

New York City Mayor's Office of Labor Relations Bulletin



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Noteworthy Arbitration and Board Decisions

RECENTLY DECIDED REPRESENTATION CASES:

Numerous unions are petitioning the Board of Certification ("BOC") to represent current managerial and original jurisdiction ("OJ") titles. In New York State, public employees are presumed to be eligible for collective bargaining. Previously decided cases at the Public Employment Relations Board ("PERB") and the BOC show that there is a very strong presumption that a New York State public employee should have union representation.

Exceptions based upon managerial and/or confidential status are very narrow. Employees may only be designated as managerial for two reasons: 1) if they formulate policy or 2) if they may reasonably be required on behalf of the Employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration, provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to a manager as described in #2 above.

Board of Certification Grants CSBA's Petition to Represent Assistant Advocates at NYPD.

AC-72-13 and RE-181-13.

The Civil Service Bar Association ("CSBA") filed a petition seeking to add the "Assistant Advocate-PD" title to its bargaining certificate. In response, the City/NYPD filed a Representation Petition asking that the title be deemed Confidential. The title has never been represented by any union and is authorized by DCAS solely for use in the NYPD Department Advocate's Office ("DAO"). The Department's position was that due to these attorneys' confidential relationship to the Deputy Commissioner of the DAO and their exposure to information about police discipline that is not for the eyes and ears of the rank and file, as well as the special exclusivity of the Police Commissioner's disciplinary authority, these attorneys must be excluded from collective bargaining. The Union argued that these attorneys do work similar to that of the Agency Attorneys working in the DAO, who are already represented by CSBA.

The Board of Certification determined that the title is eligible for collective bargaining. The Board found that the evidence demonstrated that the Assistant Advocates regularly reported to non-managerial employees who themselves were represented by unions, including the CSBA. The Board also found that there was no legal support for the City's argument that there was a public policy exclusion based upon the Assistant Advocates' work as part of the Police Commissioner's disciplinary machinery, in spite of the sole disciplinary authority granted to him by the NYC Charter and Administrative Code. The Board noted that membership in a union does not automatically present a conflict of loyalties and there is nothing in the record to suggest that the represented status of the Agency Attorneys who also work in the Advocate's Office has affected police discipline in any way.

Board of Certification Grants OSA's Petition to Represent HHC's Training and Development Staff.

AC-1573-14, AC 1574-14 and AC 1575-14.

OSA petitioned the Board of Certification to amend OSA's Certification No. 3-88 to add the HHC titles Program Manager, Training and Development, Levels I and II; Assistant Director of Workforce Training and Development Managerial Pay Plan II and III; and Director of Workforce Training and Staff Development. There are approximately 30 employees in these titles. The Board granted OSA's petitioning finding that the employees in these titles were eligible for collective bargaining.

September 2015

BOARD OF COLLECTIVE BARGAINING CASES

Department's Refusal to Transfer Employee Does Not Give Rise to Union Duty of Fair Representation (DFR) Claim Because Union Unable to Secure Employee's Requested Transfer.

Petitioner Tara Johnson, a Probation Officer, alleged that the Union breached its duty of fair representation by not securing a transfer to a work location closer to her home, as she requested. Ms. Johnson appeared to believe that the Union had final say over whether or not her transfer was approved and also alleged that the Union acted in bad faith by not consistently returning her calls and because other employees allegedly got the transfers they requested. The Board found that Petitioner failed to establish a prima facie claim of a violation of the New York City Collective Bargaining Law or to allege facts sufficient to demonstrate that the Union breached its duty of fair representation. The City was thus also found not liable. Other allegations were found untimely and also dismissed.

DISCIPLINE CASES

Arbitrator Rules That Employee's One Time Menacing of Supervisor Sufficient Cause For Termination From Employment (Agency Also Established Record of Progressive Discipline).

Grievant was a Staff Analyst at HRA. HRA sought to terminate him for menacing his supervisor with a pair of scissors on one occasion. The Grievant had a long history of impulse control and anger issues and said that he tried EAP and it did not work. He had been previously suspended and demoted for aggressive and insubordinate behavior. Grievant testified that he was not menacing supervisor, but only approached her with a pair of scissors in his hand because he had been in the process of cutting the crossword out of the newspaper. Grievant recently had another discipline case where, although the charges were unrelated, the other arbitrator found that the employee lacked credibility. That decision was submitted as an exhibit in the menacing case, leading the arbitrator in this case to determine that the Grievant was also not credible in his version of events regarding his interactions with his supervisor. Grievant's termination was upheld.

Termination Sustained Where Employee Caught on Camera in Area of Cubicle From Which \$50 was Stolen From a Co-worker.

The Grievant was a City laborer working at DEP's headquarters at Lefrak City. After a DEP employee complained that \$50 was missing from her purse, which was kept in her cubicle, DEP's Director of Security reviewed video footage and saw the Grievant leaning into the employee's cubicle at the approximate time of the theft. The matter was referred to the Department of Investigation ("DOI"), and two DOI investigators interviewed the Grievant. Both investigators testified that during the interview, the Grievant admitted to taking the money from his co-worker, and contemporaneous memoranda from the time of the interview confirmed those accounts. At the hearing, the Grievant denied taking the money and denied making any admission to the DOI investigators. The Union argued that the video footage did not actually show any theft and that a confession was simply too convenient, and thus, the DOI investigators' testimonies should be discredited. The Arbitrator denied the grievance and sustained the termination, finding the DOI investigators testified credibly and had no motivation to fabricate a confession.

Termination of Long Term Employee Upheld Where Employee was AWOL, Previously Noticed, and Failed to Contact Agency.

The Grievant was a 17 year City employee with 8 years as a Job Opportunity Specialist with HRA. The Grievant's absence began on August 12, 2010, and she was terminated from employment on April 11, 2011 following charges. The Grievant had submitted a request for FMLA leave of an indeterminate length for a medical condition, to begin September 7, 2010 – the faxed document was submitted on December 10, 2010, but the agency determined that the Grievant had already exhausted her twelve-week FMLA allowance. In addition, the FMLA Physician Certification form was incomplete and illegible. Consequently, HRA contacted the physician's office to verify the form. HRA was informed that the provider had no current information on the Grievant's condition since she had not complied with instructions for follow-up care since October 2010. The agency notified the Grievant by mail on December 10, 2010 that her FMLA application had been disapproved and gave her until January 5, 2011 to provide medical documentation in support of her continued absences. In the hearing, the Grievant submitted over 30 documents that she claims were sent to the agency in support of her application for FMLA leave – many of the documents were incomplete, untimely or illegible, and there was no evidence that she transmitted them to the employer prior to December 10, 2010.

The Arbitrator sustained the termination. The arbitrator noted in his decision that the Grievant was necessarily aware of the documentary requirements for such an extended absence since she had recently been disciplined for a similar failure and accepted a 25-day suspension. He found that there was sufficient cause for termination under the circumstances,

irrespective of the nature of the Grievant's condition, based on the Grievant's failure to communicate with the employer or to provide adequate medical documentation.

OUT OF TITLE (OOT) CASES

Regular Assignment to Employees of Duties Outside their Job Specifications Defined As Out of Title. Cease and Desist Order Appropriate Under the Facts of This Case.

Hudson River Park Trust contracted with Parks for Associate Urban Park Rangers ("AUPRs") and Urban Park Rangers ("UPRs") to provide security and law enforcement services in Hudson River Park. AUPRs and UPRs were assigned to move approximately 150 steel barricades at night to block entrances at Hudson River Park. The barricades are also used to close off areas during emergencies and special events. The Union argued this work is physically demanding, manual work that Maintenance and Operations staff should perform, not AUPRs and UPRs, and that this work is unique to Hudson River Park. The City argued this work is related to the crowd control and safety services UPRs and AUPRs perform as described in their job specifications and emphasized that moving barricades is included as an example of a typical task in the UPR notice of examination. The City further presented testimony that AUPRs and UPRs move barricades at special events throughout the City and to similarly close the Brooklyn Bridge Park at night.

The Arbitrator determined that the movement of the substantial number of metal barricades a distance of 30 feet on a nightly basis for approximately 3 hours each night was out-of-title work for AUPRs and UPRs. However, he distinguished the basic moving of metal barricades for crowd control purposes at special events or to close of a small number of park areas or larger areas in the event of an emergency and determined these functions were not out-of-title for AUPRs and UPRs. He determined no monetary remedy was available to the Grievants because they were not performing duties of a job title with a higher rate of pay and instead ordered Parks to cease and desist.

Providing Occasional Translation of Customer Inquiries Does Not Rise to the Level of Out of Title Work.

Arbitrator denied the grievance of a Clerical Associate Level 2 who claimed to be performing the duties of a Clerical Associate Level 3, primarily based on the fact that she occasionally performed translation of customer inquiries in her role greeting clients in the Office of Child Support Enforcement ("OCSE"). The Grievant is assigned to greet clients at the OCSE reception area, answer questions, review documentation and direct them to the appropriate personnel in the office. In the course of performing these duties, the Grievant will occasionally serve as a translator between a client and a caseworker because she is fluent in Spanish. Both the Grievant and the employer verified that this task was not part of her assigned duties. The parties disagreed on the amount of time the Grievant spends doing translations – her supervisor stated it was "occasional" and the Grievant testified that it took approximately 25% of her time. The agency asserted, and the Grievant acknowledged, that she would not be subject to any adverse consequence if she were to refuse to do the translation.

Notwithstanding the fact that the record established the Grievant is an excellent employee, the arbitrator determined that there was insufficient evidence to support her claim to higher level work. There was nothing to suggest that she responded any differently to clients in Spanish than in English, nor was it established that assisting clients in Spanish was more complex or challenging. In the arbitrator's view, the Grievant's translation was part and parcel of performing her in-title duties "with some latitude for independent judgment" and does not constitute duties "substantially different" from those of her Clerical Associate, Level 2 assignment.

Although Interaction With The Public was Not Part of Job Specification, Employee was Still not Performing Out of Title Work (But Note: Most Arbitrators Routinely Rule Otherwise).

The Grievant was a Computer Aide working as a registrar for day care providers. She collected information for their day care permits applications and renewals and entered it into computer databases. She claimed that the work she was doing was more complex, and that she spent a great deal of time counseling applicants, which was not in the job specification for Computer Aide, but was more analytic and administrative, like Principal Administrative Associate work. The City argued that the Union did not prove that the work done by the grievant was substantially different (neither qualitatively nor quantitatively) from the Computer Aide job specification. The arbitrator found that the aspect of the Grievant's job that required interaction with the public was not covered by either job specifications, and that the Union failed to proffer evidence that these interactions were a quantitatively significant aspect of the Grievant's day. Further, the City had submitted a previous decision by another arbitrator, concerning the same Grievant, same duties, and same job position, wherein the grievance was denied. The current arbitrator did not believe that it was necessary to depart from the prior arbitrator's determination. The out of title grievance was denied.

Quality Health Care/Cost Containment

OLR is pleased to report that we attained the first year healthcare cost savings goal of \$400 million for Fiscal Year 2015. The City and the Municipal Labor Committee worked together to implement a number of programs designed to bend the health care cost curve for the City's plans including the Dependent Eligibility Verification Audit, changes to the Care Management program to add Complex Case Management, changes to the prescription drug contract and changing the plan from a fully insured rate to a minimum premium rate.

This was the first step in reaching the four year \$3.4 billion savings goal for Fiscal Years 2015 – FY 2018. For Fiscal Year 2016, we estimate that we are over 90% of the way towards meeting our \$700 million goal. In Fiscal Year 2016, we have implemented a Diabetes Case Management program, and we will be making additional changes to the Care Management program including outpatient authorization requirements. Another important initiative we are rolling out now is an increased buy-out payment for employees with access to other insurance coverage that choose to opt out of the City Plan. The City is tripling the incentive, going to a \$1500 payment for individual coverage opt outs and \$3000 for family coverage.



Achieving the \$3.4 billion savings



Data Source: OLR Estimates, September 2014

Office of Labor Relations

New Staff – OLR is growing

Executive Division

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Contract Management

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Dependent Eligibility Verification Audit Unit

Eric Best

Employee Assistance Program

John Sheehan

Financial Management

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Research & Evaluation

Misty Smith

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Office of Labor Relations Step III Process

Step III grievances, as per the bargained collective bargaining agreements, are presented to the Commissioner of Labor Relations or the Commissioner's designee.

WHO May Request a Step III Conference?

- A union-represented employee.
- A certified union with a collective bargaining agreement with the City and HHC, with certain exceptions such as the Department of Education, the New York City Housing Authority and other authorities and non-mayoral entities.

WHEN is a Request for Step III Review Made?

- Generally, requests are made after the issuance of a Step II determination at the agency level.
- The Article in the collective bargaining agreement setting forth the Grievance Procedure details the controlling timelines.

WHAT Matters are Reviewed at Step III?

- Only matters that are grievable under the relevant collective bargaining agreements are scheduled for Step III conferences.
- Whether a matter is grievable is determined by the definition of grievance in the collective bargaining agreements. Generally, grievable matters include a dispute concerning the application or interpretation of the terms of the collective bargaining agreement; a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the employer applicable to the agency which employs the grievant affecting terms and condition of employment, with certain exceptions; a claimed assignment of employees to duties substantially different from those stated in their job specifications; and a claimed wrongful disciplinary action taken against an employee against whom charges of incompetence or misconduct have been filed.
- Additionally, the Step III Division is designated to hear recoupment cases. These are direct appeals of the employer's written notice to the employee of the employer's intent to recoup an erroneous overpayment from the employee's salary. Under Article IX of the *Citywide Agreement*, recoupment appeals are not subject to review or arbitration; these matters initiate and conclude at the Step III Level.
- By the practice of the parties, within 15 days of the close of the record a written Step III Reply issues. Then the Unions for most of the bargaining units have 15 work days from receipt of the Step III Reply to proceed to arbitration.

WHERE are Step III Conferences Held?

- Step III Conferences are held at the offices of the City of New York Office of Labor Relations, 40 Rector Street, 4th Floor, New York, New York 10006. All participants must bring picture identification to gain entrance into the building.

WHY are Step III Conferences Necessary?

- Our role is to assist in the furtherance of sound labor relations between employers such as City Agencies and HHC and the unions. We also provide independent review of the facts and issues.
- In addition to providing for the orderly and expeditious review of grievance appeals, the Chief Review Officer and the Review Officers are available to provide general guidance to City Agencies, HHC, and the Unions in the effective use of the grievance appeals process. Please contact our office with any questions or concerns you may have about the process.

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New York City Employee Benefits Overview

Employee Health Benefits Program (HBP) Transfer Period:

For active employees, the Employee Health Benefits Program Transfer Period for calendar year 2016 is October 1, 2015 through October 31, 2015. It will be effective at the first full pay date in January 2016.

Effective January 2016, all active City employees are eligible to choose the MetroPlus Gold health plan.

For retirees, the transfer period is November 1, 2015 through November 30, 2015.

Flexible Spending Accounts (FSA) Program Open Enrollment Period:

The annual enrollment period for Plan Year 2016 is September 21, 2015 through October 30, 2015. This enrollment will be effective January 1, 2016. The FSA program consists of the following programs:

- Health Care Flexible Spending Accounts Program (HCFSA) for out-of- Pocket medical expenses
- Dependent Care Assistance Program (DeCAP) for out- of- pocket dependent care expenses up to age 13
- MSC Buy-Out Waiver Program to receive incentive payments for waiving City health insurance and having non-City group health insurance coverage
- MSC Premium Conversion which allows for health premiums to be deducted from employee's paychecks on a pre-tax basis, which reduces the employee's taxable income, thereby saving the employee money.

What are the Buy-Out Waiver incentive payment amounts and when are they paid?

Beginning in 2016, the Buy-Out Waiver incentive payment amounts increase to \$1,500 for individual and \$3,000 for family, annually. Payments are made in June and December, which are included in the employee's paychecks.

Management Benefits Fund (MBF) Benefits Available for Active Employees:

MBF benefits are available to active employees whose titles are ineligible for collective bargaining, whose duties are managerial/confidential, and whose regular work schedule is at least 20 hours per week.

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The following is a list of MBF benefits available for active employees:

- Basic Life: 1 times (1x) their Annual Salary, up to \$50,000 maximum(Paid by Fund)
- GUL: 8 times (1x) their Annual Salary, up to \$1 million for member, \$250,000 for spouse (Paid by Member)
- LTD: 66 2/3 of annual salary, up to \$5,000 monthly, after 6-month waiting period
- Dental: Annual maximum up to \$4,000 per person and \$4,000 for lifetime orthodontia
- Vision: Covered for eye exam and eye wear, annually
- SMMP:
 - Catastrophic plan which supplements basic City health coverage
 - Covers services for out-of-pocket medical expenses (90% for medical and 80% for RX after the deductible is met, \$500 per person)
- Health and Fitness Benefit: Up to \$500, annually, for member and spouse combined.

[For more information...](#)

Visit the OLR Web site @ nyc.gov/olr

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New York City Employee Assistance Program (NYC EAP)

The NYC EAP is designed to assist City of New York non-uniform Mayoral agencies, New York City Housing Authority and Health and Hospitals Corporation. Employees and their family members of these agencies who are experiencing a wide range of personal problems. Areas of services include financial problems, child care, mental health issues, stress, chemical dependency, eldercare, anxiety, depression, panic disorder and post-traumatic stress disorder (PTSD).

Working with the EAP can greatly improve the health and well-being of employees and their family members. The NYC EAP offers all employees and their families non-discriminatory counseling, information, and referrals to help resolve personal problems efficiently and confidentially.

All EAP counselors are Master level, NYS Licensed Mental Health professionals. For additional information on our services or to schedule an orientation for your agency, [call 212-306-7660 and ask for either Kevin Bulger or Tim Sheahan](tel:212-306-7660). The New York City Employee Assistance Program is located at 250 Broadway, 28th floor. The office is open Monday- Friday, 8am-7pm.

Employees who are not covered by the NYC EAP can receive services from either their agency or union EAP. Since not all EAPs offer the same services, we encourage you to call your agency or union EAP for further details.

Employees of the Police and Correction Departments may use their agency's EAP or the NYC EAP for alcohol treatment services. If employees wish to receive treatment for substance abuse treatment other than alcohol they must self-refer through their own health plan.

Agency EAPs

Department of Sanitation
Employee Assistance Unit
212.437.4867

NYC Fire Department
Counseling Services Unit
212.570.1693

NYC Police Department
Counseling Unit
718.834.8816

NYC Correction Department
Care Unit
718.546.8331

NYC Agencies (Non-Uniform)
NYC Employee Assistance Program (NYCEAP)
212.306.7660 or email eap@olr.nyc.gov

Union EAPs

DC 37 Health & Security
Personal Services Unit
212.815.1250

NYC Police Organization Providing Peer
Assistance (POPPA)
212.298.9111

Unified Federation of Teachers
Member Assistance Program
212.701.9411