expedited arbitration, that highlight how arbitrators determine whether an employee is performing out-of-title duties.

Employee Found to be Performing Out-of-Title Duties When:

● *Different Levels of Employees in the Same Civil Service Title Work in a Collaborative Setting and Share Job Responsibilities*

Groups of Level II and III Criminalists at OCME who work in a team-oriented structure found to be performing out-of-level duties. *DC 37 Local 375 and OCME,* OCB Case Nos. A-14955-15 and A-14957-15.

Out-of-level group grievances were filed on behalf of Level II and Level III Criminalists assigned to OCME's Department of Forensic Biology. In 2014, OCME's new Director of the Department implemented an organizational production pod system to reduce a backlog of cases. This system, based upon the Lean Six Sigma methodology (an organizational philosophy focused on improving efficiency), requires Criminalists to work in pods, small groups of six to seven employees. All Criminalists in each pod report to a Criminalist, Level IV, and have daily "huddles" where the group meets to discuss their cases. Under this structure, both Level II and Level III Criminalists meet in mixed groups to discuss their cases with a Level IV Supervisor. All Criminalists also perform many of the same tasks related to analyzing evidence samples for DNA. The implemented system helped to greatly reduce the accumulated backlog.

Although these cases proceeded separately under different arbitrators, both arbitrators reached the same conclusion. In deciding that the Grievants were performing out-of-title duties, the arbitrators recognized the subtle and refined distinctions described in the Criminalist job specifications, and based their awards on the type of supervision required and the level of complexity of the work performed. Because the Grievants work in a pod structure, the arbitrators found that cases are not assigned based on Criminalist level or complexity, but are instead assigned at random. They also found this type of supervision to be distinctly different from the type of supervision contemplated by the job specifications.

● *Grievant is Given a Work Assignment of a Higher Level or Different Title For a Period of Time*

City Assessor Level II assigned to assess one large, high-value property in Queens found to be performing out-of-level duties for a portion of the grievance period. *DC 37, Local 1757 and DOF,* OCB Case No. A-14825-15.
The Union claimed that the Grievant, a City Assessor Level II, was performing the duties of a City Assessor Level III(a), largely because she worked on the conversion of a residential area to a casino, which the Union claimed demonstrated that she worked "under direction" and that she "physically examined and assessed the most complex, very large Class II, III, and IV real properties of very high assessed value." The only relevant time period addressed by the Union, however, was January to June 2014, despite the fact that the Grievant claimed she had been performing substantially different duties for many years.

The arbitrator sustained the grievance in part, holding that he "was not persuaded" by the City's argument that the majority of work done by the Grievant fell outside the grievance period. He based his holding largely on the fact that the District to which Grievant was assigned contained Resorts World Casino, which was the third most highly valued property when compared with the Districts of Level III(a) City Assessors. Although the value of the casino was stable in early 2014, the arbitrator found that it remained in the Grievant's property inventory, and retained both its large size and high value, which are indicators of complexity. The arbitrator denied the remainder of the Grievant's claim, which covered the period following July 1, 2014, and held the Union submitted insufficient evidence to sustain its burden of proving the properties the Grievant assessed during that time were the "most complex."

● *Grievants in a Different Job Title are Performing the Exact Job Specifications and Duties of Another Competitive Civil Service Title*

Community Assistants at DEP who implemented customer service functions for their office found to be performing out-of-title duties. *DC 37 Local 371 and DEP,* OCB Case Nos. A-14993-15 & A-14994-15.
The arbitrator found Grievants, two Community Assistants, were performing out-of-title duties. Grievants were found to be performing the job specifications of Customer Information Representatives Level I when they implemented customer service for their office, the bulk of

which was data entry work. Grievants functioned within the limited context of providing a fixed set of services for a program and, for the most part, worked independently.

The arbitrator looked at the concept of "substantial difference" between the job specifications of the different job titles and posed the following questions: Qualitatively, are the tasks really different from the tasks included within a Grievant's job specifications? And, quantitatively, does the Grievant spend a "substantial" amount of time on such tasks? In answering these questions the arbitrator determined that the Grievants were performing duties substantially different from their job specifications, the standard set forth in the collective bargaining agreement between the parties.

Employee NOT Found to be Performing Out-of-Title Duties When:

● *Job Duties are Consistent With Those Outlined in the Job Specifications For The Employee's Job Title*

Although some duties were different from regular duties performed by a specific title, the unusual nature of the duty itself does not make it out-of-title work. *DC 37, Local 375 and DEP,* OCB Case No. A-14967-15. (Expedited arbitration).
Arbitrator found that an Associate Project Manager Level II working in DEP's Grahamsville Region in the Bureau of Water Supply was not performing out-of-title duties. Grievant's job consisted of work on a variety of projects affecting the upstate Grahamsville region. All of the projects that Grievant worked on were job order contracts and not capital projects. The Grievant coordinated with DEP's Bureau of Engineering Design and Construction, which handles capital projects; however, Grievant only acted as a liaison and did not manage those projects. The Grievant also performed lock out / tag out procedures, which are safety procedures, but the arbitrator found that this did not constitute out-of-title duties. The Grievant also supervised a machinist and an electrician by assigning and reviewing their daily work. The arbitrator noted that these supervisory duties were unusual for an Associate Project Manager but not inconsistent with the Associate Project Manager Level II job specifications.

Employee found to be performing in-title work as an analysis of duties showed that no capital project work was assigned as part of his tasks. *DC 37, Local 375 and DEP,* OCB Case No. A-15013-15. (Expedited arbitration).
Assistant Civil Engineer working in DEP's Bureau of Water and Sewer Operations, Division of Contract Repairs and Maintenance in the Connections and Permitting Unit found not to be performing out-of-title duties as no capital contracts are assigned to the Grievant's unit. Grievant simply responds to complaints regarding sewer and water projects performed by outside contractors, performs on-site inspections, supervises a group containing more than a "small" amount of Inspectors (although he is paid a differential to do so), and does not work on capital projects.

Citywide Agreement Useful Links and Resources

The link to the Citywide Agreement, Unit Agreements and most recent settlements can be found on the NYC Office of Labor Relations web-site.

- **Link to the Citywide Agreement**
  http://www1.nyc.gov/assets/olr/downloads/pdf/collectivebargaining/1995-2001-citywide-agreement-1.pdf
- **Link to Civilian and Uniformed Unit Agreements**
  http://www1.nyc.gov/site/olr/labor/labor-civilian-contracts.page

  http://www1.nyc.gov/site/olr/labor/labor-uniformed-contracts.page
- **Recent Agreements**
  http://www1.nyc.gov/site/olr/labor/labor-recent-agreements.page

District Council 37 Memorandum of Economic Agreements prior to the 2010 – 2017 settlement is located in the Archive sub-folder of the Citywide time and leave library.

- Citywide Time and Leave Library, Citywide Archive sub-folder
  https://opencitypoint.csc.nycnet/timeleave/CITYWIDE%20AGREEMENTS/Forms/AllItems.aspx

Titles covered by the Citywide Agreement can be found on the Citywide Administrative Services Title Specifications Online using the following link and search option.

- Title Specifications Home Page, Title Information Search, More Search Options, Title Listing in Rule XI.
- http://dcascitynet.dcas.nycnet/TitleSpecs/ListTitleRuleResults.aspx

References to the New York City Collective Bargaining Law, and titles covered by Local Law 56 are found on the Office of Collective Bargaining web-site.

- http://www.ocb-nyc.org/
- http://www.ocb-nyc.org/rules/NYCCBL.pdf
- **Local Law 56**
  http://www.ocb-nyc.org/uploads/2016/06/7-OCB2d-1-BOC-2014--FU.pdf
  http://www.ocb-nyc.org/uploads/2015/09/8-OCB2d-27-BOC-2015-odk.pdf

Employee Benefits Program

Fall is a very busy time for the Employee Benefits Programs!

Each year, the Flexible Spending Accounts Program has its Open Enrollment Period for the following calendar year from September to October. Enrollment is not automatic from year to year. Employees must re-enroll each year during the annual Open Enrollment Period.

The Health Benefits Transfer Period for employees is held in October or November of each calendar year. During this period, employees may transfer from their current health plan to any other plan for which they are eligible, or they may add or drop Optional Rider coverage to their present plan.

A Health Benefits Transfer Period is held in even-numbered years for retirees. During this period, retirees may transfer from their current health plan to any other plan for which they are eligible, or they may add Optional Rider coverage to their present plan (the Optional Rider can be dropped at any time).

Important dates to remember for Fall 2016:

- Flexible Spending Accounts Program Annual Open Enrollment Period: September 19 – October 31, 2016
- Health Benefits Fall Transfer Period for Employees: October 11 – November 11, 2016
- Health Benefits Fall Transfer Period for Retirees: November 1 – November 30, 2016

Links to the Employee Benefits Programs' for information, to obtain forms and view videos:

- **Health Benefits Program:** nyc.gov/hbp
- **Management Benefits Fund:** nyc.gov/mbf
- **Flexible Spending Accounts Program:** nyc.gov/fsa
- **Deferred Compensation Plan:** nyc.gov/deferredcomp