Local 924, DC 37, 1 OCB2d 3 (BCB 2008)

(Arb) (Docket No. BCB-2672-07) (A-12484-07).

***Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the NYPD wrongfully denied overtime to a member. The City argued there was no nexus between the subject of the grievance and provisions of a collective bargaining agreement. The provisions cited by the Union are contained in an Executive Order which is not a rule, regulation, written policy, or order of the NYPD. The City also argued the assignment of overtime was a statutory managerial right, and that there were no disciplinary charges. The Board found that the lack of formal disciplinary charges was not dispositive, that the cited Executive Order constituted a rule of the employer, and that, while decisions regarding whether an agency will use overtime may be argued to be a managerial right, decisions regarding the individual distribution of overtime are not. Accordingly, the request for arbitration was granted. **(*Official decision follows*).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

-and-

LOCAL 924, DISTRICT COUNCIL 37

Respondent.

DECISION AND ORDER

On November 26, 2007, the City of New York ("City") and the New York City Police Department ("NYPD") filed a petition challenging the arbitrability of a grievance brought by Local 924 of District Council 37 ("Union" or "Local 924"). On August 23, 2007, Local 924 filed a Request for Arbitration ("RFA") alleging that the NYPD violated Article V, § 1(b) and (e), of the

Laborers (Non-Economic) Agreement ("Laborers Agreement") and §§ 1 and 8 of Mayoral Executive Order ("EO") 94-3 when the NYPD denied overtime to Thomas DeSantis ("Grievant"). The City argues that the RFA should be denied because Local 924 has failed to establish a nexus between the subject of the grievance and the Laborers Agreement as EO 94-3 is not a rule, regulation, written policy, or order of the NYPD and the Laborers Agreement itself does not address the distribution of overtime, which is a managerial right. Also, there were no formal charges levied against the Grievant. The Board found that the lack of formal charges is not dispositive, that EO 94-3 is a rule of the employer, and that the distribution of overtime is not a managerial right. Therefore, the Union demonstrated a nexus between the subject of the grievance and the Laborers Agreement. Accordingly, the petition is denied, and the RFA granted.

BACKGROUND

The Grievant was hired by the NYPD on or about January 31, 1986, and is currently employed as a City Laborer in the Barrier Division of the NYPD, which is responsible for placing and removing barriers used for traffic and crowd control. The Union alleges, but the City denies, that Grievant was given the least overtime of any employee in the Barrier Division in 2006 and 2007. According to a March 3, 2006, email from Sergeant Sean Allen, Grievant was denied overtime opportunities on March 4 and 6, 2006, "[d]ue to his tardiness, his expressed medical condition and not being a qualified Barrier truck operator." (Ans. Ex. A). According to a January 31, 2007, email from Sergeant Joseph Castaldo, a contributing factor in his decision not to consider Grievant for overtime was Grievant's history of being "incapacitated for several days due to illness and/or tardiness" following previous overtime assignments. (Ans. Ex. B).

City Laborers are prevailing rate workers whose wages and benefits are determined in accordance with Labor Law § 220 ("§ 220"). (Pet. Ex. 1). They are covered under the Laborers Agreement, not the Citywide Agreement, which does not address economic terms, such as overtime. Rather, Article III thereof incorporates by reference the determinations of the State Comptroller. (Pet. Ex. 2, page 2). The current economic terms of employment are found in such a determination, dated April 1, 2000 ("Consent Determination").[1] The Consent Determination sets the overtime rates, states that work performed in excess of 40 hours per week shall be paid at the overtime rate, that any overtime not paid within 120 days shall earn three percent interest per annum, and that all pre-existing legal claims for overtime are merged into the determination. (Pet. Ex. 1, pages 4, 6, 8 & 9). The Consent Determination does not further address overtime.

On or about September 25, 2007, the Grievant filed a Step II grievance stating: "unfair distribution of overtime[.] [Grievant] is being denied overtime, and the overtime is being given to the police officers." (Pet. Ex. 5).[2] A Step III hearing was requested on February 7, 2007; was held

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[1] Both the Laborers Agreement and the Consent Determination were for the period of April 1, 2000, through June 30, 2002, and remain in force pursuant to the status quo provisions of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). NYCCBL § 12-311(d) provides, in pertinent part:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdown, work stoppages or mass absenteeism nor shall such public employee organization induce any mass resignation, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . .

[2] The grievance form refers to EO No. 7, which was repealed and replaced by EO 94-3. The Union subsequently corrected its filing to refer to EO 94-3. (Pet. Ex. 6). There is no reference in the record to a Step I grievance.

on August 14, 2007; and a decision was issued by the Office of Labor Relations ("OLR") on August 20, 2007. The OLR denied the grievance, finding that EO 94-3 "does not mandate that each employee receive overtime and/or the manner in which overtime should be approved." (Pet. Ex. 6).

On August 22, 2007, the Union filed the instant RFA, stating that the grievance to be arbitrated is "whether the [NYPD] violated Article V, [§] 1(b) and (e), of the [Laborers Agreement] and [§§] 1 and 8 of [EO] 94-3 when the [NYPD] denied overtime to [Grievant]." (Pet. Ex. 3). Article V of the Laborers Agreement is entitled "Grievance Procedure" and § 1 defines the term "grievance." Section 1(b) defines a grievance as:

> 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 conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration;

(Pet. Ex. 2, page 3). Section 1(e) defines a grievance as:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

(Pet. Ex. 2, page 4).

EO 94-3 is an Executive Order of the Mayor addressed to all Agencies Heads and Departments and entitled "Overtime Reporting and Monitoring." (Pet. Ex. 4). Section 1 is entitled "Purpose" and reads:

> As with all City expenditures, overtime must be carefully monitored and controlled. Overtime is not a discretionary expenditure; it should be used only if planned and

> budgeted for. It is the responsibility of management to ensure that overtime is used only in accordance with City's guidelines in this area. Likewise, compensatory time should be considered as carefully as the granting of overtime. In order to implement a uniform approach towards overtime, the guidelines set forth below regarding overtime and compensatory time shall be implemented and adhered to by all agencies:

(Pet. Ex. 4, page 1). Section 8 is entitled "Review of Overtime Earners" and reads:

> Agency Heads shall personally review the top overtime earners in their agency, at least quarterly, to ensure that overtime is being distributed equitably and to avoid potential abuse. Operations and OMB will review the top earners as well and may require information from agencies as appropriate.

(Pet. Ex. 4, page 2) (emphasis in original).

POSITIONS OF THE PARTIES

City's Position

The City asserts that the RFA must be denied because Local 924 cannot establish a nexus between the subject of the grievance, the failure to assign overtime, and any written rule or regulation of the NYPD. The cited sections of the Laborers Agreement do not address the assignment of overtime, nor does the RFA identify any rule, regulation, written policy, or order of the NYPD addressing the assignment of overtime. Similarly, since Grievant is not the recipient of any charges filed pursuant to § 75(1) of the Civil Service Law ("CSL"), Article V, § 1(e), is also inapplicable. The City further argues that should the Board not require the actual service of written charges upon an employee to invoke Article V, § 1(e), the Union has nevertheless failed to establish that action taken by the NYPD was of a disciplinary nature.

Instead, the instant matter arises out of EO 94-3, which is not incorporated by reference, or even referred to, in the Laborers Agreement. Nor does EO 94-3 provide a substantive grievance right

to overtime earning employees. Rather, the stated purpose of EO 94-3 is the need for mayoral agencies to plan for budget and overtime. EO 94-3 is directed to Agency Heads, not employees, and the only parties discussed within it are the Agency Heads, the Mayor's Office of Operations, and the Office of Management and Budget. (Pet. Ex. 4). The only reference to employees is in § 8 which calls for a review of top overtime earners. The City argues that this brief reference is not sufficient to make EO 94-3 a rule, regulation, written policy, or order of the NYPD. If EO 94-3 were intended to provide rights for employees to grieve the inequitable distribution of overtime, it would so state, or at least call for a review of all overtime earners. The City contrasts EO 94-3 with the Citywide Agreement, which contains 14 explicit sections addressing overtime, indicating a contractual source of a right to grieve an overtime dispute. As the Grievant is a City Laborer covered by § 220, not the Citywide Agreement, and the Laborers Agreement and the Consent Determination do not provide a grievable right for issues regarding overtime, the instant RFA must be denied.

Finally, the City argues the assignment of overtime is within the City's statutory managerial rights pursuant to NYCCBL § 12-307(b).[3] City employees have no substantive right or guarantee to overtime, and the City references several cases where the Board has found the City can unilaterally alter the amount of overtime assigned.

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[3] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services offered by its agencies; . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . . .

Union's Position

The Union argues that EOs, such as EO 94-3, are rules of the agencies that are required to follow them. As the NYPD is required to follow EO 94-3, it is a rule thereof, and colorable arguments of a violation of EO 94-3 are subject to grievance under Article V, § 1(b). EO 94-3 expressly states overtime is to be "distributed equitably." (Pet. Ex. 4, page 2). The Union notes that in a prior case before the Board, the City argued that EO 94-3 required City agencies to distribute overtime equitably. As the RFA clearly alleges overtime was not distributed equitably, and the NYPD is subject to EO 94-3, the RFA should be granted.

Further, the Union argues that there is no requirement that formal written charges pursuant to CSL § 75 be filed for a disciplinary action to be grievable under Article V, § 1(e). The Union appended emails from the NYPD which document that one of the grounds for denying Grievant overtime was his alleged tardiness. As such, a nexus to discipline sufficient to invoke Article V, § 1(e), has been shown.

Local 924 argues that the City's managerial rights argument is without merit. First, assuming, *arguendo*, approval of overtime were a managerial prerogative, a denial of overtime based on a punitive motivation would nevertheless be arbitrable under Article V, § 1(e). Second, the City's argument, and its cases cited in support thereof, address approval of overtime on an agency wide basis. At issue in the instant case is the assignment of overtime to individual employees after the agency had already decided the need for overtime. In other words, assuming, *arguendo*, agency wide overtime issues are a managerial prerogative, the system used to distribute overtime is not an unfettered managerial right.

DISCUSSION

This Board's interpretation of the NYCCBL policy regarding arbitrability is clear and well established:

> It has long been the stated policy of the NYCCBL to favor and encourage arbitration to resolve grievances. Therefore, the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration. However, the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.

Local 1180, CWA, 79 OCB 35, at 10 (BCB 2007) (citations and internal editing marks omitted); *see also SBA*, 79 OCB 15, at 5 (BCB 2007); *CWA, Local 1182*, 77 OCB 31, at 7 (BCB 2006); *OSA*, 77 OCB 19, at 10 (BCB 2006); *COBA*, 45 OCB 73, at 9 (BCB 1990); *DC 37*, 13 OCB 14, at 12 (BCB 1974); *CWA, Local 1180*, 1 OCB 8, at 6 (BCB 1968).[4]

This Board has established the following two prong test for arbitrability:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable

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[4] Section 12-302 of the NYCCBL provides:

> Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

Section 12-309(a)(3) of the NYCCBL provides this Board with the unique power as an administrative body "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter." NYCCBL § 12-312 promulgates the parties' rights and responsibilities in arbitrations and the Board's role in administering an arbitration panel. *See New York State Nurses Ass'n*, 69 OCB 21 (BCB 2002) (in depth discussion of public sector arbitration and the Board's role therein).

> relationship between the subject matter of the dispute and the general subject matter of the CBA.

OSA, 79 OCB 22, at 10 (BCB 2007) (citations and internal quotation marks omitted); *see also New York State Nurses Ass'n*, 69 OCB 21, at 7-8; *SSEU*, 3 OCB 2, at 2 (BCB 1969).

The City argues that it is not obligated to arbitrate issues regarding the distribution of overtime, both because it is statutorily prohibited as a managerial right and because neither the Laborers Agreement nor the Consent Determination address the distribution of overtime and EO 94-3 cannot be considered a rule or regulation of the NYPD. The Union, the City argues, therefore cannot satisfy the first prong of the arbitrability test.

In support of its managerial rights argument, the City cites several Board decisions holding:

> the general proposition that the scheduling and assignment of overtime falls within the City's management right to determine the methods, means and personnel by which government operations are to be conducted. The decision as to when and how much overtime is to be authorized or ordered is outside the scope of the City's obligation to bargain collectively.

FDNY, 67 OCB 3, at 6-7 (BCB 2001); *see also UPOA*, 67 OCB 48 (BCB 2001); *UPOA*, 39 OCB 29 (BCB 1987).

The Board in *FDNY*, however, went on to distinguish between decisions regarding "when or how much overtime the Department deems necessary" and "the system that the Department utilizes in distributing overtime to employees, after it has determined the need for overtime." *Id.* at 7. The former is managerial prerogative, the latter is not. *Id.* ("We find that bargaining over a method for the distribution of overtime would not interfere with the employer's managerial prerogative to schedule necessary overtime.").

This Board has also stated the equitable distribution of overtime is a mandatory subject of bargaining. In *Local 621, SEIU*, 51 OCB 34 (BCB 1993), we held:

> A demand of that nature, limited to the procedures by which overtime is to be assigned, does not interfere with the employer's managerial prerogative to schedule overtime only when it deems such overtime necessary. We therefore find the demand a mandatory subject of bargaining. We stress, however, that there is a clear distinction between a demand for equalization of overtime, such as this, and a demand seeking an entitlement to perform overtime work. As we have said in the past and reiterate here, the option of assigning overtime falls squarely within the employer's statutory right to determine how its operations are to be conducted.

Id. at 12. Similarly, we have held a union may violate its duty of fair representation if it chooses not to pursue a grievance claiming the violation of the right to equitable distribution of overtime contained in an EO. In *Fabbricante*, 59 OCB 43 (BCB 1997), we held:

> The gravamen of Petitioner's complaint concerns the distribution of overtime assignments among members of his bargaining unit. While the assignment of overtime is generally a prerogative of management, we have held that a claim that an [EO] has been violated may be submitted to a contractually-provided grievance procedure where parties to a collective bargaining agreement have included such a claim within the contract's definition of a grievance, as here.

Id. at 9-10. As the instant case concerns the equitable distribution of overtime, the arbitration thereof would not interfere with the employer's managerial prerogative regarding overtime.

As for the City's argument that EO 94-3 is not a rule or regulation of the NYPD, as noted in *Fabbricante*, this Board has long held the opposite–that EOs are rules of the agencies that are subject to them. *Id.; see also Local Union No.3, IBEW*, 19 OCB 13, at 4 (BCB 1977). In *Local Union No.3, IBEW*, the City argued that the grievance procedure found in EO 83, which was limited to violations of "a rule or regulation of the mayoral agency," did not encompass EO 4, which required promotions

be made in accordance with the Civil Service merit system.[5] The Board described the City's "theory [as] untenable," holding:

> we cannot hold that an agency's failure to abide by an [EO] of the Mayor applicable to it is not arbitrable because an [EO] is not a rule or regulation of the mayoral agency. On the contrary, if the Mayor issues a rule in the form of an [EO] applicable to all mayoral agencies, such rule becomes a rule of each mayoral agency unless a different effect is specifically prescribed. It would be inconsistent, for arbitration purposes, to hold that an agency must abide by the rule as set forth in the [EO], but that such rule is not a "rule or regulation of the mayoral agency" so as to preclude arbitration over an alleged violation of it.

Id. at 4-5; *see also Plumbers Local, Union No. 1 of Brooklyn & Queens*, 49 OCB 27, at 15 (BCB 1992) (describing the same argument of the City as "meritless"); *Local Union No.3, IBEW*, 21 OCB 1, at 11-12 (BCB 1978) (following and explaining *Local Union No.3, IBEW*, 19 OCB 13).

In *COBA*, 45 OCB 41 (BCB 1990), the Board clarified that if a collective bargaining agreement had similar broad language defining a greivance, an EO would be considered a rule of the agency subject to it. *Id.* at 9-12 & n. 16-18 (listing numerous cases finding EOs and similar directives to be rules of the agencies subject to them). We found in *COBA* the following language broad enough to encompass EOs: "claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment." *Id.* Article V, § 1(b), of the Laborers Agreement, at issue in the instant case, is nearly identical: "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

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[5] Paragraph b of EO 83 defines a grievance as:

> a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting terms and conditions of employment.

conditions of employment." *See also Local 3, IBEW*, 45 OCB 59 (BCB 1990) (EO regarding overtime construed to be a rule of the FDNY under a grievance provision with similar language). It is undisputed that the NYPD is subject to EO 94-3; therefore, EO 94-3 is a rule of the NYPD subject to Article V, § 1(b).

This does not end the inquiry, for finding EO 94-3 to be a rule of the NYPD "does not, however, abandon the requirement of a *prima facie* relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration." *COBA*, 45 OCB 41, at 12. That, as the City argues, EO 94-3 does not itself create any grievance rights is not dispositive, for the Union is basing its right to grieve on the Laborers Agreement, which undisputably provides for a grievance procedure. The right provided by EO 94-3 is the right to equitable distribution of overtime, and the act complained of is the failure of the NYPD to do so. Section 8 of EO 94-3 explicitly states "Agency Heads shall . . . ensure that overtime is being distributed equitably."[6] In *Local 3, IBEW*, 45 OCB 59, this Board found a dispute over the distribution of overtime to be arbitrable where the parties disagreed over the effect of the term "evenly distributed" in an EO regarding overtime; the City argued it meant actual parity in the amount of overtime while the union argued in required equal opportunity to work overtime. We held: "[e]ach interpretation is plausible; the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Id.* at 12. The necessary nexus to Article V, § 1(b), of the Laborers Agreement, therefore, has been established.

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[6] The Board takes administrative notice of the papers filed in *FDNY*,67 OCB 3, cited by both parties in their moving papers. In that case, the City cited EO 94-3 for the proposition "that there was a directive to all agency heads in 1994 'to ensure that overtime is being distributed equitably.'" *Id.* at 4 (quoting EO 94-3).

The City also argues that no nexus exists to Article V, § 1(e), of the Laborers Agreement, which addresses a claim of wrongful disciplinary action, because Greivant was not subject to any disciplinary charges taken pursuant to CSL § 75. This Board, however, in a prior decision concerning a RFA filed pursuant to a grievance provision identical to Article V, § 1(e), held: "the fact that no written charges of incompetency or misconduct were served on a grievant will not invariably bar the arbitrability of a claimed wrongful disciplinary action." *DC 37*, *Local 375*, 51 OCB 12, at 12 (BCB 1993), *aff'd*, *New York City Dept. of Sanitation v. MacDonald*, 1993 NY Slip Op 402944[U] (Sup. Ct., New York County, December 20, 1993), *aff'd*, 215 A.D.2d 324 (1st Dept. 1995), *aff'd*, 87 N.Y.2d 650 (1996).[7]

The Court of Appeals in *MacDonald*, although not finding the arbitration clause itself to be as broad as the Board had found, after approvingly citing the Board's standard for arbitrability, held:

> the Department particularly challenges the Board's finding of arbitrability on the ground that the employee was not served with written charges and, therefore, is not entitled to arbitration by the plain words of the collective bargaining agreement. Such a unilateral power to forestall invocation of the arbitration recourse is dubious at best as applied here. For in interpreting grievance clauses identical to the one in this collective bargaining agreement, the Board has consistently held that written charges are not a prerequisite to an employee's arbitration rights, because the requirement for written charges was intended as a shield to protect employees and not as a sword to cut off arbitration (*see*, Board of Collective Bargaining, Decision No. B-52-89, at 10; Decision No. B-33-90, at 14-15; Decision No. B-33-88, at 17; Decision No. B-9-81, at 10).

Id., 87 N.Y.2d at 658. The act of filing charges, like the procedural requirement that such charges

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[7] The Board addressed in *DC 37*, *Local 375*, the decision in *Matter of City of New York and District Council 37*, N.Y.L.J., Oct. 23, 1981, at 6, col. 5 (Sup. Ct. New York County 1981) in which the Supreme Court reversed a Board determination that written charges were not required under an arbitration clause with identical language. The Board noted that, as the judgement was never entered in that case, it was deemed to have no binding effect. *DC 37*, *Local 375*, 51 OCB 12, at n. 15. The Supreme Court agreed. *MacDonald*, 1993 NY Slip Op 402944[U], *6-8.

be in writing, is part of the employee's shield and the lack thereof cannot bar an otherwise valid claim of wrongful discipline. In their reply, the City states the NYPD's actions regarding Grievant's "overtime assignments were clearly not bourne out of any intent to discipline but rather solely to ensure proper staffing for overtime shifts." (Rep. ¶ 12). However, it is well established that "the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator." *DC 37, Local 375*, 51 OCB 12, at 11; *see also DC 37, Local 299*, 79 OCB 29, at 14 (BCB 2007). Since the Union has provided documentation, the validity of which the City has not challenged, establishing that one of the reasons for the denial of overtime opportunities to Grievant was his alleged tardiness, the requisite nexus to Article V, § 1(e), of the Laborers Agreement has been established.

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 and the New York City Police Department, docketed as No. BCB-2672-07, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Local 924 of District Council 37, docketed as A-12484-07, hereby is granted.

Dated: January 23, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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