PBA, 3 OCB2d 41 (BCB 2010)

(Arb.) (Docket No. BCB-2826-10) (A-13317-09).

Summary of Decision*:* The City challenged the arbitrability of a grievance alleging that it violated the parties' collective bargaining agreement, an Interim Order, and an Administrative Guide Procedure by failing to compensate Grievant for accrued compensatory time at the appropriate rate by failing to include differential payments in accordance with a court order. The City argues that Grievant had not submitted a valid waiver, that the arbitration is precluded by the doctrine of *res judicata*, and that no nexus exists between the subject of the grievance and the source of the alleged right. The Board found that Grievant had not submitted a valid waiver and that there was no nexus. Accordingly, the petition is granted, and the RFA 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 and
THE NEW YORK CITY POLICE DEPARTMENT

Petitioners,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On January 8, 2010, the City of New York ("City") and the New York City Police Department ("NYPD" or "Department") filed a petition challenging the arbitrability of a grievance brought by the Patrolmen's Benevolent Association of the City of New York ("Union" or "PBA") on behalf of Stephan E. Foley ("Grievant"). On November 30, 2009, the Union filed a request for

arbitration ("RFA") alleging that the City violated the parties' collective bargaining agreement ("Agreement"), an Interim Order ("IO"), and an Administrative Guide Procedure ("AGP") by failing to compensate Grievant for accrued compensatory time at the appropriate rate. The City challenges the arbitrability of the grievance to the extent that the RFA alleges that the City failed to adjust Grievant's pay rate to include differential payments in accordance with the court order issued in *Scott v. City of New York*, 592 F.Supp.2d 386 (S.D.N.Y. 2008) ("*Scott* Order"). The City argues that the waiver submitted by Grievant is not valid as to any claim based upon the *Scott* litigation and that no nexus exists between the subject of the grievance and the source of the alleged right. The City further argues that any claim based upon the *Scott* Order is precluded by the doctrine of *res judicata*. The Board finds that Grievant has not submitted a valid waiver and that there was no nexus. Accordingly, the petition is granted, and the RFA is denied.

BACKGROUND

The Union is the duly certified collective bargaining representative of Police Officers. Grievant is a former Police Officer who retired in January 2005. On July 15, 2005, the Department paid Grievant for his accrued compensatory time based upon the 2002 rate of pay. In its RFA, the Union avers that Grievant's accrued compensatory time was improperly calculated as the NYPD failed to adjust Grievant's rate of pay to account for (i) contractual general wage increases resulting from interest arbitration awards and (ii) certain differential payments as required by the *Scott* Order. The City disputes the first claim but does not challenge its arbitrability. The City challenges the arbitrability of the Union's second claim only, the claim that it failed to adjust Grievant's rate of pay in accordance with the *Scott* Order.

The *Scott* Litigation

On November 27, 2002, a suit was initiated in federal court on behalf of current and former Polices Officers and Detectives against the City and the NYPD alleging that the City violated the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").[1] Grievant joined the suit on January 28, 2003. His consent form reads, in pertinent part: "I consent to become a party to an action under the [FLSA], concerning the [City's] failure to properly compensate its employees for overtime hours worked. . . . Unpaid overtime compensation, liquidated damages, attorney's fees and other relief will be sought in this action." (Pet., Ex. 4).

An amended complaint was filed on February 24, 2003. The *Scott* Order was issued on August 28, 2008, and describes the five claims of the amended complaint as follows:

> *First*, plaintiffs claim that defendants have a routine practice of denying requests to use accrued compensatory time off without complying with FLSA's requirements (the "denial of use" claim). *Second*, plaintiffs claim that several of defendants' policies unlawfully force plaintiffs to accept compensatory time rather than cash overtime (the "forced accrual" claim). *Third*, plaintiffs claim that some regular work schedules contain overtime, for which they are not compensated (the "chart" claim). *Fourth*, plaintiffs claim that defendants improperly exclude shift differentials and longevity pay when calculating FLSA overtime rates (the "regular rate" claim). *Fifth*, plaintiffs claim that defendants impermissibly fail to compensate for overtime amounting to less than fifteen minutes (the "failure to pay" claim).

(Pet., Ex. 3, p. 2-3) (parentheticals and italics in original, footnote citations omitted, and

[1] The Court described the *Scott* plaintiffs as "approximately 15,800 current and former police officers and detectives employed by the NYPD." *Scott v. City of New York*, 2004 WL 2980135, * 1 (S.D.N.Y. Dec. 27, 2004). The Court denied the City's motion to join the Union as a necessary party but noted that the plaintiffs "are represented for collective bargaining purposes by the PBA and the DEA, respectively." *Scott v. City of New York*, 340 F.Supp.2d 371, 373 (S.D.N.Y.2004).

underscoring added).[2] The term "regular rate" is defined by § 7(e) of FLSA as "all remuneration for employment paid to, or on behalf of, the employee" minus specific remunerations enumerated in the act. 29 U.S.C.A. § 207(e).

The *Scott* Order rejected the City's argument that it was entitled to summary judgment because the plaintiffs had failed to pursue a contractual grievance, finding that:

> Under the terms of the [Agreement], grievances are limited to five discrete categories of complaints, none of which explicitly or implicitly include a failure to comply with federal employment law. Moreover, the brief mention of compensatory time in the [Agreement]–merely authorizing its use and placing the choice between cash overtime and compensatory time in the hands of the employee–makes no reference to grievance mechanisms. Thus the [Agreement] does not contain the "clear and unmistakable" waiver required to eliminate a federal right to a judicial forum in favor of contractual arbitration.

(Pet., Ex. 3, p. 37) (footnote citations omitted).[3] The *Scott* Order granted plaintiffs summary

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[2] While all five counts raise claims under the FLSA, in a previous decision in the case, the *Scott* Court noted that the second count (the forced accrual claim) references the 1995 collective bargaining agreement ("CBA") between the parties: "In that claim, plaintiffs allege that the '[CBA] between [d]efendants and the PBA and the DEA do not authorize' defendants' overtime policies." *Scott v. City of New York*, 340 F.Supp.2d 371, n. 71 (quoting the Amended Complaint, ¶ 18).

[3] The Court cited Article XXII, § 1(a), of the parties 1995 CBA for the five discrete categories of grievance: "(1) violations and misinterpretation of the CBA, (2) violation[s] of NYPD regulations concerning employment, (3) violations of NYPD regulations concerning interrogation of officers, (4) violations concerning internal promotion mechanisms, and (5) assignment to duties differing from an officer's job specification." (Pet., Ex. 3, p. 9). The current Agreement, Article XXI, § 1(a), defines "grievance" as:

> a. A claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
> b. A claimed violation, misinterpretation or misapplication of the written rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not include disciplinary matters;

judgement as to liability on the third (chart) and fourth (regular rate) claims. As to the regular rate claim, the court found that the NYPD violated the FLSA by not recalculating the regular rate of pay based on the realities of each work period. This failure to recalculate meant that the NYPD failed to including shift differentials, some longevity pay, and assignment pay in the regular rate.[4]

A trial was ordered to determine damages for the chart and regular rate claims, and to determine liability as to the remaining three claims.[5] A judgement was issued upon a jury verdict awarding total damages of $900,000 for the combination of the third (chart) and fourth (regular rate)

> c. A claimed improper holding of an open-competitive rather than a promotion exam;
> d. A claimed assignment of the grievant to duties substantially different from those stated in the grievant's job title specification.

(Pet., Ex. 1).

[4] In a subsequent opinion addressing in depth what constitutes the regular rate, the *Scott* court relied upon the Supreme Court opinion in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948), which held that for FLSA calculations:

> We have said that the words regular rate obviously mean the hourly rate actually paid for the normal, non-overtime workweek. Wage divided by hours equals regular rate. The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary regular rate in the wage contracts.

Id. at 461 (quotation marks and citations omitted); *see Scott v. City of New York*, 592 F.Supp.2d 475, 482 (S.D.N.Y.2008).

[5] The trial was held in November and December 2008, a verdict was returned on December 2, 2008, and final judgment entered on June 30, 2009.

claims.[6] The first (denial of use) and fifth (failure to pay) claims were dismissed, with judgement entered in favor of the defendants. Some named plaintiffs prevailed on the second (cap) claim, others had it dismissed. As to non-named plaintiffs, the second (cap) claim was dismissed without prejudice. (Pet., Ex. 5).

The parties cross-appealed but then reached a settlement, with the defendants agreeing to pay the $900,000 in damages and much of the attorneys' fees and costs. The Court held a Fairness Hearing prior to approving the settlement and noted that:

> Many of the letters [from plaintiffs] assume that the $900,000 will be split evenly among plaintiffs. However, the jury award will not be disbursed equally. Rather, due to the nature of the claims upon which plaintiffs prevailed, individual awards require individualized calculations of damages. At the Fairness Hearing, counsel represented that class members stand to receive between approximately $10 and $1000, with the vast majority of plaintiffs receiving an award on the low end of the range.

Scott v. City of New York, 2009 WL 5033957, * n. 10 (S.D.N.Y. Dec. 21, 2009).

Grievance History

On December 22, 2008, the Union filed a Step III grievance on behalf of Grievant that the accrued compensatory time paid him in July 2005 had not been adjusted for subsequent retroactive increases due to arbitration awards or for the *Scott* Order. Article XXI of the Agreement defines the term "grievance" to include a claimed violation, misinterpretation or misapplication of the provisions of the Agreement or of the written rules, regulations or procedures of the Department affecting terms and conditions of employment. The Step III grievance referenced IO 26, ¶ 5, which reads:

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[6] The $900,000 in damages consisted of $450,000 in unpaid wages and $450,000 in liquidated damages for both claims. The Final Judgment, however, does not specify how much was awarded for the each claim.

> An employee who has accrued [FLSA] compensatory time shall, upon termination or separation of employment, be paid for the unused compensatory time at the rate of compensatory not less than:
>
> a. The average regular rate received by such employee during the last three (3) years of the employee's employment, OR
>
> b. The final regular rate received by such employee, whichever is greater.

(Pet., Ex. 2) (underscoring in original). In its Answer, the Union states that a Police Officer's right to be compensated at the regular rate for accrued compensatory time upon termination of employment derives from the FLSA. (Ans. ¶ 73). The Step III grievance was denied on September 21, 2009. On October 23, 2009, the Union filed a Step IV grievance, which was denied on November 2, 2009.

On November 30, 2009, the Union filed the RFA, with which it submitted a waiver. Grievant individually submitted a waiver on December 10, 2009. In the RFA, the Union cites to IO 26 and AGP No. 320-41, which are, for all pertinent purposes, identical.[7] Both were drafted to ensure compliance with the FLSA. IO-26 states that it was promulgated due to a 1985 Supreme Court opinion that found local governments subject to the FLSA. AGP No. 320-41 states its purposes is "[t]o set forth guidelines for compliance with the provisions of the [FLSA]." (Pet., Ex. 2). The RFA states the issues to be arbitrated as:

> Whether the [NYPD] violated [IO] 26 of 1986 and [AGP] No. 320-41 by failing to compensate [Grievant] for accrued FLSA compensatory time at the appropriate "regular rate" by (i) failing to adjust [Grievant's] regular rate in order to reflect contractual general wage increases resulting from interest arbitration awards covering the

[7] AGP No. 320-41 has the same a and b sections as that of IO 26 quoted above. AGP No. 320-41 refers to a "member of service" who "must be paid," while IO 26 refers to an "employee" who "shall . . . be paid." (*Compare* Ans. ¶ 47 *with* Ans. ¶ 48).

> periods August 1, 2002 to July 31, 2004 and August 1, 2004 to July 31, 2006; and (ii) failing to include certain differential payments in [Grievant's] regular rate in accordance with the Opinion and Order in *Scott et al. v. City of New York, et al.*, dated August 28, 2008.

(*Id.*). The City does not challenge the arbitrability of the first claim. The relief requested in the RFA is that the NYPD be ordered to:

> (i) recalculate the regular rate of pay the Department paid to [Grievant] for his accrued FLSA compensatory time upon his retirement to reflect the contractual wage increases resulting from the 2002-2004 and 2004-2006 interest arbitration awards as well as adjustments to the regular rate of pay resulting from the Opinion and Order in *Scott et al. v. City of New York, et al.*, dated August 28, 2008; (ii) pay [Grievant] the difference between what he received following his retirement in 2005 and what he should have received under the arbitration awards and consistent with the Opinion and Order in *Scott et al. v. City of New York, et al.*, including interest; and (iii) cease and desist from failing to recalculate the regular rate of pay following arbitration awards or negotiated settlements that result in retroactive salary increases and concomitant adjustments to the regular rate of pay.

(*Id.*).

POSITIONS OF THE PARTIES

City's Position

The City contends that the RFA must be dismissed insofar as it alleges that the NYPD failed to adjust Grievant's regular rate in accordance with the *Scott* Order as the waiver submitted by Grievant is not valid. As a prerequisite to arbitration, a grievant must waive their right to submit the dispute to any other forum but, prior to filing the RFA, Grievant submitted the identical FLSA dispute to federal court. The relief sought in federal court was for plaintiffs to be paid in accordance with the FLSA, the same relief sought in the RFA. The legal theory underlying the *Scott* litigation

is the same as that for the instant RFA. The *Scott* litigation has concluded with a final judgement on the merits. This makes it impossible for Grievant to submit a valid waiver.

The City urges the Board to reject the Union's argument that its waiver makes the grievance arbitrable even if Grievant's waiver is invalid. Board precedent holds that if a grievant's waiver is invalid due to prior litigation, the grievance cannot proceed to arbitration regardless of the Union's absence from the prior litigation. The City further argues that the doctrine of *res judicata* precludes relitigating Grievant's FLSA claims as they were decided on their merits in the *Scott* Order. The dispute resolved by the *Scott* Order and the second claim in the RFA are identical, as is the relief requested, and the underlying legal theories.

The City also argues that the Union has failed to establish the requisite nexus between the act complained of and the source of the alleged right. Disputes defined in Article XXI of the Agreement are the only disputes that the parties have agreed to arbitrate. Questions of whether the NYPD has complied with a federal statute are inappropriate for arbitration unless expressly defined as grievable under the Agreement. The parties have not agreed to arbitrate disputes concerning the FLSA or FLSA-related court decisions. Mere reference of the FLSA in IO 26 or AGP No. 320-41 does not render a FLSA dispute arbitrable. Further, the Union is not arguing a misapplication of IO 26 or AGP No. 320-41. Rather, the Union is arguing that the application of these provisions violates the FLSA, which is not for an arbitrator to decide.

Union's Position

The Union argues that Grievant's waiver is valid. The Board has held that the scope of the waiver is limited to claims under the collective bargaining agreement. The waiver does not encompass all statutory, constitutional, or common law claims arising from the same facts. Further,

courts have ruled that an employee's waiver provided to allow the submission to arbitration of a contractual dispute based upon the FLSA does not preclude that employee from proceeding to court to seek a judicial review of an alleged FLSA violation. The Board should find the inverse herein. The issues of law litigated in the *Scott* litigation are not implicated by the waiver. Therefore, Grievant could, and did, properly submit a valid waiver consistent with the Board's decisions and governing judicial precedent.

Further, even if the Board found that under certain circumstances a waiver could bar FLSA claims, Grievant's waiver is nonetheless valid. A waiver is invalid only when the prior proceedings stem from the same factual circumstances, involve the same parties, and seek to determine the same issues of law. The City argues that Grievant submitted "his FLSA dispute" to the courts, but fails to specificity the nature of "his FLSA dispute." (Ans. ¶ 72) (quoting Pet. ¶ 43). The City does not demonstrate how the dispute was submitted to or decided in *Scott*. For example, the City has failed to show that the *Scott* litigation addressed the City's obligation to compensate retirees for accrued FLSA compensatory time in cash. The *Scott* litigation clarified the definition of regular rate. It did not address the factual or legal issues regarding whether Grievant was compensated at the appropriate regular rate for accrued overtime at retirement. Therefore, the same disputes have not been submitted to arbitration and to a court. Further, a waiver will be found invalid only where the Grievant's underlying choice of forums was made with knowledge of all the facts necessary to make an election of remedies. Here, Grievant consented to the *Scott* litigation more than two years prior to his retirement and more than five years prior to the *Scott* Order. The factual circumstances underlying the grievance had yet to occur when Grievant elected to be a plaintiff in *Scott*.

Assuming, *arguendo*, that Grievant's waiver was invalid, this matter nonetheless should proceed to arbitration because the Union was not a party to the *Scott* litigation and has submitted a valid waiver. The Union may proceed to enforce IO 26 and AGP 320-41 as applied to all of its members irrespective of whether some of its members were plaintiffs in *Scott*.

The Union also argues that *res judicata* does not apply. The burden is on the City to establish such and it has not met this burden. At issue in the RFA is the right to retroactive adjustments to accrued compensatory time, a right found in IO 26 and AGP 320-41. This issue was not among the five distinct issues the *Scott* Order addressed.

The Union argues that a grievance is presumed to be arbitrable unless specifically excluded by the arbitration provisions of the parties' collective bargaining agreement. The Agreement explicitly defines grievance to include claimed violation, misinterpretation or misapplication of the written procedures of the NYPD. IO 26 and AGP No. 320-41 are written procedures of the NYPD, and the Board has found operating orders and AGPs arbitrable. IO 26 and AGP No. 320-41 provide that Police Officers are to be paid for accrued FLSA compensatory time upon their retirement. They also state that the FLSA rate of compensation shall be the average of the last three years regular rate or the final regular rate, whichever is greater. The Union alleges in the RFA that Grievant was not paid at the appropriate regular rate. There is, therefore, a clear nexus between the grievance and IO 26 and AGP 320-41. Nothing more is required to proceed to arbitration.

The Union is not seeking to arbitrate a violation of the FLSA, nor is such alleged in the grievance. A grievable written policy may be drafted in compliance with federal law. IO 26 and AGP No. 320-41 were drafted to comply with the requirements of the FLSA. They are grievable written policies that apply the FLSA. The Board has held that, while claims alleging a violation of

law may not be arbitrable, claims alleging violations of contractual provisions applying a law are arbitrable. Such is the instant case.

DISCUSSION

As a preliminary matter, we first address the City's contention that Grievant has not submitted a valid waiver, a statutory condition precedent to arbitration. *See DC 37, L. 376*, 1 OCB2d 36, at 11 (BCB 2008); *PBA*, 23 OCB 8, at 4 (BCB 1979). The City argues that the waiver filed by Grievant is invalid as to the second claim since Grievant had previously submitted that underlying dispute to federal court, ultimately resulting in the *Scott* Order. We agree.

Section 12-312(d) the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") requires Grievant to file "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." NYCCBL § 12-312(d) prevents duplicative litigation of the same dispute and ensures that a grievant who chooses redress through one forum will not attempt to relitigate the same claim in another. *See UFA*, 73 OCB 3A, at 7 (BCB 2004). The waiver prevents the subsequent arbitration of a matter submitted to and adjudicated on its merits by a court. *See PBA*, 23 OCB 8, at 4.

Here, Grievant is seeking to have an arbitrator determine the same calculation of differential and longevity payments as being determined in the *Scott* litigation. The fourth claim in the *Scott* litigation was whether the "defendants improperly exclude[d] shift differentials and longevity pay when calculating FLSA overtime rates (the 'regular rate' claim)." (Pet., Ex. 3, p2-3) (parenthetical in original). The *Scott* Court determined what constituted the regular rate and that the City had not

properly calculated it. A jury then determined and awarded total damages for all plaintiffs, which were entered by the *Scott* Court. The parties filed cross-appeals and subsequently reached a settlement resolving all claims. The Court held a Fairness Hearing and approved the settlement, noting that the plaintiffs would receive "individual awards [that] require individualized calculations of damages." *Scott*, 2009 WL 5033957, * n.10.[8] These damages are limited to the amount of the verdict, and allocated among the plaintiffs based upon their individual damages.

In the RFA, the Union also seeks the individualized calculations of damages. The second claim of the RFA is that the City failed "to include certain differential payments in [Grievant's] regular rate in accordance with the [*Scott* Order]." (Pet., Ex. 2). The RFA seeks damages "resulting from" and "consistent with" the *Scott* Order. (*Id.*). In its Answer, the Union specifies that the RFA seeks to have Grievant's accrued compensatory time "adjusted to include night shift differential and longevity payments in accord with the [*Scott* Order]." (Ans. ¶ 51). The relief requested in the RFA is the same as provided by the *Scott* Court. *See DC 37, L. 376*, 1 OCB2d 36, at 12.

The Union argues that Grievant cannot be deemed to have waived his right to arbitration because at the time he joined the *Scott* litigation in January 2003 he could not have known that some time later the City would not abide by its obligations under IO 26 and AGP No. 320-41. The NYCCBL waiver requirement prohibits the submission of the same underlying dispute to two forums, regardless of whether the claim is submitted subsequent to arbitration or, as here, prior to the filing of the RFA. *See PBA*, 23 OCB 8, at 4. Grievant never withdrew from the *Scott* litigation–not before the jury rendered its verdict nor before the parties settled their appeals. It

[8] The Court also noted that all individual plaintiffs were mailed notices of the proposed settlement and of the Court's Fairness Hearing.

appears that Grievant, nevertheless, is seeking through arbitration damages for his FLSA regular rate claim in excess of what he was informed he could expect to receive as his share of the settlement of the *Scott* litigation. Grievant indisputably was aware, years before he filed his waiver, that the *Scott* litigation would address the calculation of regular rate.[9] By July 2009, five months prior to submitting his waiver, a jury had awarded damages, and a final judgment had been entered on the merits of the regular rate claim–the claim that the City improperly excluded shift differentials and longevity pay when calculating FLSA overtime rates. Accordingly, Grievant is unable to submit a valid waiver for the second claim on which there has been a determination on the merits.[10] *See DC 37, L. 376*, 1 OCB2d 36, at 12 ("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").[11]

Further, the second claim is not arbitrable because it is not reasonably related to the Agreement. Although the NYCCBL favors the arbitration of grievances, the Board "cannot create a duty to arbitrate where none exists." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (quoting *UFA, L. 94*,

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[9] In its Answer, the Union described the second claim of the RFA as the failure of the City to adjust Grievant's 2005 payment "in accord with IO-26 and AG[P] 320-41 to reflect the appropriate regular rate as that term was clarified in [the *Scott* Order]." (Ans. ¶ 49).

[10] That the Union also submitted a waiver does not make the instant matter grievable. The RFA was brought solely on behalf of Grievant, and the concrete remedy sought is specific only to Grievant. Where a RFA is brought on behalf of a Grievant, and the Grievant cannot submit a valid waiver, the RFA must be denied. *See Local 246, SEIU*, 7 OCB 12, at 9-10 (BCB 1971) (Valid waiver from grievant required "[w]hen the grievance sought to be arbitrated is uniquely personal to the grievant and involves an ascertainable aggrieved employee.") (internal quotations and citations omitted); *see also DC37*, 37 OCB 46 at 16 (BCB 1986).

[11] As we have found Grievant could not submit a valid waiver, we need not and do not determine if arbitration would have been precluded under the doctrine of *res judicata*.

23 OCB 10, at 6 (BCB 1979)). In determinating if a matter is arbitrable, we apply a two-prong 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 CBA.

OSA, 79 OCB 22, at 10 (BCB 2007) (citations and internal quotation marks omitted); *see also NYSNA*, 69 OCB 21, at 7-8 (BCB 2002); *SSEU*, 3 OCB 2, at 2 (BCB 1969). As it is undisputed that the parties are contractually obligated to arbitrate disputes, the first prong is satisfied.

The City argues that the Union cannot establish the requisite nexus between the act complained of and the source of the alleged right as the parties have not agreed to arbitrate disputes concerning the FLSA or FLSA-related court decisions. The Union counters that the Agreement explicitly allows for arbitration of claimed violation, misinterpretation or misapplication of the written procedures of the NYPD such as IO 26 and AGP No. 320-41.

Although worded with reference to written procedures of the NYPD, the essence of the Union's second claim is that the City failed to compensate Grievant in accordance with the *Scott* Order. That is, the RFA does not seek the interpretation or application of IO 26 and AGP No. 320-41. Rather, by its explicit terms, the RFA seeks the regular rate of pay as determined by the *Scott* Order. The issue in the RFA is defined as the failure "to include certain differential payments in [Grievant's] regular rate in accordance with the [*Scott* Order]." (Pet., Ex. 2). This is, in essence, the enforcement of the Court's determination on regular rate. The relief sought is to order the NYPD to recalculate Grievant's regular rate to reflect "adjustments to the regular rate of pay resulting from

the [*Scott* Order]" and to "pay [Grievant] the difference between what he received . . . and what he should have received . . . consistent with the [*Scott* Order]." (*Id.*). IO 26 and AGP No. 320-41 do not mention differential payments or calculating the regular rate. They state that upon termination of employment, an employee shall be paid for accrued compensatory time at the greater of the average regular rate received over the last three years or their final regular rate. Which regular rate to use–the average of the last three years or the final–is not an issue raised in the RFA.

Thus, the question in the instant matter is not whether alleged violations of IO 26 and AGP No. 320-41 are arbitrable but whether, under the Agreement, the alleged failure to abide by the *Scott* Order is arbitrable. Here, the RFA does not seek the enforcement of any contractual right but of rights determined in the *Scott* Order. The definition of grievance in Article XXI, § 1(a), of the Agreement does not include court orders and "[b]y negotiating the contractual grievance and arbitration procedure, the parties have agreed upon the kinds of disputes to be brought to arbitration." *DEA*, 57 OCB 4, at 11 (BCB 1996). Therefore, the Agreement "does not encompass the particular controversy presented here," and the RFA fails to satisfy the second prong of our arbitrability test. *DC 37, L. 768 & SSEU, L. 371*, 3 OCB2d 7, at 14 (BCB 2010).

Accordingly, we grant the City's petition challenging arbitrability of the second allegation of the RFA that the City failed to include certain differential payments in Grievant's regular rate in accordance with the *Scott* Order, and deny the RFA to the same extent.

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-2826-10, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by the Patrolmen's Benevolent Association of the City of New York, docketed as A-13317-09, to the extent that it alleges failing to include certain differential payments in Grievant's regular rate in accordance with the Opinion and Order in *Scott v. City of New York*, 592 F.Supp.2d 386 (S.D.N.Y. 2008), hereby is denied.

Dated: September 22, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER