Plumbers Local Union No. 1, U.A., AFL-CIO, 1 OCB2d 28 (BCB 2008)

(Arb) (Docket No. BCB-2651-07) (A-12511-07). **Aff'd,** *Matter of Plumbers Loc. Union No. 1 v. Gold*, Ind. No. 112139/08 (Sup. Ct. N.Y. Co. Feb. 2, 2010) .

***Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the New York City Department of Education violated the parties' Night Shift Agreement. The City argues that the DOE is not a municipal agency, has not elected to be subject to the NYCCBL, nor has it been made so by state law. Therefore, the Union could not invoke the arbitration procedures set forth in NYCCBL § 12-312 and § 1-06 of the Rules of the City of New York. The Union argues that the DOE is a municipal agency and that it has establish a nexus between the subject of the grievance and provisions of the Night Shift Agreement. The Board finds that the New York City Board of Education is the employer and that it is not subject to the NYCCBL. Accordingly, we lack of jurisdiction, the petition is dismissed and the request for arbitration is denied. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

PLUMBERS LOCAL UNION No. 1, U.A., AFL-CIO

Respondent.

DECISION AND ORDER

On September 7, 2007, the Plumbers Local Union No. 1, U.A., AFL-CIO ("Union") filed a Request for Arbitration ("RFA") alleging that the New York City Department of Education ("DOE" or "Department") violated the Night Shift Agreement between the parties by failing and/or refusing to assign Supervising Plumbers to the night shift. On September 21, 2007, the City of New York

("City") filed a petition challenging the arbitrability of the grievance to the extent that the RFA affects the legal rights and obligations of the City. The DOE has not appeared, nor is the City acting on their behalf.[1] The City argues that the RFA should be denied because the DOE is not a municipal agency, has not elected to be subject to the NYCCBL, and has not been made so by state law. The DOE, therefore, is not subject to § 12-312 of the New York City Collective Bargaining Law ("NYCCBL") or § 1-06 of the Rules of the City of New York, and the Union cannot invoke the arbitration provisions contained therein. The City further argues that Mayoral Executive Order ("EO") 83 also fails to provide a right to arbitrate a grievance to DOE employees. Finally, the City argues that the Union has failed to establish a nexus between the subject of the grievance and a specific contract provision granting the Union a right to grieve the instant dispute.

Although both parties refer to the employer as the DOE, for reasons explained herein, we find that the New York City Board of Education ("BOE") is the employer of City school district employees and, as such, it is not automatically subject to the NYCCBL, has not elected to be so subject, nor has it been made subject by state law. We, therefore, have no jurisdiction and dismiss the City's petition. We similarly deny the RFA due to lack of jurisdiction.[2]

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[1] The City states that "[t]o the extent that the Request for Arbitration affects the legal rights and obligations of the City, Petitioner challenges the arbitrability of the instant grievance." (Pet. ¶ 6).

[2] The instant matter is one of four related cases in which the City challenged the arbitrability of a grievance filed against the DOE. The other three cases involve the New York City District Council of Carpenters and Vicinity, UBCJA ("Carpenters' Union"), docketed as BCB-2639-07, BCB-2643-07, and BCB-2644-07. The legal arguments and issues in the four case are identical, and the three Carpenters' Union cases have been consolidated. This case was not consolidated with the other three because it involves a different union.

BACKGROUND

The Union represents the Plumber and Supervising Plumber titles in the City school district. These titles are prevailing wage titles as defined by New York State Labor Law § 220 ("Section 220"). Section 220.8-d provides that the public employer and the employee organization "shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements . . ." These agreements must be approved by the New York City Office of the Comptroller ("Comptroller") and are referred to as Consent Determinations. The Comptroller issued such a Consent Determination, dated May 18, 2005, signed by the Union and the City's Office of Labor Relations ("OLR") acting "on behalf of the City et al." (Pet Ex. 4, p. 1). Although the Consent Determination provides that its operative period was July 1, 2000, through June 30, 2005, the parties agree it remains in effect until replaced. Neither the City school district, the BOE, nor the DOE, are referenced in the Consent Determination, nor are they signatories. It is undisputed, however, that the DOE has agreed to abide by the Consent Determination.

On February 2, 2007, the DOE entered into the Night Shift Agreement with several unions, including Respondent, that provides a night shift differential for certain titles, including Plumber and Supervising Plumber.[3] In the Night Shift Agreement, the DOE agreed that "the Department will abide by all the provisions of the Consent Determinations." (Ans. Ex. F, p. 4). The Night Shift Agreement arose out of a series of meetings, beginning in 2005 and continuing through early 2007,

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[3] The other unions party to the Night Shift Agreement are the Carpenters' Union; Local Union 1969, Civil Service Employees, IUPAT; City Employees Union, Local 237, I.B.T.; District Council 37, AFSCME, AFL-CIO; and Local #3, I.B.E.W. (Ans. Ex. F, p. 6).

between the unions, the DOE, OLR, and the New York City Office of Management and Budget. According to another DOE document, entitled the Nightshift Implementation Q&A, at one such meeting, on January 19, 2007, in response to a question as to what proportion of the night shift staffing would be supervisory personnel, the DOE responded that the "[i]ntent is to use the same proportion as the day shift." (*Id.* at p.2).[4] The Night Shift Agreement was signed two weeks later and states that the "Department intends to include supervisors on the night shift in those trades where the numbers of employees warrants assignments of supervisors." (Ans. Ex. F, p. 3). Only the DOE and the unions are signatories to the Night Shift Agreement; the City does not appear as a signatory.

Neither the Night Shift Agreement nor the Consent Determination contains grievance or arbitration provisions. The parties disagree as to whether these agreements are collective bargaining agreements. The City avers that the Union "does not have an economic or non-economic collective bargaining agreement" with either the DOE or the City. (Pet. ¶¶ 25, 26). The Union alleges that both the Night Shift Agreement and the Consent Determination are collective bargaining agreements. In support, the Union notes that, while the Consent Determination itself does not include the term "collective bargaining agreement," it does reference and incorporate a General Waiver and Release, appended as the last page, which, in turn, describes the Consent Determination as a "collective bargaining agreement." (Pet. Ex. 4). The Night Shift Agreement, according to the Union, resulted from numerous "bargaining sessions" and "formal negotiation sessions." (Ans. ¶¶ 71 & 73, respectively).

On March 29, 2007, the Union, pursuant to EO 83, filed a joint Step I and Step II grievance

[4] The Board takes administrative notice of the Nightshift Q&A, which was appended as an exhibit to the answer in a related challenge to arbitrability, docketed BCB-2643-07.

with the DOE alleging the following dispute:

> Since on or about March 12, 2007, the [DOE] has violated the Night Shift Agreement between the DOE and participating labor organizations, including the Union, by, among other things, failing and/or refusing to assign Supervising Plumbers on the night shift, while assigning 16 Plumbers to the Night Shift.

(Pet. Ex. G). There was no response to this grievance. On April 13, 2007, the Union filed a Step III grievance with the DOE. Once again, there was no response. Although the Union referenced EO 83 in the above filings, the DOE did not assert–and to this date has not asserted–that it is not bound by EO 83. On July 10, 2007, the Union filed a Step IV grievance with the OLR, to which there was no reply. The RFA was filed with the Board on July 24, 2007, naming the DOE as the public employer. The City, not listing the DOE as petitioner nor claiming to act on its behalf, filed the instant action on September 21, 2007.

BOE distinguished from DOE

Before addressing the position of the parties, the status of the City school district must be clarified. Prior to 2002, the City school district was governed by the BOE, which appointed the Chancellor. In July 2002, the New York State Education Law ("Education Law") was amended by Chapter 91 of Assembly Bill 11627, 2002 N.Y. ALS 91 ("2002 Amendments"), significantly reducing the powers of the BOE.

Education Law § 2554, which sets forth the powers of a board of education in New York state, was amended to add "except the city board of the city of New York." 2002 Amendments, 2002 N.Y. ALS 91, * 2. Education Law § 2590-g sets forth the powers of the BOE, and the preamble thereto was amended to add "[n]othing herein contained shall be construed to require or authorize the day-to-day supervision or the administration of the operations of any school within the

city school district of the city of New York." 2002 Amendments, 2002 N.Y. ALS 91, * 11.[5] Throughout Education Law § 2590-h, which defines the powers of the Chancellor, the phrase "subject to the approval of the city board" was deleted wherever appearing. *Id.* at * 12. Additionally, the 2002 Amendments deleted most of the powers of the BOE, including the authority to appoint the Chancellor, which now rests with Mayor.[6] The 2002 Amendments reduced the BOE to an advisory body with its other former power and responsibilities transferred to the Chancellor and the Mayor. One court described the change as thus:

> In 2002, Education Law § 2554 was amended, stripping from the New York City Board of Education the powers granted to other city school boards Instead, the amended provision of Education Law § 2590-h (17) transfers the powers previously exercised by the Board of Education to the Chancellor.

Matter of P.I. v. New York City Bd. of Educ., 10 Misc. 3d 1073A 2006 N.Y. Misc. LEXIS 71, * 3

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[5] The preamble to Education Law § 2590-g, prior to the 2002 Amendments, read:

> Powers and duties of the city board. The city board shall advise the chancellor on matters of policy affecting the welfare of the city school district and its pupils. Except as otherwise provided by law, the board shall exercise no executive power and perform no executive or administrative functions. The board shall have the power and duty to:

2002 Amendments, 2002 N.Y. ALS 91, * 11.

[6] The opening paragraph of Education Law § 2590-h now reads, in pertinent part:

> Such chancellor shall serve at the pleasure of and be employed by the mayor of the city of New York by contract . . .

Education Law § 2590-h initially read, in pertinent part:

> The office of chancellor of the city district is hereby continued. It shall be filled by a person employed by the city board by contract . . .

2002 Amendments, 2002 N.Y. ALS 91, * 12.

(Sup Ct New York Co Jan. 17, 2006) (citation omitted).[7] *See also Culotta v. City of New York*, 5 Misc. 3d 583, 587 (Sup. Ct. Richmond Co. 2004) ("chapter 91 of the Laws of 2002 . . . have rocked the governance of New York City schools at its foundation.").

However, Education Law § 2590-b(1)(a) was amended to explicitly state that the "board of education of the city school district of the city of New York is hereby continued." 2002 Amendments, 2002 N.Y. ALS 91, * 6.[8] *See also Culotta*, 5 Misc. 3d at 587 ("The governance change, however, did not eliminate the Board of Education . . . Its existence was specifically continued by Education Law § 2590-b (1) (a).").

Also, the 2002 Amendments did not alter Education Law § 2590-g(2), which states that the

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[7] Education Law § 2590-h (17) now reads, in full:

> Possess those powers and duties described in section twenty-five hundred fifty-four of this title, the exercise of which shall be in a manner not inconsistent with the provisions of this article and the city-wide educational policies of the city board.

[8] Education Law § 2590-b(1)(a) reads in full:

> The board of education of the city school district of the city of New York is hereby continued. Such board of education shall consist of thirteen members: one member to be appointed by each borough president of the city of New York; seven members to be appointed by the mayor of the city of New York; and the chancellor. The chancellor shall serve as the chairperson of the city board. All twelve appointed members shall serve at the pleasure of the appointing authority and shall not be employed in any capacity by the city of New York, or a subdivision thereof, or the city board. Each borough president's appointee shall be a resident of the borough for which the borough president appointing him or her was elected and shall be the parent of a child attending a public school within the city school district of the city of New York. Each mayoral appointee shall be a resident of the city. Any vacancy shall be filled by appointment by the appropriate appointing authority. Notwithstanding any provision of local law, the members of the board shall not have staff, offices, or vehicles assigned to them or receive compensation for their services, but shall be reimbursed for the actual and necessary expenses incurred by them in the performance of their duties.

BOE shall "for all purposes, be the government or public employer of all persons appointed or assigned by the city board or the community districts."[9] Despite Education Law § 2590-g(2), both parties identify the DOE as the employer, not the BOE, and the Night Shift Agreement refers to the BOE as the "predecessor" of the DOE. (Pet Ex. 4, p. 4).

The first reference to DOE appears in 2003, when the BOE issued the "By-Laws of the Panel for Educational Policy of the Department of Education of the City School District of the City of New York" ("2003 BOE By-Laws") (Rep. Ex 1).[10] With these By-Laws, the BOE renamed itself to the "Panel for Educational Policy" and stated that the "City School District of the City of New York . . . shall be designated as the Department of Education of the City of New York."[11] The DOE was

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[9] Education Law § 2590-g(2) reads in full:

> for all purposes, be the government or public employer of all persons appointed or assigned by the city board or the community districts; provided, however, that the chancellor shall have the authority to appoint staff pursuant to subdivision forty-one of section twenty-five hundred ninety-h of this article;

Educational Law § 2590-h defines the powers of the Chancellor and § 25 thereof concerns the Chancellor's power to transfer principals.

[10] The 2003 BOE By-Laws can be found on line at the DOE website, http://schools.nyc.gov/NR/rdonlyres/81EC748F-A8E8-4EA4-9C02-AC372918A065/1076/By_Laws.pdf.

[11] The preamble to the 2003 BOE By-Laws reads, in pertinent part:

> The Board of Education of the City of School District of the City of New York is created by the Legislature of the State of New York and derives its powers from State law. The thirteen member body designated as the Board of Education in section 2590-g of the Education Law shall be known as the Panel for Educational Policy. The Panel for Educational Policy is a part of the governance structure responsible for the City School District of the City of New York, subject to the laws of the State of New York and the regulations of the State Department of Education. Other parts of the structure include the Chancellor, superintendents, community school boards,

described as consisting of the Panel for Educational Policy, the Chancellor, superintendents, community school boards, principals, and school leadership teams. The DOE does not have an authorizing statute, nor is it mentioned in the City charter. *Perez v. City of New York*, 9 Misc. 3d 934, 935 (Sup. Ct. Bronx Co. 2005) ("Significantly, the Department of Education is nowhere mentioned in the legislation and has no independent legal status."). The DOE appears to have been created out of the 2003 BOE By-Laws. *See Nacipucha v. City of New York*, 18 Misc. 3d 846, 850-851 (Sup. Ct. Bronx Co. 2008) ("Although that legislation itself made no specific reference to a 'Department of Education of the City of New York', the by laws subsequently adopted by the Board, provide that this thirteen member body 'shall be known as the Panel for Educational Policy', which together with the Chancellor and other school employees is designated as the 'Department of Education of the City of New York.'") (quoting 2003 BOE By-Laws).[12]

Recently, the Court of Appeals for the Second Circuit remanded a case to the Eastern District of New York to address the specific question of "whether the Board [of Education], by amending its by-laws, (a) effectively created an entity called the New York City Department of Education and, if so, whether that entity is a subdivision of the Board as opposed to a department of the City of New York." *Ximines v. George Wingate High School and New York City Dept. Of Education*, 516 F.3d

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principals, and school leadership teams. Together this structure shall be designated as the Department of Education of the City of New York.

[12] Several courts, without analysis, have noted the name change for the City school district from BOE to DOE. *See, e.g., Varsity Transit Inc. v. Board of Education*, 5 N.Y.3d 532, fn.1 (2007) (In a contract case, the Court of Appeals recognized that the City school district is now doing business, and entering contracts, as the Department of Education); *D.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 506 n 1 (2nd Cir. 2006) (Court noted that the "New York City Board of Education has been renamed the 'New York City Department of Education.'"); *A.R. ex rel. R.V. v. New York City Dep't. of Educ.*, 407 F.3d 65, 67 n. 2 (2d Cir. 2005) (same as *D.D.*).

156, 159 (2nd Cir. 2008). The *Ximines* Court noted that the BOE "following the 2002 reorganization, adopted a by-law that purported to change its name to the Panel for Educational Policy and to create something called the New York City Department of Education, which it defined to include the Panel and 'the Chancellor, superintendents, community school boards, principals, and school leadership teams.' In this regard, we note that departments of the City of New York typically, perhaps uniformly, have been created by the City Charter, which does not create a New York City Department of Education." (quoting 2003 BOE By-Laws, citations omitted).

POSITIONS OF THE PARTIES

City's Position

The City argues that the DOE is a separate legal entity from the City and that the 2002 Amendments did not revise the definitions provided in the NYCCBL. Rather, the City argues that "the DOE is the same 'board of education'" referred to in the NYCCBL. (Rep. p.3). Therefore, the DOE is not automatically covered by the NYCCBL because the BOE is explicitly excluded from such automatic coverage. NYCCBL § 12-304 states that the NYCCBL is applicable to (i) all municipal agencies; (ii) public employers who elect, by executive order with the mayor's consent, to be covered; and (iii) public employers which have been made subject to the NYCCBL by state law.[13] The term municipal agency is defined in NYCCBL § 12-303(d) and it explicitly excludes

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[13] NYCCBL § 12-304 reads in full:

This chapter shall be applicable to:

a. All municipal agencies and to the public employees and public employees organizations thereof;

from that definition is any "agencies specified in [NYCCBL § 12-303(g)(2)]."[14] NYCCBL § 12-303(g)(2), in turn, defines public employers and one of the agencies specified therein is the "board of education."[15] Therefore, to be subject to the NYCCBL, the DOE must so elect or be made so by

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> b. any agency or public employer, and the public employees and public employee organizations thereof, which have been made subject to this chapter by state law;
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> c. any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable, subject to approval by the mayor, provided, however, that any such election by the New York city board of education shall not include any teacher as defined in section 13-501 of the administrative code or any employee who works in that capacity or any paraprofessional employees with teaching functions; and
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> d. any public employer, and the public employees and public employee organizations thereof, to whom the provisions of this chapter are made applicable pursuant to paragraph four of subdivision c of section 12-309 of this chapter.

NYCCBL § 12-309(c)(4), in turn, reads in full:

> On the request of the mayor, to make available the mediation, impasse, and arbitration services of the office of collective bargaining to public employers and public employee organizations not otherwise entitled to make use thereof at a cost to them to be determined by the board; and

[14] NYCCBL § 12-303(d) reads in full:

> The term "municipal agency" shall mean an administration, department, division, bureau, office, board, or commission, or other agency of the city established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the city treasury, other than the agencies specified in paragraph two of subdivision g of this section.

[15] NYCCBL § 12-303(g)(2) reads in full:

> The term "public employer" shall mean (1) any municipal agency; (2) the board of education, the New York city health and hospitals corporation, the New York city off-track betting corporation, the New York city board of elections and the public

state law. This is underscored by NYCCBL § 12-304(c), which states "that any such election by the New York city board of education shall not include any teacher as defined in section 13-501 of the administrative code or any employee who works in that capacity or any paraprofessional employees with teaching functions." The exclusion of pedagogical employees does not imply the inclusion of non-pedagogical employees. Rather, this distinction underscores that the DOE could elect NYCCBL coverage for non-pedagogical employees, an election the DOE has not made. The City further argues that the Union must be deemed to recognize that the DOE has not so elected coverage under the NYCCBL by virtue of the Union's past filings of an improper practice petition with the New York State Public Employment Relations Board ("PERB"), instead of this Board, citing *Plumbers Local Union No. 1, UA, AFL-CIO and Board of Education of the City School District of the City of New York*, 39 PERB ¶ 3014 (2006). Nor has state law ever made the DOE subject to the NYCCBL. Therefore, the DOE is not subject to the NYCCBL and the Union cannot invoke the Board's arbitration procedures set forth in NYCCBL § 12-312 or OCB Rule § 1-06.

In response to the Union's argument that the Mayor's power to appoint the head of the DOE, the Chancellor, makes it a mayoral agency subject to the NYCCBL and EO 83, the City argues that the NYCCBL explicitly contemplates situations in which an entity may be headed by a mayoral appointee and yet not be a municipal agency for the purposes of the NYCCBL, and asserts that the

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> administrator and the district attorney of any county within the city of New York; (3) any public authority other than a state public authority as defined in subdivision eight of section two hundred one of the civil service law, whose activities are conducted in whole or in substantial part within the city; and (4) any public benefit corporation, or any museum, library, zoological garden or similar cultural institution, which is a public employer or government within the meaning of article fourteen of the civil service law, employing personnel whose salary is paid in whole or in part from the city treasury.

DOE is such a non-municipal agency public employer. The City notes that prior to the 2002 Amendments, the Mayor appointed members to the BOE. Thus, the nature of the Chancellor as a mayoral appointee is not dispositive.

The City further argues that EO 83, which provides a grievance and arbitration procedure, does not apply to the DOE because being subject to the NYCCBL is a prerequisite for coverage under EO 83.[16] Therefore, it cannot serve as the source of the Union's alleged grievance rights. The City notes that the Education Law is set to expire in 2009 and any ruling by the Board that EO 83 is applicable will only be valid for eighteen months.

Finally, the City argues that the RFA fails to establish a nexus between the subject of the grievance and a specific contract provision granting the Union a right to grieve the instant dispute. That is, the Union has not identified the source of its grievance rights. The City argues that neither the Night Shift Agreement nor the Consent Determination are collective bargaining agreements, and that neither document contains grievance rights. Therefore, the Union has failed to establish that the parties agreed to arbitrate this dispute.

Union's Position

The Union argues that since July 2002 when the Education Law was amended to place the DOE under the Mayor's control by giving him the power to appoint and remove the Chancellor thereof, non-pedagogical employees of the DOE became covered by EO 83, which provides for grievance and arbitration procedures for mayoral agency employees who are eligible for collective bargaining but do not have a grievance and arbitration procedure. Section 1 of EO 83 declares its

[16] EO 83 was issued on July 26, 1973, and was amended by EO 84 on June 17, 1985. The 1985 amendments are not pertinent to this matter.

policy is "to refer unresolved grievances with certified or designated employee organizations to impartial arbitration." The two requirements for coverage under EO 83 are set forth in § 5 thereof, which states that EO 83 is "applicable to all mayoral agency employees who are eligible for collective bargaining under the [NYCCBL]."[17] As for the first requirement, § 2(b) of EO 83 defines "mayoral agency employees" as "employees of mayoral agencies who are eligible for collective bargaining pursuant to the [NYCCBL]." The term "mayoral agency" itself is not defined in EO 83 but § 2(a) thereof states that "[t]he meaning of all terms in the [EO] shall be defined in § 173-3.0 of [Ch.] 54 of the Administrative Code of the [City]." Section 173-3.0 is now NYCCBL § 12-303, and subsection (f) thereof defines "mayoral agency" to mean "any municipal agency whose head is appointed by the mayor."

The Union notes that the Chancellor, the head of the DOE, is now appointed by the Mayor. The Union recognizes that NYCCBL § 12-303(g)(2) exempts the "board of education" from the definition of municipal agencies but argues that it does not exempt the DOE. That is, the Union argues that the July 2002 Amendments to the Education Law resulted in more than just a name change from BOE to DOE; it created a new mayoral agency, the DOE. The whole point of the 2002 Amendments was to establish mayoral control over the school system. In doing so, the legislature created a new mayoral agency, the DOE, an entity that is not exempt from the NYCCBL as its predecessor, the BOE, was and one whose employees have grievance rights under EO 83. Prior to July 2002, City school district employees were employed by the BOE. The July 2002 Amendments

[17] Section 5 of EO 83 exempts from its coverage employees in a bargaining unit which have a collective bargaining agreement containing a grievance procedure and members of the Police Force. Neither exception applies to the instant matter.

reduced the BOE to an advisory role. The BOE was explicitly stripped of all executive and administrative powers and functions. These powers were transferred to the Chancellor, who, prior to July 2002 was appointed by the BOE but after the 2002 Amendments is now appointed by, and can be removed by, the Mayor. Plumbers and Supervising Plumbers are under the direct jurisdiction of the Chancellor, who serves at the pleasure of the Mayor. The cases cited by the City implying that the BOE continues as a separate entity for tort law are inapplicable to the instant case, which concerns the status of the DOE under the NYCCBL and EO 83. The Union notes that the City identifies the DOE on its official website as a City agency. Also, DOE funds, including those used to pay the Union's members, are allocated and paid through the City's operating budget.

As for the second requirement, the Union argues that it has engaged in collective bargaining with the City and the DOE on behalf of DOE employees, both in the Consent Determination and in the Night Shift Agreement, both of which it considers collective bargaining agreements. The Union notes that Section 220 requires the parties to "negotiate and enter into a written agreement." Also, the General Release and Waiver incorporated into every Consent Determination explicitly refers to the Consent Determination as collective bargaining agreements. The Night Shift Agreement is a collective bargaining agreement, as it resulted from numerous "bargaining sessions." (Ans. ¶ 71). Neither, however, contains a grievance or arbitration procedures. As there exist no collective bargaining agreement between the parties containing grievance or arbitration procedures, and EO 83 contains no exception for employees of the DOE, Plumbers and Supervising Plumbers employed by the DOE are covered by EO 83.

The Union argues that public policy strongly favors arbitration, as the alternative in the

instant case would be a lawsuit heard by courts lacking expertise in labor law. By virtue of EO 83, the parties agreed to arbitrate employee grievances. The nexus is clear. The specific issue herein, the staffing of supervisors, was addressed during the Night Shift Agreement negotiations. While no specific ratio of Supervising Plumbers to Plumbers is in the Night Shift Agreement, it does clearly state that supervisors would be assigned as warranted. The Night Shift Agreement does not include an "integration" or "entire agreement" clause, meaning an arbitrator could look outside of the document to determine if the parties had otherwise agreed to staffing levels for supervisors. According to DOE's own internal documentation, as of January 19, 2007, two weeks before the Night Shift Agreement was signed, the DOE represented that supervisor staffing levels for the night shift were supposed to mirror the day shift.

DISCUSSION

The threshold inquiry is whether this Board has jurisdiction, for if the employer is not subject to the Board's jurisdiction our inquiry must end there. The parties do not dispute that prior to the 2002 Amendments, the term "board of education" as used in the NYCCBL referred to the City school district, that the BOE was the employer of City school district employees for purposes of the NYCCBL, and that the BOE was not a municipal agency, nor otherwise subject to NYCCBL.

The first issue is whether subsequent to the 2002 Amendments the BOE is still the employer of City school district employees for purposes of the NYCCBL. The City argues that as a result of the 2002 Amendments the DOE is now the employer of City school district employees and the DOE should be substituted for the term "board of education" wherever appearing in the NYCCBL. The

Union also recognizes the DOE as the employer of City school district employees but argues that the 2002 Amendments created a new mayoral agency. That is, the Union argues that the DOE has been made subject to the NYCCBL by operation of state law–the 2002 Amendments–effectively nullifying the reference to the BOE in NYCCBL § 12-303(g)(2). For reasons discussed *infra*, we disagree with the parties' contention that the DOE is the "public employer" pursuant to the NYCCBL of City school district employees.

Whether the creation of the DOE has created a new and distinct public employer in terms of the NYCCBL is a question of first impression. As a first step in analyzing this claim, we look to the plain meaning of the statutory term, when such is readily discernible. *United States v. American Trucking Assn.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. . . . In such cases we have followed their plain meaning.") (citations and editing marks omitted); *Matter of Orens v Novello*, 99 N.Y.2d 180, 185-186 (2002) ("In cases where the term at issue does not have a controlling statutory definition, courts should construe the term using its 'usual and commonly understood meaning.'") (quoting *Rosner v Metro. Property & Liability Ins. Co.*, 96 N.Y.2d 475, 479, (2001)). Both prior to the 2002 Amendments, and at present, the NYCCBL employs only the term "board of education" to denote the public employer of employees working under the aegis of the City school district. No amendment to the NYCCBL was included in the 2002 Amendments, or is necessarily required thereby. Thus, adopting a textualist reading of the NYCCBL, we would be hard put to justify any construction of the statutory term "board of education" as employed in the NYCCBL to denote any other entity, including the DOE.

However, such a literalist approach should not be adopted if the plain meaning would lead to an absurd result. *American Trucking Assn.*, 310 U.S. at 543 ("When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.") (citations and editing marks omitted); *Riggs v. Palmer*, 115 N.Y. 506, 510-511 (1889) ("speaking of the construction of statutes, says: 'If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.'") (quoting Blackstone's Commentaries); *see also Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 421 (1990) (courts are to avoid a literal construction when it leads to an absurd result).

Although the term "board of education" is not defined in the NYCCBL, its meaning is readily discernible from context to be the employer of City school district employees. NYCCBL § 12-304(c) states that the "New York city board of education shall not include any teacher" in any election for coverage under the NYCCBL. As teachers are employees of the City school district, the term "board of education" is clearly discernible as meaning the employer of City school district employees. The parties both argue that the DOE is now the employer of City school district employees for purposes of the NYCCBL. Were this reading correct, finding the term "board of education" to refer to the BOE would result in an absurdity–the NYCCBL referring to an employer without employees.

However, no such absurdity exists in this case because the 2002 Amendments amended Education Law § 2590-b(1)(a)) to read that the "board of education of the city school district of the city of New York is hereby continued." 2002 Amendments, 2002 N.Y. ALS 91, * 6. As to the question whether the BOE continues as the employer of City school district employees, while the

2002 Amendments were extensive, the legislature choose to leave untouched the first clause of Education Law § 2590-g (2), which states that the BOE shall "for all purposes, be the government or public employer of all persons appointed or assigned by the city board or the community districts." Taking the words to have their usual and commonly understood meaning, "for all purposes" must be deemed to include references in other statutes, including the NYCCBL, while "employer" means just that–the employer of City school district employees. Language in the preamble of Education Law § 2590 that generally describes the BOE as an advisory body does not justify ignoring the specific language in § 2 thereof stating that the BOE is the employer. *See Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992) (it "is a commonplace of statutory construction that the specific governs the general"); *Strategic Risk Mgmt. v. Fed. Express Corp.*, 253 A.D.2d 167, 172 (1st Dept. 1999) (following and quoting *Morales*). We also note that prior to the 2002 Amendments, the preamble to Education Law § 2590 stated that the "city board shall advise the chancellor . . . [and] shall exercise no executive power and perform no executive or administrative functions." In other words, day to day management of BOE employees rested with the Chancellor prior to 2002. While the 2002 Amendments increased the Chancellor's powers at the expense of the BOE, it did not effect the status of the BOE as employer.

The inquiry does not end here, for the Union has argued that the effect of the 2002 Amendments was to implicitly repeal NYCCBL § 12-303(d) & (g)(2) to the extent that they exclude from the definition of mayoral agency the employer of City school district employees. We must therefore look to see if the 2002 Amendments altered *sub silento* the NYCCBL. We do not opine as to whether, for other contexts and for other laws, the City school district, however defined (*i.e.*,

BOE or DOE), could be considered a mayoral agency. However, the NYCCBL provides a specific definition of mayoral agency and for this statute, the employer of City school district employees is not a mayoral agency. NYCCBL § 12-303(f) states that "[t]he term 'mayoral agency' shall mean any municipal agency whose head is appointed by the mayor."

After the 2002 Amendments, the City school district arguably fulfills the second part of the definition, as the head thereof, the Chancellor, is now appointed by the mayor. However, that, standing alone, is insufficient to make the City school district a mayoral agency because of the explicit prerequisite that only municipal agencies can be mayoral agencies. That is, mayoral agencies are a sub-set of municipal agencies and the NYCCBL does not preclude a situation where the mayor appoints the head of an agency yet that agency is not a municipal agency and, therefore, is not defined as a mayoral agency for purposes of the NYCCBL. Since NYCCBL § 12-303(d) explicitly excludes from the definition of municipal agency any agency specified in NYCCBL § 12-303(g)(2), any such agency–even if the head thereof is appointed by the Mayor–is not a municipal agency. Therefore, any agency specified in NYCCBL § 12-303(g)(2) is not a mayoral agency. NYCCBL § 12-303(g)(2) specifies the BOE–the employer of City school district employees–and that employer (whether known as the BOE or the DOE) cannot be a mayoral agency for purposes of the NYCCBL.

We could only reach the opposite conclusion by nullifying sections of the NYCCBL, something we will not do absent a clear legislative intent to do so. *See Perez v. City of New York*, 41 A.D.3d 378, 378 (1st Dept. 2007), *app. denied*, 2008 N.Y. LEXIS 1077 (2008) (overturning trial court finding that the City school district was now a mayoral agency because the "legislative changes

do not abrogate the statutory scheme.") (citing *Matter of Delmar Box Co. v. AETNA Insurance Co., et al*, 309 N.Y. 60, 66 (1955) ("It is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation.").

We note that the law disfavors the implicit repeal of statutes. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88 (1982) (repeals of statutes by implication are disfavored and the intention of the legislature to repeal must be clear and manifest); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, __ U.S. __, 127 S.Ct. 2518, 2533 (2007) (describing Court's "presumption against implied repeals."); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (describing, in context of a treaty, the "firm and obviously sound canon of construction against finding implicit repeal.").[18]

The Court of Appeals has similarly held:

It is well settled that repeal or modification of legislation by implication is not

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[18] *Kaiser Steel Corp.* involved defenses raised against non-compliance with a collective bargaining agreement provision, specifically whether the Labor Management Relations Act ("LMRA") implicitly repealed other laws. The Court held:

> Respondents' argument necessarily assumes that in enacting § 306(a) [of the LMRA], Congress implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective-bargaining agreement requiring an employer to contribute to a pension fund. Since "repeals by implication are disfavored," *Allen v. McCurry*, 449 U.S. 90, 99 (1980), "'the intention of the legislature to repeal must be clear and manifest.'" *TVA v. Hill*, 437 U.S. 153, 189 (1978), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The statutory language provides no basis for implying such a repeal, and nowhere in the legislative history is there any mention that § 306(a) might conflict with other laws.

Id.

> favored in the law and that the doctrine will be resorted to only in the clearest of cases. Put another way, a repeal by implication will not be discovered unless the conclusion is unavoidable, as when repugnancy between the two statutes is plain.

Natural Resources Defense Council v. New York City Dep't of Sanitation, 83 N.Y.2d 215, 222-223 (1994) (citations and editing marks omitted).

While the effect of the 2002 Amendments upon the NYCCBL is a question of first impression, the issue of whether the 2002 Amendments implicitly repealed other statues has been addressed, including in the tort context. New York has long had a statutory scheme which required the BOE to be sued in its own capacity and prevented the City from being sued directly for torts committed on BOE property or by BOE employees, despite the City holding the title to all BOE property and paying BOE employees out of the City treasury. After the 2002 Amendments, several trial courts accepted arguments similar to those raised herein by the Union, and concluded that the prior statutory scheme must give way to the new scheme created by the 2002 Amendments. *See, e.g., Perez*, 9 Misc. 3d at 935; *Nasser v. Nakhbo and City of New York*, 13 Misc. 3d 1223A, 2006 N.Y. Misc. LEXIS 2933, * 2 (Sup. Ct. Kings Co. 2006); *Ocasio v. City of New York*, 2005 N.Y. Misc. LEXIS 3511, * 10, 234 N.Y.L.J. 85 (Sup. Ct. Bronx Co., Nov. 1, 2005).

However, the only appellate court to date to review this issue squarely rejected the trial court's analysis and found that the tort statutes remained unchanged based upon the "cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation." *Perez*, 41 A.D.3d at 378 (quoting *Matter of Delmar Box Co.*, 309 N.Y. at 66). *Perez* reversed the lower court's finding that the BOE is a mayoral agency as the 2002 Amendments "do not abrogate the statutory scheme

for bringing lawsuits arising out of torts allegedly committed by the Board and its employees." *Id.* (citations omitted).[19] *See also Villaseca v. City of New York*, 48 A.D.3d 218 (1st Dept. 2008) (following *Perez*, reversed denial of City's motion to dismiss while affirming judgment as to liability against the BOE).[20]

Following *Perez*, the Supreme Court of Bronx County found parts of the statutory scheme that "*were not amended [] continue as binding statutory mandates*." *Nacipucha*, 18 Misc. 3d at 854 (emphasis in original).[21] *See also Caleca v. City of New York*, 18 Misc. 3d 1128A, 2008 N.Y. Misc. LEXIS 368, * 3 (Sup. Ct. Kings Co. 2008) (following *Perez*; holding that while the 2002 Amendments "provided for greater mayoral control and significantly limited the power of the Board of Education, [they] did not change the law pertaining to the relationship between the Board of Education and the City."); *Brown v. City of New York*, 18 Misc. 3d 1113A; 2007 N.Y. Misc. LEXIS 8631, * 2 (Sup. Ct. Richmond Co. 2007) (same).

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[19] *Perez* relies in part upon finding that the City school district exists separate from the City, the same argument put forth by the City in this case. While a separate existence was critical to finding that the pre-existing statutory tort scheme continued for the City school district, such a separate existence, or lack thereof, is not determinative as to the NYCCBL.

[20] Three state courts prior to *Perez* have referred to the DOE as the employer of City school district employees instead of the BOE when the DOE was named as a defendant, but did so without analysis. *See Matter of City Employees Union Local 237, IBT, AFL-CIO, v. City of New York, et al.*, 28 A.D.3d 230, 231 (1st Dept. 2006) (Union "alleged that DOE wrongfully terminated one of its membership."); *Batyreva v. New York City Dept. of Educ.*, 2008 N.Y. Misc. LEXIS 2594 (Sup. Ct., New York Co., April 30, 2008) (DOE named as defendant in retaliation complaint); *Roberts v. City of New York,* 3 Misc. 3d 549 (Sup. Ct. New York Co. 2003) (Union named DOE as a defendant when seeking injunction against layoffs).

[21] The *Nacipucha* Court was referring to "Section 521 of the City Charter (which provides that all school property 'shall be under the care and control of the Board of Education' and that 'suits in relation to such property shall be brought in the name of the said Board of Education')." *Id.*

Federal District courts have similarly found that the BOE continues to exist, that the prior statutory scheme has not been abrogated, and that the City is not liable for torts of the BOE. In *Gonzalez v. Esparza*, 2003 U.S. Dist. LEXIS 13711 (S.D.N.Y. 2003), the plaintiff sued the City and the BOE over a sexual relationship he had with a teacher when he was a student. The *Gonzalez* Court dismissed the City as a defendant, finding that the "claims against the City must be dismissed, 'since the Board of Education is an entity separate from the City itself.'" *Id.*, 2003 U.S. Dist. LEXIS 13711, * 4 (quoting *Linder v. City of N.Y.*, 263 F. Supp. 2d 585, 590-591 (E.D.N.Y. Mar. 13, 2003)). Significantly, the *Gonzalez* Court relied on New York state case law that pre-dated the 2002 Amendments, specifically *Campbell v. City of N.Y.*, 203 A.D.2d 504 (2d Dept. 1994)). The *Gonzalez* Court explained that:

> Although plaintiff argues that recent changes in the structure of the Board and the control by the mayor's office over the position of Chancellor have blurred the division between the two entities, the Board continues "for all purposes, [to] be the government or public employer of all persons appointed or assigned by the city board or the community districts[.]" N.Y. Educ. Law. § 2590-g(2) (McKinney 2003). The Court agrees with the Corporation Counsel for the City that changes in the statutory scheme regarding the interplay between the Board and the City can be best described as "political," with the Board continuing to exist as a separate and distinct legal entity from the City.

Id., 2003 U.S. Dist. LEXIS 13711, * 5 (editing marks in original). The *Perez* Court favorably cited *Gonzalez* for this point. *Perez*, 41 A.D.3d at 379. *See also Marrero v City of New York*, 2004 U.S. Dist. LEXIS 3529, * 6 (S.D.N.Y. Mar. 10, 2004) (citing *Gonzalez*, *Campbell*, and Education Law § 2590-g(2)).[22]

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[22] Some Federal District courts have substituted the DOE for the BOE without analysis, nevertheless holding that the City cannot be sued for torts of the BOE. *See McElroy v. Klein*, 2007 U.S. Dist. LEXIS 45919, * 39-40 (S.D.N.Y. June 26, 2007) (following *Gonzalez* and *Marrero* but also finding that, based upon Education Law § 2590-g(2), the plaintiff is "an employee of the DOE

Additional support comes from a Southern District of New York case concerning the constitutionality of the City's non-resident income tax ("Section 1127"). In *Patrolmen's Benevolent Assn. of the City of N.Y.*, 2004 U.S. Dist. LEXIS 18172 (S.D.N.Y. Aug. 19, 2004), the plaintiffs attempt to bolster their equal protection argument by arguing that the exemption from the tax for the "Board of Education . . . no longer is defensible because the Board has been reconstituted as the Department of Education and is listed as a mayoral agency on the City's official website." *Id.* at 24. Plaintiffs further noted that "the Mayor [now] appoints eight [of the 13] members of the Board, including the Chancellor, all of whom report directly to the Mayor." *Id.* (quoting plaintiffs' brief) (editing marks in original). Following *Gonzalez*, the Court held:

> It is true that, following the recent legislative changes granting the Mayor greater authority over the New York City schools, the Board no longer is authorized to exercise any executive power or perform any executive functions. See N.Y. Educ. Law § 2590-g. On the other hand, the Education Law, as amended, specifically provides that the Board continues "for all purposes [to] be the government or public employer of all persons appointed or assigned by the City Board or the community districts." *Id.* § 2590-g(2). In light of this declaration, the Plaintiffs cannot show, as they must, that it is no longer rational for the City to continue to treat the Board - which was originally created and still exists by virtue of State law - as a State agency for purposes of Section 1127.

Id., at * 24-25 (editing marks in original).

We also find support in *Culotta v. City of New York*, 5 Misc. 3d 583 (Sup. Ct. Richmond Co. 2004), which concerned the effect of the 2002 Amendments on zoning. In *Culotta* a developer sought a writ of mandamus to require the New York City Department of City Planning ("DCP") to

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for purposes of the FLSA, and thus also for the purposes of the New York Labor Law."); *Falchenberg v. New York City Department of Education*, 375 F. Supp. 2d 344, 347 (S.D.N.Y. 2005) (although the DOE was the named party, the Court relied upon a pre-2002 Amendment case involving the BOE when holding that the City is not liable for the torts of the DOE.) (citing *Kelly v. Bd. of Ed.*, 141 N.Y.S.2d 34, 35 (N.Y. Sup. Ct. 1955)).

issue a school seat certification, a requirement of Zoning Resolution of City of New York § 107-123 ("Zoning Resolution § 107-123").[23] A pre-requisite for granting the school seat certification was a report to the City Planning Commission ("CPC") from the BOE concerning the availability of school capacity.[24] The CPC would than create the school seat certificate for the DCP to issue. However, the 2002 Amendments stripped the BOE of the authority to issue the required report. Nevertheless, the parties presumed the DCP still had the authority to issue the school seat certification absent the BOE report. In effect, the parties believed the 2002 Amendments had implicitly repealed the requirement of the BOE report of Zoning Resolution § 107-123.

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[23] Zoning Resolution § 107-123 provides as follows:

> Public Schools: For any development containing residential uses, the Department of Buildings shall be in receipt of a certificate from the Chairperson of the City Planning Commission which certifies that sufficient school capacity exists to accommodate the anticipated primary and intermediate public school children of the development. All applications for certification pursuant to this Section shall be referred by the Chairperson of the City Planning Commission to the Board of Education.
>
> The Board of Education shall issue a report concerning the availability of school capacity within sixty days after receipt of the application. The Chairperson of the City Planning Commission shall respond within 90 days after receipt of an application.

[24] The *Culotta* Court explained the requirement for a school seat certification:

> The Pursuant to Zoning Resolution of City of New York § 107-123, as a prerequisite to applying for a building permit to construct residential dwelling units in this special district, such as the 12 units in the six detached residences that petitioner proposes to build on the property which is the subject of his application and about which mandamus is sought, the New York City Planning Commission (CPC) must certify that capacity exists sufficient to accommodate any expected increase in the pre-high school student population attributable to the proposed development.

Id., 5 Misc. 3d at 584-585.

The *Culotta* Court disagreed and held that "the legislation implementing the most recent overhaul in the governance of New York City's public schools commands a contrary conclusion." *Culotta*, 5 Misc. 3d at 586. The *Culotta* Court, after noting that the 2002 Amendments "rocked the governance of New York City schools at its foundation," began by recognizing the existence of the DOE and the continued existence of the BOE. *Id.*[25] However, the BOE can no longer provide the required report:

> Current Education Law § 2590-g provides in more than precatory language: "The city board shall advise the chancellor on matters of policy affecting the welfare of the city school district and its pupils. *The board shall exercise no executive power and perform no executive or administrative functions.*" (Emphasis supplied.) The new law then lists six specific grants of power and duty to the Board, none of which would authorize or permit the Board to provide a report to CPC as demanded in Zoning Resolution § 107-123.

Id. at 587. The *Culotta* Court concluded that "neither CPC nor DCP can lawfully perform" the act demanded of petitioner–issuing the school seat certification:

> since the Board of Education cannot lawfully provide City Planning the school capacity report essential to the seat certification process. . . . Left at the gate by the governance changes to the Board of Education without parallel revisions in the Zoning Resolution's South Richmond special district regulations, the petition must be dismissed.

Id. at 588. In short, *Culotta* refused to implicitly repeal a zoning requirement, even though the 2002

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[25] Specifically, the *Culotta* Court held:

> The radical change wrought by the Legislature shifted management responsibilities for the schools from the Board of Education to a municipal Department of Education headed by a chancellor directly appointed by the Mayor of the City of New York. The governance change, however, did not eliminate the Board of Education of the City of New York referred to in the Zoning Resolution. Its existence was specifically continued by Education Law § 2590-b (1) (a).

Id. at 586.

Amendments created an impossible situation. *See also Matter of Pena v. Robles*, 12 Misc. 3d 1163A, 2006 N.Y. Misc. LEXIS 1338, * 16 (Sup. Ct. New York Co. 2006) (citing *Culotta* as "recognizing that Chapter 91 [of the Education Law] played havoc with City Zoning resolution provisions which had not at that time been modified to address Chapter 91 changes.").

Similarly, we choose not to implicitly repeal provisions of the NYCCBL. We find nothing in the legislative history or statutes themselves indicating a desire by the legislature to abrogate the pre-existing statutory scheme defining the BOE as the employer and exempting it from automatic coverage under the NYCCBL. Therefore, just as the BOE was not a municipal agency for the purposes of the NYCCBL prior to the 2002 Amendments, it still is not, and can only be subject to the NYCCBL if it so elects or otherwise is made so by state law.[26]

As discussed *supra*, any such election is limited to non-pedagogical employees, and the BOE never made any such election. In fact, although there is no PERB decision addressing the effect of the 2002 Amendments upon its jurisdiction, improper practice charges involving non-pedagogical employees of the City school district and the unions that represent them continue to be filed with, and decided by, PERB. *See Delahaye and Amalgamated Transit Union and Board of Education of the City School District of the City of New York*, 41 PERB ¶ 3004 (2008) (fair representation claim against union); *Local Union 1969, Civil Service Employees, IUPAT, AFL-CIO, and Board of Education of the City School District of the City of New York, and Local 891, International Union of Operating Engineers, AFL-CIO*, 40 PERB ¶ 3002 (2007) (unilateral transferring unit work);

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[26] An agency not otherwise subject to the NYCCBL can be so subject at the request of the mayor pursuant to NYCCBL §§ 12-304(4) & 12-309(c)(4). These provision are not relevant to the instant matter.

Plumbers Local Union No. 1, UA, AFL-CIO and Board of Education of the City School District of the City of New York, 39 PERB ¶ 3014 (2006) (unilateral transferring unit work); *Rudin-Moore and District Council 37, AFSCME, AFL-CIO and Board of Education of the City School District of the City of New York*, 39 PERB ¶ 3010 (2006) (fair representation claim against union); *Local 372, District Council 37, AFSCME, AFL-CIO and Board of Education of the City School District of the City of New York*, 36 PERB ¶ 4579 (2003) (Maier, ALJ, layoffs and recall). We note that in 2005 the Union itself filed such an improper practice charge with PERB against the City school district, recognizing PERB's jurisdiction, and that the case caption named the BOE, not the DOE. *See Plumbers Local Union No. 1, UA, AFL-CIO and Board of Education of the City School District of the City of New York*, 39 PERB ¶ 4527 (2006).

As for the Union's argument that the DOE has become subject to the NYCCBL by virtue of state law (the 2002 Amendments), such would merely result in replacing the term "board of education" with DOE wherever appearing in the NYCCBL. For the same reasons explained, *supra*, as to why the 2002 Amendments did not make the BOE subject to the NYCCBL, so too the DOE would not be subject to the NYCCBL. That is, the Union's argument that the DOE is a mayoral agency is reliant on finding that the DOE is municipal agency for purposes of the NYCCBL–a finding we reject.

Since we find that the employer herein is not subject to this Board's jurisdiction, we decline to reach the issue as to whether the grievance is arbitrable. However, the RFA must be denied for the same reasons.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York, docketed as No. BCB-2651-07, hereby is dismissed for lack of jurisdiction; and it is further

ORDERED, that the request for arbitration filed by the Plumbers Local Union No. 1, U.A., AFL-CIO, docketed as A-12511-07, hereby is denied for lack of jurisdiction.

Dated: July 30, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER