OSA, 10 OCB2d 17 (BCB 2017)

(Arb.) (Docket No. BCB-4213-17) (A-15269-17)

Summary of Decision: NYCHA challenged the arbitrability of a grievance alleging that it failed to promote Grievant. It argued there was no nexus with the parties' collective bargaining agreement or Executive Order 75. The Board found that there is a nexus to both the collective bargaining agreement and Executive Order 75. Accordingly, the petition challenging arbitrability was denied, and the request for arbitration was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS,

Respondent.

DECISION AND ORDER

On April 25, 2017, the Organization of Staff Analysts ("OSA" or "Union") filed a request for arbitration on behalf of Robert Spencer ("Grievant") alleging that the New York City Housing Authority ("NYCHA") violated the collective bargaining agreement between NYCHA and OSA ("Agreement") and Mayor's Executive Order 75 of 1973 ("EO 75") when it denied Grievant a promotion. On May 12, 2017, NYCHA filed a petition challenging the arbitrability of the grievance. NYCHA contends that there is no nexus between the decision not to promote Grievant and EO 75 or the cited provisions of the Agreement. It asserts that neither the Agreement nor EO 75 bestows upon employees a right to a promotion, thus, the Union has not established a nexus

between its claim and a contractual provision. The Board finds that there is a nexus to the Agreement and to Executive Order 75. Accordingly, the petition challenging arbitrability is denied, and the request for arbitration is granted.

BACKGROUND

In September 2002, Grievant started working at NYCHA as a Staff Analyst. In January 2005, Grievant became a Union Representative on full-time paid release from his position at NYCHA pursuant to EO 75.[1] In September 2008, while on full-time paid release, Grievant was promoted to Associate Staff Analyst.[2] In 2015, Grievant took the Department of Citywide Administrative Services ("DCAS") Exam Number 5517 for promotion to the title Administrative Staff Analyst. On August 29, 2016, DCAS notified Grievant that he had passed the examination and that he was number nine on the promotional list, however, he was not promoted.

Article 5 of the Agreement is entitled "Posting of Job Vacancies, Transfers & Promotions." (Pet., Ex. 1) Article 5 (d) of the Agreement reads:

> When an employee in a title covered by this Agreement is considered for a promotion to a posted vacated position at a higher level or in a higher title covered by this Agreement, [NYCHA] agrees to consider job performance, experience, special skills and training. After considering the aforementioned factors, if candidates are still considered to be equal, then seniority in title will be the governing factor in employee selection.

(Pet., Ex. 1)

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[1] Grievant's leave is designated by the New York City Office of Labor Relations as "Full-Time Leave With Pay and Benefits." (Ans., Ex A)

[2] Since Grievant's promotion in 2008, the Union has paid for the salary differential between the titles of Staff Analyst and Associate Staff Analyst.

Article 6(a), of the Agreement defines the term "Grievance," in part, as including:

> i. A dispute concerning the application and interpretation of the terms of written collective bargaining agreements and written rules and regulations.
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> ii. A claimed violation, misinterpretation or misapplication of the rules and regulations of [NYCHA] affecting the terms and conditions of employment.
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> * * *
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> iv. Any dispute defined as a grievance by a collective bargaining agreement, or as expressly agreed to in writing by [NYCHA] and a public employee organization.

(Pet., Ex. 1) Article 6(b), of the Agreement sets out the multi-step procedure that governs in any case involving a grievance under Article 6(a).

Article 11 of the Agreement, entitled "Release Time," states that "[NYCHA] agrees to follow the policy of the City of New York with respect to the release of employees as embodied in the terms specified in [EO 75], governing 'Time Spent on the Conduct of Labor Relations Between the City and Its Employees and on Union Activity.'" (Pet., Ex. 1) EO 75, § 2, entitled "Labor-Management Joint Activities," reads in pertinent part:

> Employee representatives, duly designated by certified employee organizations, when acting on matters related only to the interests of employees in their certified bargaining units shall be permitted to perform the following functions, subject to the conditions set forth in this Executive Order, without loss of pay or other employee benefits: . . .[3]

(Pet., Ex. 2) EO 75, § 4(9), states that "Employee representatives who are granted a leave of absence **without pay** pursuant to this Order shall continue to have their seniority rights preserved, the right to take promotional examinations, full pension rights for the time on such leave-of-

[3] EO 75, § 2, sets out multiple functions that these employee representatives are permitted to perform, including: "attend[ing] award, honor, graduation, and promotional ceremonies, as employee representatives." (Pet., Ex. 2)

absence **without pay** and shall be entitled to salary increments." (Pet., Ex. 2) (emphasis added) EO 75, § 4(10), reads, in pertinent part, that "[e]mployees assigned on a **full-time or part-time basis or granted leave without pay** pursuant to the Order shall at all times conduct themselves in a responsible manner." (Pet., Ex. 2) (emphasis added)

The Union avers, and NYCHA denies, that in September and October of 2016, NYCHA appointed all but four of the 63 individuals on the Administrative Staff Analyst promotional list for Exam Number 5517.[4] Grievant was neither notified of any Administrative Staff Analyst vacancies nor invited to interview for any Administrative Staff Analyst positions at NYCHA.

In October 2016, Grievant began reaching out to NYCHA to inquire about his status with respect to the promotional list. In November 2016, Grievant received a letter from NYCHA's Administrator of Certification regarding the promotion to Administrative Staff Analyst. The November 2016 Letter stated that: "This is to notify you that you were considered and not selected for promotion to three separate vacancies. Your name will be removed from the list. You must contact your supervisor in order to request restoration." (Ans., Ex. E)

On November 28, 2016, NYCHA's then-Director of Human Resources ("Director of HR"), Kenya Salaudeen, met with the Union Chairperson, Robert J. Croghan. According to the Union, NYCHA's Director of HR told the Union Chairperson that NYCHA only promoted individuals if it felt it would get additional value for the increased salary and asked if the Union would pay the promotional increase if Grievant was promoted.[5] According to NYCHA, the Union Chairperson

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[4] Of the individuals that were not promoted in the fall of 2016, one declined the offer of promotion, and two were appointed from another list in or around April 2017 at the Citywide hiring pool administered by DCAS. Grievant also appeared on that same list, and he was invited to attend at least one Citywide hiring pool in November of 2016.

[5] Without explanation, NYCHA denied "knowledge of any statements made by Ms. Salaudeen about value." (Rep. ¶ 28)

told NYCHA that the Union no longer had any interest in paying the salary difference between Staff Analyst and Associate Staff Analyst nor would it pay the salary difference for a promotion to Administrative Staff Analyst.[6]

The Union's Step II grievance form alleged that "[t]here has been a violation and/or misinterpretation of Article 6 of the Agreement between [NYCHA] and the [Union] and [EO 75], in that grievant was denied a promotion." (Rep., Ex. 1) The Union's Step III grievance form also alleged a violation and/or misinterpretation of Article 11 of the Agreement and "any other applicable contracts, rules and regulations." (Rep., Ex. 1) NYCHA denied the grievance at each of the lower steps of the grievance process.

On April 25, 2017, the Union filed the instant request for arbitration, which states the grievance to be arbitrated as: "Whether [NYCHA] violated Article 6 & Article 11 of [the Agreement] and [EO 75], in that [G]rievant was denied a promotion and if so, what should be the remedy." (Rep., Ex. 2) In its answer to NYCHA's petition, the Union also specified a violation and/or misinterpretation of Article 5 of the Agreement.

POSITIONS OF THE PARTIES

NYCHA's Position

According to NYCHA, the request for arbitration must be dismissed because the Union has not established a nexus between NYCHA's alleged failure to promote Grievant from Associate Staff Analyst to Administrative Staff Analyst and Articles 6 and 11 of the Agreement or EO 75. NYCHA asserts that Grievant took promotional Exam Number 5517 and was considered for that position, and that New York Civil Service Law ("CSL") §61(1) reinforces that an employee on a

[6] The Union did not deny this assertion made by NYCHA.

promotional list is not guaranteed a promotion.[7] NYCHA also asserts that Grievant was free to attend Citywide hiring pools and to seek promotion elsewhere.

With respect to the Agreement, neither Article 6 nor Article 11 contain any references to promotion. NYCHA asserts that "only one Article in the [Agreement], Article 5, makes any reference to promotion," and that Article was not cited by the Union until it filed its answer to the petition challenging arbitrability. (Pet. ¶ 17) It maintains that the Board should not consider whether Article 5 of the Agreement has a nexus to the grievance because the Union did not provide proper notice of this claim. NYCHA asserts that allowing the Union to introduce a new claim after the parties have already considered the grievance at each level of the step process and following the petition challenging arbitrability would defeat the purpose of the multi-level grievance process. Further, NYCHA contends that "[n]owhere in that section does it make any mention of a right to promotion. It merely describes the process of evaluating candidates for an available promotion."

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[7] NYCHA asserts that it exercised its rights under CSL §61(1) in considering, but not selecting Grievant for promotion. Section 61(1) of the CSL provides:

> Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; provided, however, that the state or a municipal commission may provide, by rule, that where it is necessary to break ties among eligibles having the same final examination ratings in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or higher than the final examination rating of the third highest standing eligible willing to accept such appointment or promotion. Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled.

(Pet. ¶ 17) Thus, it argues that nothing in the Agreement provides a relationship between the claim and a contractual right.

With respect to EO 75, NYCHA asserts that there are only two references to promotions.[8] The first relates to attending promotional ceremonies, and the second applies to employee representatives who are granted a leave of absence without pay. NYCHA argues that neither section applies here, and even if they did, neither guarantees a right to a promotion. Thus, NYCHA asserts that nothing in EO 75 provides a relationship between the claimed wrong and a contractual right.

In sum, NYCHA argues that its decision to not promote Grievant is not a violation of any contractual provision. It also asserts that if the Board grants the request for arbitration, it will be creating a right that was not contemplated in the contract or Mayoral order. Accordingly, the request for arbitration should be dismissed.

Union's Position

According to the Union, a nexus exists between NYCHA's failure to promote Grievant and the Agreement and EO 75. Article 6 of the Agreement defines a grievance and sets forth the procedure for resolving grievances, which culminates with arbitration. The Union argues that, pursuant to Article 5, when filling promotional vacancies, NYCHA may consider only an employee's eligibility based upon the promotional exam, job performance, experience, special skills and training, and where all other factors are equal, seniority. However, the Union asserts that NYCHA's agent, NYCHA's Director of HR, admitted that NYCHA's decision to not promote

[8] While NYCHA asserts that it has always maintained that it is not bound by Mayoral Executive Orders, it also "acknowledges that this Board found that NYCHA's HR Manual incorporates EO 75 for those employees who are 'regularly designated union representatives.'" (Pet. ¶ 18)

Grievant was based on the fact that NYCHA believed it would not get any additional value from him. As a result, NYCHA failed to use the standards set forth in Article 5 of the Agreement.

The Union also asserts that Article 11 of the Agreement and EO 75 prohibit NYCHA from depriving an employee of any salary and benefits he would otherwise be entitled to if the employee was not on Union release. It asserts that NYCHA's Director of HR's statement about adding additional value is evidence that NYCHA would never promote any employee who was on full-time release because NYCHA believes it won't realize any additional value from these employees. Thus, the Union asserts that NYCHA violated these provisions when it refused to promote Grievant in order to avoid paying him the salary and benefits he would otherwise be entitled to receive if he was not on Union release.

Finally, the Union asserts that NYCHA violated § 4(9) of EO 75 since an arbitrator could find that this section could apply to Grievant and the right to take promotional exams includes the right to be considered for promotion once placed on the promotional list.[9] Here, the Union contends that although Grievant was allowed to take the exam and his name appeared on the promotional list, NYCHA refused to actually consider him for the promotion since it believed he would not add value.

Thus, the Union asserts that the failure to promote Grievant is subject to arbitration and requests that the Board dismiss the petition challenging arbitrability.

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[9] The Union asserts that in *Patrolmen's Benevolent Assn. of City of NY, Inc. v. City of New York*, 112 A.D.3d 116 (1st Dept. 2013), *reprinted as amended*, 119 A.D.3d 1 (1st Dept. 2014), *revd.*, 26 N.Y.3d 1044 (2015) "the court held that [§] 4(10) of E.O. 75, which contains the same 'without pay' language, applied to the petitioners in that case, who were on full-time leave <u>with</u> pay and benefits." (Ans. fn. 2)

DISCUSSION

The Union has alleged multiple sources of right – Articles 5, 6, and 11 of the Agreement and EO 75 – for its claim that NYCHA improperly denied Grievant a promotion. The Board finds that there is a reasonable relationship to Articles 5 and 11 of the Agreement and to § 2 of EO 75. Accordingly, the petition challenging arbitrability is denied.

It is the well-established policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances." NYCCBL § 12-302; *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures); *OSA*, 77 OCB 19, at 10 (BCB 2006).[10] In recognition of this policy, the Board has long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *COBA*, 8 OCB2d 30, at 7 (BCB 2015) (citations and quotation marks omitted); *see also CWA, L. 1182*, 77 OCB 31, at 7 (BCB 2006). Under NYCCBL § 12-309(a)(3), the Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." The Board, however, "cannot create a duty to arbitrate where none exists." *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *UFA, L. 94*, 23 OCB 10, at 6 (BCB 1979)); *see also IUOE, L. 15*, 19 OCB 12, at 9 (BCB 1977).

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[10] NYCCBL § 12-302 provides that:

> 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.

To determine whether a dispute is arbitrable, the Board applies the following two-pronged test:

> (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 relationship between the subject matter of the dispute and the general subject matter of the Agreement.

COBA, 8 OCB2d 30, at 8; *see also UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011).

Establishing a "nexus between the collective bargaining agreement and the right that the grieving party asserts only requires that the party demonstrate a 'relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *CCA*, 4 OCB2d 49, at 9 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 13); *see also Local 371*, 17 OCB 1, at 11 (BCB 1976). This showing "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact constitute 'an interpretation of the [agreement] that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)); *see also* CSL § 205.5(d). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (internal citations and quotation marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

Here, it is undisputed that the parties are contractually obligated to arbitrate disputes as defined by the Agreement, and it has not been argued that there are any court-enunciated public

policy, statutory, or constitutional restrictions. Thus, the first prong is satisfied. Therefore, the relevant inquiry is whether there is a reasonable relationship between the act complained of, the failure to promote Grievant, and the cited provisions of the Agreement, Articles 5, 6, and 11, and EO 75.

Article 5(d) of the Agreement states that in considering an employee for a promotion, NYCHA "agrees to consider job performance, experience, special skills and training. After considering the aforementioned factors, if candidates are still considered to be equal, then seniority in title will be the governing factor in employee selection." (Pet., Ex 1) The Union alleges that NYCHA refused to consider Grievant for a reason that falls outside of the criteria set forth in Article 5(d). Specifically, the Union alleges that NYCHA considered whether Grievant would add value for the additional salary. We find an arguable nexus between this claim and Article 5(d) of the Agreement. *See Local 1199*, 51 OCB 14, at 11 (BCB 1993) ("Parties to a collective bargaining agreement may voluntarily agree to restrict a matter that falls within an area of management prerogative"); *UFOA*, 4 OCB2d 5, at 10 (grievance related to salary and promotional pay found arbitrable where union can point to specific language in the parties' agreement); *Local 3*, 19 OCB 13, at 6 (BCB 1977), *affd.*, *Matter of City of New York v. Anderson*, Index No. 40532/1978 (Sup. Ct. N.Y. Co. July 17, 1978) (Kassal, J.) (grievance alleging that a member was bypassed for promotion in violation of a restriction unilaterally promulgated by the City in Mayor's Executive Order Number 4 found arbitrable). Whether the language of Article 5(d) may reasonably be interpreted to set forth standards that NYCHA was required to follow in evaluating Grievant for promotion and, if so, whether it failed to consider these criteria is for an arbitrator to determine.

Additionally, we find an arguable nexus between Article 11 of the Agreement and § 2 of EO 75, and the grievance. Article 11 of the Agreement states that NYCHA agrees to follow EO

75 and EO 75, § 2, entitled 'Labor-Management Joint Activities," states in pertinent part that "[e]mployee representatives . . . when acting on matters related only to the interests of employees in their certified bargaining units shall be permitted to perform the following functions, subject to the conditions set forth in this Executive Order, **without loss of pay or other employee benefits**." (Pet., Ex. 2) (emphasis added) The Union alleges that NYCHA violated these provisions when it denied Grievant a benefit, a promotion, in order to avoid paying him the salary and benefits he would otherwise be entitled to receive if he was not on Union release. Here, there is no dispute that Grievant was on full-time leave with pay and benefits to do Union business. The cited section of EO 75 provides that covered union representatives' release time shall be "without loss of pay or other employee benefits." (Pet., Ex. 2) It is for an arbitrator to determine the extent to which the disputed sections apply in the context of this dispute. The Board "need only find a 'relationship' between the act complained of and the source of the alleged right in order to find a dispute arbitrable, and we have done so here." *DC 37, L. 983*, 6 OCB2d 17, at 11 (BCB 2013); *see also PBA*, 4 OCB2d 22, at 14-15.

We do not find a nexus to § 4(9) of EO 75, which applies to "[e]mployee representatives who are granted a leave of absence **without pay**." (Pet., Ex. 2) (emphasis added) The Court of Appeals has held that the rules for determining whether a grievance is arbitrable "are applicable as long as a contractual interpretation is at least colorable, but it is not true that any claim, no matter how insubstantial, may be arbitrated." *Matter of NYS Office of Children & Family Servs. v. Lanterman*, 14 N.Y.3d 275, 283 (2010); *see also SSEU, L. 371*, 6 OCB2d 16, at 6-7 (BCB 2013). Since § 4(9) of EO 75, on its face, applies only to employees on leave without pay, while Grievant

is on leave with pay, there is no colorable nexus to section 4(9) of EO 75.[11] We do not opine as to whether employees on paid release are entitled to the rights enumerated in § 4(9) of EO 75, we merely find that this section does not affect their rights.

Finally, we reject NYCHA's argument that the Union's failure to cite to Article 5 of the Agreement as a source of right during the grievance process or in the arbitration request renders any claim regarding Article 5 not arbitrable. The Board has long held that "lack of an explicit citation to a specific contract provision or rule or regulation in the [r]equest for [a]rbitration is not, in and of itself, necessarily fatal to the [r]equest for [a]rbitration." *CCA*, 4 OCB2d 49, at 11 (citing *CWA*, 51 OCB 27, at 14 (BCB 1993), *affd.*, *Matter of City of New York v. MacDonald*, No. 405350/93 (Sup. Ct. N.Y. Co. Sept. 29, 1994) (Fisher-Brandveen, J.), *affd.*, 223 A.D.2d 485 (1st Dept. 1996)) (other citations omitted)*; see also NYSNA*, 7 OCB2d 17, at 10 (BCB 2014)*; SSEU, L. 371,* 3 OCB2d 53, at 6-7 (BCB 2010) (finding claims arbitrable in spite of technical omissions in an arbitration request where the opposing party's ability to respond to the request or prepare for arbitration is not impaired); *CEA*, 3 OCB2d 3, at 14 (BCB 2010) (additional grounds raised for the first time in the answer were considered by the Board); *Local 1549, DC 37*, 69 OCB 3 (BCB 2002) (union's failure to cite the pertinent contract language until its answer to the petition challenging arbitrability did not preclude arbitration of its claim); *DEA*, 43 OCB 73, at 6 (BCB 1989) (where the employer clearly knew the nature of the grievance from the outset, the employer's

[11] We do not find that *Patrolmen's Benevolent Assn. of City of NY, Inc.*, 119 A.D.3d 1, cited by the Union commands a different result. That case refers to a different provision of EO 75, specifically § 4(10), which has different language defining the scope of employees to which it applies than § 4(9). *See Patrolmen's Benevolent Assn. of City of NY, Inc.*, 119 A.D.3d at 4-5. EO 75 § 4(10) reads "[e]mployees assigned on a **full-time or part-time basis or granted leave without pay** pursuant to the Order shall at all times conduct themselves in a responsible manner." (Pet., Ex. 2) (emphasis added) EO 75 § 4(9) does not include the 'full-time or part-time' language, instead stating that it applies to "[e]mployee representatives who are granted a leave of absence **without pay."** (Pet., Ex. 2) (emphasis added)

challenge to arbitrability was denied even though the union failed to cite the pertinent contract section until it submitted its answer). Thus, where "the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." *SSEU, L. 371*, 3 OCB2d 53, at 7 (quoting *CWA*, 51 OCB 27, at 14).

Here, NYCHA had clear notice of the nature of the grievance, that is, the failure to promote Grievant, well before the Union's request for arbitration was filed. Specifically, the Union's Step II and Step III grievance forms state that there was "a violation and/or misinterpretation" of the Agreement and EO 75, "in that grievant was denied a promotion." (Rep., Ex. 1) Additionally, we note that NYCHA was clearly aware of the potential relevance of Agreement § 5, as it asserted in its petition challenging arbitrability that "only one Article in the [Agreement], Article 5, makes any reference to promotion." (Pet. ¶ 17) Thus, we find that the City had notice of the nature of the grievance, and therefore, the Union's omission of a citation to § 5 prior to filing its answer, does not preclude arbitration.

Accordingly, we find a nexus to Articles 5 and 11 of the Agreement and to § 2 of EO 75. The petition challenging arbitrability is denied, and the request for arbitration is granted. This decision is strictly limited to the issue of arbitrability and is not intended in any way to express an opinion on the merits of the Union's claim, which will be solely the province of the arbitrator to decide.

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 New York City Housing Authority, docketed as BCB-4213-17, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts docketed as A-15269-17, hereby is granted.

Dated: September 7, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER