New York City Mayor's Office of Labor Relations Bulletin

NOTEWORTHY ARBITRATION AND BOARD OF COLLECTIVE BARGAINING DECISIONS

Disciplinary Arbitration

Negligence:

Failure to follow agency policy not cause for discipline if policy is not enforced despite the Agency's knowledge of the alleged policy violation. *SEIU, L. 300 and OCME*. OCB Case No. A-15071-16.

A long-term OCME Forensic Mortuary Technician, Level II was charged with failure to mandate that his subordinates follow, and failure to follow himself, an OCME policy requiring deceased individuals' unclaimed bodies be held by OCME for ten days prior to being released to medical schools for educational use. While the arbitrator determined that the employee had failed to follow the policy at issue, she determined that the employee could not be held liable for these transgressions because, despite his superiors' alleged knowledge of his failure to follow protocol, he was never warned or admonished for his noncompliance. The Arbitrator granted the grievance, restoring the time the employee spent on suspension and the fine levied against him.

Insubordination:

An employee is properly terminated when she refuses to report for overtime and is absent from her post. *CWA, Local 1182 and NYPD*, OCB Case No. A-15188-16.

An Arbitrator upheld the termination of the Grievant, a Traffic Enforcement Agent, who failed to appear for mandated overtime shifts and failed to remain on post until properly relieved. Although the Union argued that the Employer's procedural flaws and vague rules led to her termination, the Arbitrator found that it was not sufficient to overcome the other evidence in the record establishing the regularity of the Employer's procedures and the self-contradictory reasons offered by the Grievant at the Agency's investigative hearing. Further, the Arbitrator found that termination was the appropriate

penalty as the Grievant's responses during her investigative hearing indicated both a lack of remorse and a likelihood that her misconduct would continue.

Discourteous and Unfavorable Conduct:

Arbitrator upholds three day suspension for use of obscenities and discourteous conduct directed toward a supervisor. *DC37, Local 924 and DCAS,* OCB Case No. A-14950-15.

An Arbitrator upheld the charges and recommended penalty of a three day suspension of the Grievant, a City Laborer, who directed obscenities towards and conducted himself in an unfavorable manner with a supervisor. Although the Union argued that the employee engaged in "shop talk" when voicing his dislike of the supervisor, the Arbitrator found the manner in which the Grievant spoke to the supervisor was unwarranted, regardless of whether the Grievant was justified in his response. The Arbitrator stated it an arbitrator's only role is to interpret the CBA and cannot or should not attempt to fabricate his or her own workplace justice.

Excessive Absenteeism:

Employee terminated for excessive absences who claimed absences were due to substance/alcohol abuse is reinstated with a time-served suspension. *DC 37, Local 376 and DEP,* OCB Case No. A-15153-16.

The Grievant, a construction laborer employed by DEP, was terminated based on repeated absences and the application of DEP's Absence Control Stepping Procedure. The Grievant testified that substance abuse issues were the cause of his absences and, since his termination, he had sought treatment[1]. The Arbitrator sustained the grievance, adopting a "just cause"[2] approach to disciplinary penalties and found that termination is too harsh a penalty and therefore violates the spirit and intent of collective bargaining agreement.

Contract Interpretation Arbitration

Contract section outlining maximum salary rate for specific title does not mandate payment of maximum salary to all qualifying employees in the title. *LEEBA and DOT*, OCB Case No. A-15041-16.

LEEBA, on behalf of those employees with more than one year of service in the titles of H&S Inspectors, Assoc. Inspectors (H&S), Service Inspector (DOT), and Sr. Service Inspector (DOT),

[1] Per the parties' collective bargaining agreement, the disciplinary penalty may be implemented by the Agency after the Step II Determination (thus before the matter goes to arbitration).
[2] "just cause" is not the standard applied in City arbitrations, but the Arbitrator has latitude in determining the penalty. The City chose not to appeal the Arbitrator's decision.

(collectively "Grievants") claimed that the DOT violated Article III, Section 2 of the parties' 2008-2010 CBA as no member in the bargaining unit had received the maximum salary rate. The Union argued that DOT does not have authority to determine when an employee should receive a salary increase and that there is no defined criteria for when the maximum salary rate should take effect. The City argued that the plain language of the contract does not mandate DOT to pay out the maximum salary rate, therefore there was no contract violation.
The Arbitrator dismissed the Union's grievance and ultimately determined that the plain language of the contract was clear. Nothing mandates DOT to pay the Grievants the maximum salary rate. Furthermore, DOT's consistent practice of over forty years has been to pay the Grievants within the minimum/maximum salary range.

New contract provision did not alter the Agency's past practice regarding terminal leave eligibility requirement. *ADW-DWA, CCA and DOC***,** OCB Case No. A-15003-15; A-15072-16.

ADW/DWA and CCA grieved the application of Section 6.A of the *Uniformed Superior Officers Coalition Economic Agreement* to it members at the Department of Correction, claiming that the language providing for lump sum payment of terminal leave changed the eligibility criteria for the benefit as well as the method of payment.

The Uniformed Superior Officers Coalition, representing uniformed supervisors in NYPD, FDNY, DOC and DSNY, negotiated an option to their existing terminal leave benefit to allow for a lump sum payment rather than requiring the member to run out the leave prior to retirement. The agreement identified the terminal leave benefit at issue by quoting language from a 1957 Board of Estimate resolution that created the benefit for NYPD – this was to distinguish it from other types of "terminal leave" such as accrued annual or sick leave. Based on the more expansive eligibility requirements for the benefit in the NYPD, the Correction Captains' Association and Assistant Deputy Wardens/Deputy Wardens Association argued that the new the lump sum provision also required the Department of Correction to adopt the same eligibility requirements as in NYPD. The Arbitrator denied the grievance, finding that the cited language did not establish an enhanced new benefit for all members of the coalition. The bargaining history clearly showed that the new language was only intended to provide for the lump sum payment of the existing benefit. The Arbitrator also found there was no "meeting of the minds" to create an enhanced terminal leave benefit in the USOCEA agreement.

Employee's job assignment cannot be restricted by Agency if stipulation agreement returning employee back to work after disciplinary charges does not contain such restriction. *MEBA and DOT*, OCB Case No. A-15124-16.

Grievant, a Chief Marine Engineer ("CME") with DOT's Ferries Division entered into a stipulation of settlement with DOT for falling asleep on duty. The stipulation stated Grievant would accept a thirty day suspension without pay without the need for further disciplinary action. After returning to work DOT restricted Grievant from bidding among jobs in his civil service title. Grievant was removed from working on a ferry while passengers were on board in order to

remove him from a safety sensitive supervisory position. Grievant's overtime opportunities were limited to those opportunities available to Marine Engineers, negatively affecting his seniority. However, at all times, Grievant maintained the same salary, and the same regularly scheduled hours. The Union argued that the Grievant was being twice punished for the same offense and has been financially harmed for not receiving the same overtime opportunities he would have had he been permitted to bid as a CME when he returned. The City argued that overtime is speculative, and that on average, Grievant still earned more overtime than an average CME once he returned. The City also argued that it is management's prerogative under the NYC Collective Bargaining Law to assign its personnel as necessary to meet the needs of the Agency. The Seaman's Manslaughter Statute also made it necessary for the City to insulate itself from potential liability should the Grievant's behavior cause harm to others in the future.
The Arbitrator determined that the DOT violated the parties' "Job Bidding" provision of the collective bargaining agreement. The Arbitrator ordered the Grievant to be allowed to bid as a CME and awarded back pay for the overtime lost while his bid was restricted.

Out of Title (OOT) Arbitrations

Grievant, a Community Associate, found to be working out of title as a Graphic Artist Level II. *DPR and SSEU, Local 371*, OCB Case No. A-15037-16.

Grievant held the office title of Graphic Artist and prepared graphic materials such as monthly newsletters, brochures, and folding displays for various DPR programs. The City argued that Grievant's tasks were really more clerical than that of a graphic artist. Grievant was beholden to strict visual guidelines produced by an outside consulting agency that applied to all promotional materials DPR produced. Furthermore, Grievant's discretion was narrow as all the materials produced had a pre-arranged template and layout to which Grievant could not deviate. Grievant was not creating graphic materials on her own and had no meaningful level of artistic control, furthermore graphic materials are handled by a separate department to which Grievant did not belong and did not report. The Union argued that Grievant's work was substantially different from the Community Associate title specification and that Grievant was treated like a Graphic Artist in the office and worked solely on graphic materials. While the Union acknowledged that Grievant was beholden to Agency guidelines, she still exercised discretion within those guidelines. The Arbitrator determined that Grievant's duties were substantially different from that of a Community Associate and ordered back pay representing the difference between Community Associate and the incumbent Graphic Artist Level II rate for the grievance period.

Grievant, a Staff Analyst II, found to be performing out of title duties of an Associate Staff Analyst for a portion of the grievance period. *HRA and OSA*, OCB Case No. A-15045-16

Grievant, a Trainer in HRA's Training Unit provided trainings to various program areas within HRA focusing on fraud detection and eligibility for public assistance programs such as SNAP (formerly food stamps). Grievant provided trainings and prepared training materials. The City argued that Grievant's duties were not out of title. Grievant did not prepare trainings from the ground up, rather she updated existing trainings. Some of these trainings were standard agency wide trainings, and there was nothing overly complex about them. Much of Grievant's work included updating slides and researching new developments. Grievant's work was only technical insofar as it was specialized, but not overly complicated. Due to internal reorganizing, there was a period of time in which Grievant did not give any trainings.

The Union argued that the Grievant was a technical expert on the various subject matter that she taught. Grievant had wide latitude to exercise discretion in giving trainings and preparing materials. Grievant's former supervisor credited her expertise and considered her to be a "Senior Trainer." The Arbitrator determined that Grievant was not out of title during the internal reorganization period in which Grievant gave no trainings. However, Grievant worked out of title as an Associate Staff Analyst for the remainder of the grievance period since she performed more complex duties, complexity being the main distinguishing factor between a Staff Analyst II and an Associate Staff Analyst.

Grievant, a city Medical Specialist Level I, found not to be performing work of a higher level. *Doctors Council and DOHMH,* OCB Case No. A-14972-15.

Grievant, who is a City Medical Specialist ("CMS"), Level I, claimed she was performing the duties of a CMS Level II. In addition to being responsible for more complex cases, the CMS II has supervisory duties and resultantly receives a supervisory differential. The Arbitrator rejected the Union's "responsible direction" standard in assessing whether Grievant worked in a supervisory capacity. Instead, the Arbitrator determined that under the "commonly used criteria f supervision such as assigning, scheduling, disciplining, and evaluating subordinates" the Grievant did not have supervisory duties and the out of title claim was denied.

Graphic Artist Level I's assignments and minimal supervision did not amount to Level II work. *DC 37, Local 375 and ACS,* OCB Case No. A-15041-16.

The Union claimed that the Grievant, a Graphic Artist Level I, was performing the duties of an Administrative Graphic Artist, and in the alternative, a Graphic Artist Level II. The Union claimed that the Grievant was responsible for the planning and designing the Division of Administration's entire internal newsletter. The Union also claimed that the Grievant was not adequately supervised because her supervisors were not graphic artists and did not assist her with her artwork. The Arbitrator denied the grievance in its entirety. With respect to the Administrative Graphic Artist title, the Arbitrator determined that the Grievant was not assigned

to the duties and responsibilities of that position. As for the Graphic Artist Level II claim, the Arbitrator held that even though the Grievant did not receive technical supervisory guidance in producing the newsletter, the informal and formal meetings with her supervisors were sufficient for the Level I title. The Arbitrator further held that the Grievant was not assigned a wide variety of assignments and was not given latitude for un-reviewed action or decision.

Heavy Lifting and tasks of physical strength performed by Motor Vehicle Operators found to be tasks of a City Laborer. *DC37, Local 983 and FDNY,* OCB Case No. A-15113-16.

An Arbitrator granted a group grievance filed by three Motor Vehicle Operators who claimed to be performing the duties of a City Laborer primarily based upon the fact that the Grievants spend more than 50% of their workday moving, lifting, and carrying oxygen tanks and other tasks that requires physical strength. The Grievants were assigned to FDNY EMS to primarily deliver and exchange oxygen tanks at EMS stations and Fire Houses. The City asserted that that the moving of oxygen tanks was an inherent in the "delivery" task of Motor Vehicle Operators. The Arbitrator distinguished the City's argument by finding that the moving of oxygen tanks was a major part of their daily job, rather a periodically assigned those duties for a short duration or assisting others who are regularly assigned those duties.

Arbitrator's Decision Reversed on City's Appeal

Perez, et al. v. DEP, OCB Case No. A-14486-13 -

Arbitrator's award of assignment differential to employees not specified in contract is reversed by court. DC37 claimed entitlement to a differential for Watershed Maintainers in the Department of Environmental Protection working in certain upstate facilities. The collective bargaining agreement established an assignment differential for Watershed Maintainers "who are assigned to perform duties in the New York City Department of Environmental Protection's West of Hudson Control Center, e.g. monitor SCADA system []." SCADA is a computerized system that controls a variety of devices for regulating water flow in the watershed. The Union claimed that employees in the title who work at other DEP facilities using the SCADA system should receive the differential because they perform similar tasks. The City argued that the plain language of the contract limited the differential to workers at the West of Hudson Control Center, and presented evidence that certain tasks performed at the West of Hudson site are distinguishable from other DEP facilities. The arbitrator sustained the grievance, granting the differential to these employees based on his finding that the work was essentially similar to the West of Hudson facility. The Law Department filed an Article 75 appeal of the arbitrator's decision, asserting that the arbitrator exceeded his authority when he deviated from the plain language of the contract. A NYS Supreme Court judge vacated the arbitrator's award writing, "the Court's hands are tied by the clear language of the agreement." The union has filed a motion to reargue, which is pending.

The motion to reargue is still pending before the court.

BOARD OF COLLECTIVE BARGAINING DECISIONS

Injunctive Relief Petitions (Improper Practice Petitions Still Pending)

Injunctive Relief not granted to Union when it challenged revised Department of Correction Operations Order regarding job postings. *COBA and DOC*, BCB-4203-17 (INJ)

The DOC revised an operations order establishing the policies and procedures for awarding job assignments within a command. The revised operations order implemented specific requirements of the *Mark Nunez et al.* Consent Judgment and screening requirements contained in the Rules of the City of New York and another DOC Directive. COBA claimed that the revised operations order prejudices more senior Correction Officers because they are not receiving the required training for specific posts, but more junior Correction Officers are receiving the training at the academy. COBA petitioned the Board for injunctive relief because COBA believed it would be impossible to reassign job posts if the Union were to succeed at hearing, and this would result in irreparable harm.

The Board denied COBA's petition for injunctive relief because it is not apparent that the revised operations order will result in immediate and irreparable harm. The Board determined that the record failed to "identify any harm that cannot be remedied by reassignment, rebidding, or back pay."

Injunctive Relief sought by union after Department of Correction revised Correction Officer promotional procedures is denied. *COBA and DOC*, BCB-4207-17 (INJ)

The DOC issued a directive, consistent with the *Mark Nunez* et al. Consent Judgment, outlining the procedures for promotional assignments from Correction Officer to Correction Captain. COBA alleged that the procedures outlined in the Directive were a change that would cause irreparable harm to its members currently on the Promotional List. Specifically, COBA claimed that the consideration of use of force incidents with a "look back" period of 5 years, as required by the *Nunez* Consent Judgment, was a change to the promotional process that would cause members, on the current Promotional List, to be passed over for promotion and irreparably harmed. Resultantly, COBA filed an Injunctive Relief Petition seeking a cease and desist of the implementation of the Directive.

The Board denied COBA's request for injunctive relief, stating that "[t]he record does not identify any immediate and irreparable injury, loss, or damage requiring maintenance of the status quo in order to issue an effective order at the end of the improper practice proceeding".

Improper Practice Petitions

Improper Practice Petition denied as untimely; failed to meet four (4) month statute of limitations filing requirement. *Darlene Crisci and DOT*, BCB-4244-17, 10 OCB2d 15 (ES 2017).

Petitioner is an Associate Highway and Sewer Inspector at DOT, whose title is represented by LEEBA. In August 2016, a job posting for Highway Repairer was forwarded to Inspectors at DOT. The posting indicated it was for a "transfer opportunity only" and for candidates serving permanently in the Highway Repairer title. In December 2016, Petitioner learned that the position was filled by an Inspector. In January 2017, LEEBA filed a grievance on the Petitioner's behalf. DOT's Department of Labor Relations informed the Union and Petitioner that the matter was not grievable. Petitioner next contacted the DOT Department of Human Resources in February 2017. Petitioner then filed and Improper Practice Petition with OCB in August 2017 alleging that DOT interfered with the grievance process.

The Petition was dismissed by OCB's Executive Secretary because it was untimely and there was no equitable tolling of the four month statute of limitations. The decision further held that even if the Petition was timely, it failed to allege sufficient facts to constitute interference under the NYCCBL because an employer is permitted to deny a grievance on the grounds it is beyond the scope of the collective bargaining agreement.

Duty of Fair Representation claim by Union member untimely; also Union did not violate NYCCBL with respect to its member. *Dillon v. DC 37 and City of New York/DOHMH*, BCB-4173-16, 9 OCB2d 28 (BCB 2016). The Petitioner claimed that the Union violated its duty under NYCCBL 12-306(b) to provide fair representation. The Petitioner claimed that the union failed to provide adequate representation in that they did not appeal Step III decisions and did not represent petitioner adequately at OATH proceedings and before the Civil Service Commission.

The Petition was dismissed based upon timeliness. Additionally, the Board found no violation of NYCCBL §12-306(b) for the Union Respondent's strategy decisions and rejecting the Petitioner's litigation suggestions at the 2013 OATH hearing and subsequent 2015 appeal before the Civil Service Commission. Finally, the Board found that that the Petitioner failed to prove that the Union Respondents failed to provide the Petitioner with requested documents.