DC 37, Local 376, 1 OCB2d 36 (BCB 2008)

(Arb) (Docket No. BCB-2705-08) (A-12776-08).

***Summary of Decision*:** The City challenged the arbitrability of a grievance alleging that the Department of Transportation violated Executive Order No. 83 by paying a Highway Repairer and an Assistant Highway Repairer lower salaries than the rates they were due under a May 2005 arbitration award. The City argued that the matter was litigated fully in that prior arbitration and was addressed by the arbitrator, that the Union has filed an invalid waiver under § 12-312(d) of the NYCCBL, and that the Supreme Court has exclusive jurisdiction of this claim under Article 75 of the CPLR. The Board found that both the Union's submission of the identical claims to a court seeking enforcement of the arbitration award and that court's ruling on the merits both rendered the Union's statutorily-mandated waiver invalid and, in any event precluded the Union from relitigating before the Board the issues authoritatively determined by the court. Accordingly, the petition was granted, and the request for arbitration denied. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

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

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 376, AFSCME, AFL-CIO

Respondent.

DECISION AND ORDER

On May 20, 2008, Local 376, District Council 37, AFSCME, AFL-CIO ("Union" or "Local 376") filed a Request for Arbitration ("RFA") alleging that the City of New York ("City") and the New York City Department of Transportation ("DOT") had failed to comply with an arbitration

award, issued on May 24, 2005 (the Award") and with a decision of the New York City Comptroller, affirmed by the Appellate Division, First Department. The Award upheld out-of-title grievances on behalf of Anthony Mezzacappa and Orret "Lennie" Haughton ("Grievants"), two employees in the title of Highway Repairer ("HR"), and granted back pay at the "then-existing" basic rate for Supervisor of Highway Repairers ("SHR"), plus any overtime performed, for each day that the grievants were assigned to the out-of-title work. On June 27, 2008, the City and the DOT filed a petition challenging the arbitrability of the claim, claiming that: (i) neither New York City Mayoral Executive Order No. 83 ("EO 83"), under which the original grievance was filed, nor the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, ch. 3) ("NYCCBL") authorize enforcement of an arbitration award through any vehicle other than a timely filed petition under Article 75 of the Civil Practice Law and Rules; (ii) the statutorily mandated waiver filed by the Union with the request for arbitration ("RFA") was invalid as the Union had previously filed an action in court to enforce the Award; and (iii) the original Award was clear on its face in rejecting the Union's claim to a higher wage rate, and was entitled to preclusive effect. The Board finds that the City has established that the waiver submitted by the Union was not valid, and that the decision of the Supreme Court in the Union's action on the same issues precludes this Board from finding any arbitrable dispute. The petition is granted, and the RFA denied.

BACKGROUND

The titles of HR and SHR are prevailing wage titles as defined by New York State Labor Law § 220 ("Section 220"). Employees in these titles are paid an hourly wage set as a result of negotiations between the public employer and the employee organization pursuant to Labor Law

§ 220.8-d, and memorialized in written agreements covering wages and supplements. These agreements, referred to as Consent Determinations, require approval by the City Comptroller before they can be implemented. The grievance and arbitration procedures applicable to employees in these titles, as well as other Section 220 employees not at issue herein, are set forth in EO 83.[1]

Pursuant to EO 83, in May 1999 and in December 2003 respectively, Mezzacappa and Haughton sought to grieve payment for their respective assignment to duties substantially different from those in their job description.[2] On January 21, 2005, the grievances were consolidated for arbitration. In her decision, issued on May 24, 2005, the arbitrator defined the question presented as:

> Whether the employer, the New York City Department of Transportation, ("Employer," "Department," "DOT") has assigned the grievants, Anthony Mezzappa and Lennie Haughton, to duties substantially different from those in their job specifications, in violation of Executive Order 83, Section 5, dated July 26, 1973? If so, what shall be the remedy?

(Pet. Ex. 3, at 2).

The arbitrator upheld the grievance and ordered that the Grievants "shall be paid at the then-existing basic rate for the SHR title (plus any overtime performed) for each day that they were assigned to act as GINCs [Guys in Charge of a DOT crew]." (*Id*. at 9). The arbitrator did not retain

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[1] EO 83 provides, at § 5(e), in relevant part as follows:

> an arbitrator's award is final and binding and enforceable in any appropriate tribunal in accordance with article seventy-five of the Civil Practice Law and Rules, except that awards as to grievances concerning assignment of employees to duties substantially different from those stated in their job classification shall be final and binding and enforceable only to the extent permitted by law.

[2] A-8572-00 (Mezzacappa); A-10418-04 (Haughton).

jurisdiction.

The Union asserts in its Answer, but the City denies, that the Union and the City agreed during the pendency of that arbitration that if the grievance was sustained, the parties would determine the back pay owed according to the actual rates ultimately set for the relevant time periods. Since the arbitrator could not refer, in the Award, to specific wage rates, the Award instead directed that the Grievants be paid the then-existing rate on each day they performed SHR work.

Shortly after the Award was issued, the Union filed a series of group grievances on behalf of 103 HRs who, like the Grievants had been assigned to supervise crews as GINCs. Ultimately, the Union asserts and the City agrees, this series of group grievances involving the 103 HRs was settled through a memorandum of understanding dated March 15, 2007 which created a differential of $6.00 per shift to be applied prospectively from April 12, 2007. The agreement did not provide for any back pay for the 103 HRs.

On June 14, 2007, the Appellate Division, First Department, of the Supreme Court of the State of New York, in *Matter of Hanley v. Thompson*, 41 A.D.3d 207 (1st Dept. 2007), upheld a determination of the New York City Comptroller, rendered in March 2006 (the "Comptroller's Determination"). Pursuant to the Comptroller's Determination, the City retroactively paid SHR's the new prevailing wage rate on December 28, 2007, but Grievants were not included among the recipients of this retroactive payment.

On April 4, 2008, the Union filed a petition, *Matter of Gene DeMartino v. City of New York and New York City Department of Transportation* (Index No. 105059/08 Sup. Ct. N.Y. Co.), (the "Supreme Court Petition"), seeking confirmation and enforcement of the Award, pursuant to § 7510 of the CPLR, and asserting that, independently of the Award, "[t]he City's refusal to pay [the

Grievants] at the actual rates [set by the Comptroller] is arbitrary and capricious," in violation Article 78.[3] (Supreme Court Petition ¶¶ 13, 14-16). As the Union asserted in the Supreme Court Petition:

> on or about April 7, 2006, the City paid Mezzacappa and Haughton at the rates in effect in 1999 through March 31, 2000, for work performed during that period, and at the rates in effect in March 2000 for work performed from April 2000 through May 2005.

(Pet. Ex. 8 ¶ 10).

The rate in effect through March 31, 2000 was $24.30. The Supreme Court Petition stated that "the parties never agreed on a rate for the period after March 31, 2000. Pending a resolution, the City paid [SHRs] an hourly rate of $24.43." (*Id.* ¶ 8). The Supreme Court Petition also stated that the dispute over the appropriate rate of pay was resolved by an order of the Appellate Division, First Department, on or about December 28, 2007, which ordered that the SHRs be paid an annually increased rate as follows:

> $30.03 for the period from April 1, 2000 through June 30, 2000;
> $31.33 for the period from July 1, 2000 through June 30, 2001;
> $32.73 for the period from July 1, 2001 through June 30, 2002;
> $33.53 for the period from July 1, 2002 through June 30, 2003;
> $34.38 for the period from July 1, 2003 through June 30, 2004; and
> $35.73 for the period from July 1, 2004 through June 30, 2005.

(*Id.* ¶ 11.)

In the Supreme Court Petition, the Union alleges as the allegedly wrongful act that "Mezzacappa and Haughton received no payment on December 28, 2007. The City has refused to pay Mezzacappa and Haughton at the actual rates for the period from April 2000 through May 2005.

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[3] A copy of the Supreme Court Petition was submitted by the City as Exhibit 8 to its Petition. The Supreme Court Petition asserted that the City was not in compliance as of March 2006. The petition also sought an order directing the City to pay the two Grievants at the actual wage rate for the periods of time in which they performed SHR duties.

The City owes approximately $90,000 to Mezzacappa and Haughton." (Pet., Ex. 8 ¶ 12) The Supreme Court Petition asserts that "[t]he City's refusal to pay Mezzacappa and Haughton the actual rates is arbitrary and capricious," warranting relief under Article 78. (*Id.* ¶ 14.) Explicitly asserting that "Petitioners have no other remedy at law," the petition demands an order (A) confirming the May 23, 2005 arbitration award; (B) ordering the respondents to pay the Grievants the sums the Union asserts they are owed, and (C) seeking "other and further relief." (*Id.* at 3-4.)

The Union filed an RFA on May 20, 2008, and characterizes the dispute as "whether the employer . . . failed to pay the grievants at the appropriate salary rate in accordance with the [SHR] Comptroller's Determination and [the] arbitration award of 5/23/05" and asks, as relief, for the Grievants: "To be paid the difference in salary between Highway Repairer title and Supervising H.R. title during the period of grievance . . . and any other remedy necessary to make the grievant [*sic*] whole." In the underlying grievance, the Union asserted that the failure to include the Grievants in the retroactive payment afforded SHRs under the Comptroller's Determination was a "[v]iolation of . . .Executive Order 83," and sought payment in the approximate amount of [$]80,000.00 for Mezzacappa and [$]9,000.00 for Haughton." (Pet. Ex. 6).

On June 3, 2008, the Union filed, as required by NYCCBL § 12-312(d), a form signed by both Grievants and counsel stating that "[t]he undersigned employee organization and employee(s) aggrieved in this matter waive the right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." (Pet. Ex. 10). On June 27, 2008, the City filed the instant petition challenging arbitrability.

After the answer and reply were filed, the City submitted a copy of a decision rendered on August 26, 2008, dismissing the Supreme Court Petition. *Matter of Gene DeMartino v. City of New*

York and New York City Department of Transportation, Index No. 105059/08 (Sup. Ct. N.Y. Co. August 26, 2008) (Diamond, J.). Noting that the Supreme Court Petition asserted claims both under Article 75, seeking confirmation of the Award, and Article 78 "challenging the respondent's interpretation of the [A]ward," (*id*. at 1), the Supreme Court went on to construe the Award's import as follows:

> There is nothing in the arbitrator's award which suggests that it was not final until new rates for the period after April 1, 2000 had been determined. Indeed, there is nothing in the decision which even awarded the two employees the right to be retroactively paid at whatever new rates were subsequently fixed by the Comptroller or by negotiations between the City and the union. Rather, as already noted, the award merely stated that the two employees were to be paid at the "then-existing basic rate" for SHR's. The then-existing rate for work performed after April 1, 2000 was the rate previously fixed for the period between March 1, 2000 and March 21, 2000. If this language did not actually reflect the arbitrator's intentions, the petitioner could and should have sought modification or clarification. He failed to do so.
>
> In any event, even if the term "then-existing basic rate" could somehow be interpreted to mean that the two employees were entitled to retroactively receive payments reflecting the new SHR hourly rates which had not yet been determined, the petitioner could have sought to confirm the award as it was written and the award would then have been enforceable. . . . the petitioner has failed to explain why he could not have sought confirmation within a year of the award and then, once a new rate was fixed and after the respondents refused to apply this new rate to the two employees, moved to enforce the previously-confirmed award. At that point, the dispute between the parties over the interpretation of the arbitration award would have been appropriate. Instead, the petitioner failed to seek judicial relief until it became clear that the City would not retroactively apply the new rates to the two employees.

Id. at 2. The Supreme Court accordingly dismissed the Supreme Court Petition in its entirety.

POSITIONS OF THE PARTIES

City's Position

The City urges the Board deny the instant RFA as a continuation of the arbitration resolved by the May 24, 2005 Award. That case determined that Grievants were not entitled to compensation for retroactive increases in the rate of pay for SHR, as the arbitrator awarded back pay at the "then-existing basic rate" for the SHR title, not retroactive increases for SHR's that might be set in the future. The City asserts that the instant RFA alleges that the Award itself has been violated. Thus, the current dispute is tantamount to seeking an interpretation of the Award, which is properly done only in a proceeding pursuant to CPLR Article 75 in Supreme Court. EO 83 does not permit confirmation or enforcement of a prior arbitration award through the grievance process.

Further, the dispute sought by the Union in the instant RFA is not a new matter of wage-agreement interpretation. The proper remedy due Grievants was fully litigated, actually determined, and was necessary to the Award. Accordingly, the Union should be collaterally estopped from relitigating the issue of what that proper remedy should be. *Lieutenants Benevolent Ass'n*, 49 OCB 13 (BCB 1992).

Finally, the RFA must be denied because the Union cannot satisfy the waiver requirement of NYCCBL § 12-312(d) or § 1-06(b)(1)(iii) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), which require, as a condition precedent to submitting a dispute to arbitration, that a union and grievant waive the right to submit the underlying dispute to any other administrative or judicial tribunal. To permit the Union to proceed at the same time that it has filed a claim in state court seeking the same relief arising from the same transactions would violate the purpose of the NYCCBL's waiver requirement and cannot

be permitted. The RFA must fail.

Union's Position

The Union, by this action, does not intend to enforce the Award by means of the grievance procedure provided in EO 83. That Award has already determined that Grievants are entitled to payment in compensation for their out-of-title SHR work. Relying on *How Arbitration Works*, Elkouri and Elkouri, (6th ed. 2003), 578, the Union argues that, "where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration, but, in the absence of materially changed circumstances, it may be controlled by the prior award." Thus, the City's characterization of the Union's contention as a failure on the part of the City to have complied with the Award is incorrect. DOT's refusal to make retroactive payments to the Grievants in December 2007 pursuant to the Comptroller's Determination is not a restatement of the old dispute but rather a new dispute warranting its own hearing before an arbitrator.

Further, this new dispute is distinct from the petition filed in Supreme Court seeking to confirm the Award. The new dispute arose during the arbitration proceeding, when the wage rate for the SHR title after March 31, 2000 had not yet been set. The Union asserts that, during the arbitration proceeding, the City agreed that if the grievance were sustained, the parties would determine the back pay owed according to the actual rates ultimately set for the relevant time periods. Since the arbitrator could not refer in the Award to specific wage rates, the Award instead directed that grievants be paid the then-existing rate on each day they performed SHR work. The grievance remains unpaid pursuant to the newly determined wage rates. The agency's refusal to make this payment is grounds for a new grievance that should be heard at arbitration.

DISCUSSION

It is public policy, expressed in the NYCCBL, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances. *Corr. Officers Bene. Ass'n*., 53 OCB 14, at 5 (BCB 1994). We cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties. *Id*. This Board has exclusive power under § 12-309(a)(3) of the NYCCBL "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."[4] *See NYSNA*, 69 OCB 21 (BCB 2002).

While the doctrine of *res judicata* presents a broader bar to the litigation of claims arising from the same set of operative facts than does the waiver requirement of NYCCBL § 12-312(d), both seek to prevent unnecessary or repetitive litigation, and to eliminate the prospect of inconsistent determinations of the merits of disputes, by ensuring that a grievant who elects to seek redress through the arbitration process will not attempt at another time to re-litigate the same legal claims in another forum. *Queens Borough Public Library*, 17 OCB 13, at 22-23 (BCB 1976), *aff'd*, *Queens Borough Public Library v. Board of Collective Bargaining*, No. 40591/77 (Sup. Ct. N.Y. Co., May 20, 1977); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 503 F. Supp.2d 699, 703-704 (S.D.N.Y. 2007) (*res judicata* bars the litigation of any claim that was raised or could have been raised in prior proceeding). In the instant case, both the waiver requirement of NYCCBL § 12-312(d) and the doctrine or *res judicata* act to bar arbitration of the grievance herein. Having pursued its Supreme Court Petition through a final decision on the merits, the Union is unable to comply with

[4] NYCCBL § 12-312 sets forth the parties' rights and responsibilities in arbitrations and the Board's role in administering an arbitration panel.

the waiver requirement, and, in any event, the Union cannot relitigate before this Board or an arbitrator claims that have already been the subject of a final judicial decision on the merits.

Waiver

Section 12-312(d) of the NYCCBL provides that:

> As a condition to the right of a municipal employee to invoke impartial arbitration . . . , the grievant or grievants and such [municipal employee] organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

We have consistently held this waiver requirement "constitutes a condition precedent to arbitration i[n] that the waiver requirement must be satisfied before the request for arbitration may be considered, regardless of the merits of the underlying grievance." *PBA*, 23 OCB 8, at 4 (BCB 1979). As we have often had occasion to affirm, the purpose of this provision is to prevent multiple litigation of the same dispute, and to ensure that a grievant who chooses to seek redress through the arbitration process will not attempt to relitigate the same claim as that submitted to the arbitrator before another forum. *UFA*, 73 OCB 3A, at 7, 13-14 (BCB 2004); *see also Communications Workers of America, Local 1182*, 59 OCB 3, at 6 (BCB 1997); *UFA*, 45 OCB 17, at 12 (BCB 1990).

The waiver form generally in use by practitioners before the Office of Collective Bargaining has been authoritatively construed by this Board as not waiving "all statutory, constitutional, or common law claims arising from the same factual circumstances" but as encompassing the right to assert before any other forum those claims properly raised before an arbitrator under the NYCCBL, such as "contractual claims under the collective bargaining agreement." *UFA*, 73 OCB 3A, at 13-14 (BCB 2004). Here, Executive Order 83 provides the right to arbitration under the OCB Rules with

the same waiver requirement, in the exact same words, as provided for by the NYCCBL. EO 83 § 5(d); NYCCBL § 12-312(d). EO 83 further states that "arbitration shall be conducted in accordance with" the OCB Rules. EO 83 § 5(d). The statutory waiver form in arbitration pursuant to EO 83 extends, just as it does in arbitrations conducted under NYCCBL § 12-30312(d), to claims arising from the same sources of right as to which the arbitrator is empowered to rule. *See. e.g., Benesowitz v. Metro Life Ins. Co.*, 8 N.Y.3d 661, 668 (2007) (use of the same terms denotes same meaning); *UFA*, 73 OCB 3A, at 13-14. EO 83 specifically allows for arbitration of "a determination under section 220 of the Labor Law affecting terms of conditions of employment," and assignment of a grievant to out of title work. EO 83 § 5(b)(A)(ii)& (C); (e).

In the instant case, of course, the Union submitted the same dispute to arbitration in the RFA and to the Court; the relief requested is the same, down to the amounts demanded as are the sources of right–the arbitrator's Award, the Comptroller's Determination and EO 83. Even the legal theory underlying the claim–that the arbitrator's use of "then in effect" in the Award encompasses the retroactive sum determined upon by the Comptroller–is also indistinguishable from the grievance and the RFA to the Supreme Court Petition.

The filing of the Supreme Court Petition constitutes an election of a judicial forum that, on its face, renders the statutory waiver ineffective. However, this is not alone fatal to the Union's claim. We have found that where claims included within a judicial proceeding are sought to be brought to arbitration, the Union can, by withdrawing arbitrable claims from the judicial proceeding, render the putatively invalid waiver valid. *See, e.g., UFA*, 73 OCB 3A, at 13-14. What dooms the RFA herein, by contrast, is that the judicial proceedings have concluded with a judgment on the merits on the precise claims on which arbitration is sought.

As we explained in *PBA*, 23 OCB 8, at 5:

> Commencement of a court proceeding for adjudication of the underlying dispute in a matter such as this constitutes at least a provisional election; permitting the matter to proceed to the point of judgment renders the election conclusive and irreversible for purposes of [12-312(d)] of the NYCCBL. Having obtained a judgment of a court on an issue, a party seeking arbitration of the same issue no longer has the capacity to make a waiver satisfactory to the statutory requirement.

Id.; *see UFA*, 73 OCB 3A, at 13-14.

Therefore, having chosen to submit the exact same issue–whether the Award and EO 83 required that the Grievants be afforded the benefit of the retroactive raise afforded SHRs under the Comptroller's Determination–to both the Supreme Court and to the grievance process, and having pursued the judicial proceedings to a judgment on the merits, the Union is no longer capable of undoing its provisional election or of choosing to bifurcate its claims. *PBA*, 23 OCB 8, at 5; *compare Unif. Firefighters Assn. of Greater New York*, 73 OCB 3A, at 13-14. Accordingly, the waiver is fatally defective. *Local 1549, DC 37*, 43 OCB 50 at 8-9.

Res Judicata

In addition, entirely independent of the Union's inability to comply with the waiver requirement, the rendering of a judicial decision dismissing the Supreme Court Petition on the merits has the consequence of precluding any arbitration arising out of the same transaction. In determining whether a claim is barred by a prior judicial determination, New York State courts apply a transactional test; as we explained in *Howe*, 79 OCB 19:

> the Court of Appeals has enunciated "as a general rule" that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Parker* v.

> *Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347-348 (1999), *quoting O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981); *citing Matter of Reilly v. Reid*, 45 N.Y.2d 24, 30 (editing marks and citations omitted). Thus, a cause of action that could have been presented in a prior proceeding "against the same party, based upon the same harm and arising out of the same or related facts," is barred by *res judicata*. *Id.; see also, North American Van Lines v. American Int'l Cos.*, 11 Misc.2d 1076A, 814 N.Y.S.2d 849 (Sup. Ct. N.Y. Co. 2006).

Id., at 7-8; *Duane Reade*, 503 F. Supp. 2d at 703-704.

The Union in this case sought relief under both Article 75, which is limited to confirmation and enforcement of an arbitration award, and Article 78, which allows for review of any governmental act on the ground that its the body or officer involved "failed to perform a duty enjoined upon it by law," or its action was "affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(1), (3). As a result, the Union could and in fact did assert its claims that the City was obligated to pay Grievants at the higher rate provided for in the Comptroller's Determination, in addition to simply seeking to enforce the Award pursuant to Article 75. Thus, the Supreme Court had full authority to rule upon both the Union's claim for confirmation and enforcement of the Award and its claim that the City unlawfully failed to apply to the Grievants the wage rate determined upon by the Comptroller and the court's decision is preclusive as to such claims. *See, e.g., Thomas v. City of New York*, 239 A.D.2d 180, 181 (1st Dept. 1997) (dismissal of Article 78 claim that termination of employment was arbitrary and capricious decision precludes plenary action based on same transaction); *Mazza v. New York City Police Dept.*, 6 A.D.3d 186 (1st Dept. 2004).

In fact, the Supreme Court exercised jurisdiction over both of the claims "pursuant to CPLR 7510 to confirm an arbitration award, as well as pursuant to Article 78 challenging the respondent's

interpretation of the [A]ward." *Matter of Gene DeMartino v. City of New York and New York City Department of Transportation,* Index No. 105059/08 (Sup. Ct. N.Y. Co. Aug. 26, 2008) (Diamond, J.) at 1. The petition was dismissed in its entirety, a final disposition of both claims. *Id.* at 2. As we have already noted, the claims before the Supreme Court and those raised here and their legal bases are identical.

Moreover, the Supreme Court decided the very issues the Union seeks to arbitrate adversely to the Union. The court found that "there is nothing in the decision which even awarded the two employees the right to be retroactively paid at whatever new rates were subsequently fixed by the Comptroller or by negotiations between the City and the union," and that the Award's holding "merely stated that the two employees were to be paid at the 'then-existing basic rate' for SHR's," which meant "the rate previously fixed for the period" at issue. *Matter of DeMartino*, *supra*, at 2.[5]

The Union's own invocation of the judicial process has resulted in a final judgment on the merits on the meaning of the Award and acts to preclude any relitigation of that claim, or any other claim that could have been presented before the Supreme Court. *Howe*, 79 OCB 19 at 7-8; *Duane Reade*, 503 F. Supp. 2d at 703-704. Accordingly, therefore, we grant the City's petition challenging arbitrability and deny the Union's Request for Arbitration.

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[5] The Supreme Court decision, of course, is also preclusive as collateral estoppel on the questions necessarily decided by that Court. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003); *DC 37*, 1 OCB2d 5 at 53 (BCB 2008). Thus, the question of the interpretation of the Award and any legal obligation arising under the Comptroller's Determination for the City to pay Grievants at the higher rate, been authoritatively resolved as far as the Union is concerned and cannot be relitigated before this Board. *Id.*

ORDER

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

ORDERED, the petition challenging arbitrability filed by the City of New York and the New York City Department of Transportation, docketed as No. BCB-2705-08, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by Local 376, District Council 37, AFSCME, AFL-CIO, docketed as A-12776-08, hereby is denied.

Dated: New York, New York
November 10, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER