***DC 37, Local 768 and SSEU Local 371,* 3 OCB2d 7 (BCB 2010)**
(Arb) (Docket Nos. BCB-2752-09 and BCB-2757-09).

Summary of Decision: The Union filed a request for arbitration stemming from NYCHA's decision to lay off certain employees working in community centers, and the City and DYCD's concurrent decision to fund centers to provide similar services to the community via private contractors. The City filed a petition challenging the arbitrability of the grievance. NYCHA filed a separate petition challenging the arbitrability of the same grievance. The Board found that the contractual claim related solely to NYCHA, and dismissed the request as to the City. The Board further found that there was no nexus between the contracting-out provisions of the agreement and NYCHA's actions. Accordingly, NYCHA's challenge to arbitrability was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK and
THE DEPARTMENT OF YOUTH AND COMMUNITY DEVELOPMENT,

Petitioners,

- and -

THE NEW YORK CITY HOUSING AUTHORITY,

***Petitioner*,**

- and -

DISTRICT COUNCIL 37, LOCAL 768 and SSEU LOCAL 371,

Respondents.

DECISION AND ORDER

On March 11, 2009, the City of New York ("City") and its Department of Youth and Community Development ("DYCD") filed a petition challenging the arbitrability of a grievance

brought by District Council 37 ("DC 37" or "Union") on behalf of SSEU Local 371 and Local 768. On March 27, 2009, the New York City Housing Authority ("NYCHA" or "Authority") likewise filed a petition challenging the arbitrability of this same matter. The Union's Request for Arbitration ("RFA"), dated January 29, 2009, alleged that the City, DYCD, and NYCHA violated contract provisions concerning "Privatization/Contracting-Out/Contracting-In," when NYCHA laid off 200 employees, and the City and DYCD thereafter contracted with and provided funds to a private entity to provide similar services. The City and DYCD assert that they are not proper parties to this proceeding, that the Union is unable to execute a valid waiver, and that there is no nexus between the contract cited by the Union and NYCHA's decision to lay off employees. NYCHA makes similar assertions and additionally argues that the Union complains of actions not covered by the agreement cited by the Union, that NYCHA and the City are separate legal entities, that contracts may contain similar language but not obligate entities not party to the contract, and that issues that are suitable for arbitration should be severed and proceed as separate matters involving only the parties to the contract. Given the overlapping facts and issues presented here, this Board determined that the two petitions should be consolidated, and we thus decide all issues herein. We find that the Union has failed to show that the issue presented is a proper matter for arbitration. Accordingly, we grant the petitions challenging arbitrability filed by the City and by NYCHA.

BACKGROUND

NYCHA is a public benefit corporation whose purpose is "to provide safe, decent, and sanitary housing for low-income families in the City of New York." (NYCHA Pet., ¶ 1). NYCHA is a separate legal entity from the City and is not a mayoral agency.

NYCHA and DC 37 are parties to a Memorandum of Agreement ("MOA"), which is currently in status quo. The MOA, dated March 30, 2001, incorporates by reference certain sections from the 1995 Municipal Coalition Memorandum of Economic Agreement ("MEA")[1] to which DC 37, the City, the New York City Board of Education and the New York City Health and Hospitals Corporation are parties. In particular, the MOA provides in pertinent part:

> 2. TERMS OF THE 1995 MCMEA
>
> The new Agreement shall incorporate the following provisions contained in the [1995 MCMEA], where applicable:
>
> * * *
>
> c) Section 11: Privatization/Contracting-Out/Contracting-In
>
> * * *
>
> The language of the above-referenced provisions, and the language of the articles of the expired Agreement which relate to said provisions, shall be modified where appropriate to recognize that the Authority is a public benefit corporation that has been established under the state public housing law and that is not a so-called Mayoral agency.

(NYCHA Pet., Ex. 5).

The relevant section of the 1995 MEA provides:

> **Section 11. Privatization/Contracting-Out/Contracting-In.**
>
> a. the parties have recognized appropriate processes and procedures involving privatization, contracting-out and contracting-in. During the period of this 1995 MCMEA when the job security provisions are in effect, no employee will be involuntarily displaced by the above. Once the Job Security provision has expired, it is not the City's intention to utilize privatization as a means to involuntarily displace

[1] The parties and the record refer to the documents as both "MEA" and MCMEA." For simplicity, we refer to it as MCMEA only.

employees. In the event such circumstances do arise the Unions and the City reserve their rights.

b. It is the Employer's policy to have advance discussions with the Union to review its plans for letting a particular contract which may adversely affect employees covered by this 1995 MCMEA. The Union shall be advised as early as possible, but in no case later than 90 days in advance of the contract being let, of the nature, scope, and approximate dates of the contract and the reasons therefor.

c. The Employer will provide the Union as soon as practicable with information, in sufficient detail, so that the Union may prepare a proposal designed to demonstrate the cost effectiveness of keeping the work in-house. Such information, consistent with the applicable provisions of Section 312(a) of the New York City Charter, shall include but not be limited to, applicable solicitations to vendors, winning bids, descriptions of services to be provided by vendors, cost comparison analyses, and the agency's estimated direct operating and administrative costs of contracting out the work.

d. Not less than 45 days prior to submission to the Comptroller of a recommendation for the award of the contract the union shall have an opportunity to make a formal proposal to the employer demonstrating that it is cost effective or that it is in the best interest of the employer to continue to perform the work in house. The Employer agrees to consider such proposal before making a final determination. Such final determination shall be made in writing and submitted to the Union as soon as practicable.

e. The parties agree to set up a labor-management study committee to discuss and review processes for the contracting-in of public services. The study committee will consider:

I. the conditions under which "contracting in" should be considered and the method by which it should be determined that City services should be contracted in;

ii. The establishment of pilot projects in mutually agreed upon targeted areas to determine the feasibility of providing such services in-house; and

iii. if the parties mutually agree to the study committee's recommendations, the City will examine the feasibility of contracting-

> in services during the period covered by this 1995 MCMEA.

(NYCHA, Pet., Ex. 6).

NYCHA was not a party to the 1995 MCMEA, and is not now a party to the 2008 MCMEA. The employer signatories to the 2008 MCMEA are the City, the New York City Department of Education and the New York City Health and Hospitals Corporation. The 2008 MCMEA Section 11, entitled "Privatization/Contracting-Out/Contracting-In" uses similar language to the 1995 MCMEA to cover this issue.

NYCHA has community centers located throughout its housing developments. Various services including activities and programs for children and senior citizens have been traditionally provided in the centers. Some of these community centers were funded and staffed by NYCHA employees, others are funded and staffed by other agencies and private contractors or organizations. The Union represents employees that worked in community centers funded and staffed by NYCHA.

Due to reduced funding, NYCHA contemplated closing many of its community centers. In May 2008, NYCHA Chairman Ricardo Elias Morales testified before the New York City Council, stating that NYCHA need to reduce its expenses and would be, among other things, "eliminating all non-core services." (NYCHA Pet., ¶ 56 quoting Ex. 9). As early as September 15, 2008, NYCHA informed the Union that it planned to close 19 community centers and eliminate the related positions at those centers. In response, to an estimated budget gap of approximately $150 million for its 2009 Fiscal Year, NYCHA Chairman Morales notified the City Council in November 2008 that NYCHA planned to eliminate certain community programs and reduce its staff accordingly, thereby saving approximately $20 million. NYCHA and the Union met at various times thereafter to discuss NYCHA's plan to close the community centers.

On January 2, 2009, NYCHA informed the Union that it intended to cease funding and running the 19 community centers. However, on January 13, 2009, a joint press conference was held by NYCHA, the City, and DYCD, which is a mayoral agency. At this joint conference, a press release was disseminated, which stated that: "NYC Department of Youth and Community Development to Administer Comprehensive Youth Programming at NYCHA Community Center Sites in all Five Boroughs; 19 NYCHA Centers Slated for Closure Will Remain Open." (NYCHA Pet, Ex. 2). This press release further stated that

> [DYCD Commissioner Mulgrav] announced a plan to ensure continuity of services at 25 NYCHA community centers utilizing $12.25 million in funding provided by the New York City Council. The plan will allow 19 NYCHA centers to remain open that were previously slated for immediate closure. . . . Federal funding shortfalls, which have shortchanged NYCHA by more than $551 million since 2002, have continuously challenged the Authority's mission to preserve public housing in New York City.

(NYCHA Pet., Ex. 2).

DC 37 filed a RFA, dated January 29, 2009, listing NYCHA, DYCD and the City as the employer and stating that it was filed pursuant to the 2008 MCMEA and the MOA between NYCHA and DC 37. In its RFA, DC 37 characterized its grievance as follows:

> Whether [NYCHA], [DYCD], and the [City] violated the terms of Section 11 of the [MC]MEA regarding the letting of contracts to community-based organizations to provide community services, presently performed by DC 37 represented City employees, in that:
>
> 1) the City has caused DC 37 represented employees of NYCHA to be involuntarily displaced, or will be displaced, as a result of contracting-out services to community centers previously provided by the affected employees;
>
> 2) the City failed to provide the requisite 90-day advanced notice of the services being contracted out which may adversely affect the

> [MC]MEA covered employees;
>
> 3) the failure to provide the Union with advanced notice of their intentions to let the above-described contract denied the Union the ability to review the plans for letting said contracts; and
>
> 4) the City failed to provide the Union with information to enable the Union to prepare a proposal designed to demonstrate the cost effectiveness of keeping the work in-house.

(NYCHA Pet., Ex. 1).

The Union's waiver, dated February 6, 2009, describes its grievance as follows:

> Whether the employer, the New York City Housing Authority, the Department of Youth and Community Development, and the City of New York, (collectively "the City") violated the terms of section 11 of the [MC]MEA regarding the letting of contracts to community-based organizations to provide community service, presently performed by DC 37 represented employees, and if so, what shall be the remedy?

(NYCHA Pet., Ex. 3).

On February 10, 2009, the Union filed an action in the Supreme Court of the State of New York, seeking an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, against various respondents, including Michael R. Bloomberg, as Mayor of the City; Jeanne B. Mullgrav, as Commissioner of DYCD; Ricardo Elias Morales, as Chairman of NYCHA; and various community-based organizations and/or providers of community-based services. The Union alleged that the City's actions were a violation of Local Law 35 of 1994 (New York City Charter § 312(a)) and Article V, § 6 of the New York State Constitution.

On February 20, 2009, NYCHA implemented its decision to cease its operation of these centers, and as a result, at least 200 NYCHA employees were laid off. Also in February 2009, with $12.25 million in funding provided by DYCD, Beacon Community Centers, a private organization,

began providing services at the center sites.

POSITIONS OF THE PARTIES

City's Position

In its Petition, the City argues that it is not a proper party to this proceeding because the affected employees were employed by NYCHA, and not by the City. The City and NYCHA are separate and distinct entities. NYCHA has elected to be covered by the NYCCBL, but such does not impute NYCHA's actions to the City. Further, the 2008 MCMEA is an agreement between the Union and various employers including the City, the New York City Health and Hospitals Corporation, and the New York City Department of Education. NYCHA is not a party to the MCMEA, and therefore, NYCHA's employees are not covered by the terms of that agreement. Contrary to DC 37's allegations, these NYCHA employees have no rights under the 2008 MCMEA and the MCMEA creates no binding obligations for the City to these employees.

The City also argues that DC 37 failed to execute a valid waiver, pursuant to NYCCBL § 12-312(d) because, in addition to filing for arbitration, the Union filed the same claim in the New York State Supreme Court.[2] Since the claims filed by the Union for arbitration and with the courts concern common legal and factual issues, the Union's waiver is invalid.

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[2] NYCCBL § 12-312 states in pertinent part:

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

Finally, the City asserts that there is no nexus between the 2008 MCMEA and NYCHA's decision to lay off the community center employees. The Union has no substantive rights under § 11 of the MCMEA, which concerns privatization and contracting work because the City "is not privatizing or contracting out any work that affects Respondent's employees," but instead "expanding existing contracts to fill a void in services that occurred as a result of NYCHA's closing of its community centers."

NYCHA's Position

NYCHA first argues that the Union failed to assert a valid grievance because the circumstances about which the Union complains in its RFA are not covered by the MOA. The Union purports to grieve about contracting out of work; however, NYCHA has not contracted out any work, but only laid off employees due to economic necessity.

Further, NYCHA is a separate and distinct entity from the City or DYCD; the affected employees at issue were employees of NYCHA, and not of the City or DYCD. Naming these other parties in the RFA and the waiver render them both defective. Further, the City and DYCD are not parties to the Agreement, and NYCHA is not obligated to arbitrate a matter in which other parties are included. Even if there are matters that are suitable for arbitration, issues concerning NYCHA as the employer should be severed from those against the City and DYCD, which are not parties to the Agreement, and which did not have an employment relationship with the employees in question. Although the NYCHA/DC 37 agreement contains similar language as the MCMEA, the two are separate and unique. Also, while the MOA integrated language from the 1995 MCMEA, NYCHA notes that the signatories to the MCMEA have since signed a new agreement, the 2008 MCMEA, which supercedes the earlier agreement.

NYCHA also argues that the Union's waiver is invalid because it submitted the same matter to a judicial tribunal, which thereby leaves the Union incapable of rendering a valid waiver. The waiver is also procedurally defective as the issues stated on the RFA and on the waiver are "substantially different" in that "[t]he waiver does not waiver Respondent's right to submit the dispute in other judicial and administrative tribunals as to the MOA, even though the MOA is the only collective bargaining agreement between NYCHA and Respondents." (NYCHA Pet., ¶¶ 137, 143). Also, "the last four lines of the proposed issue as stated in the waiver as substantially different from the issue proposed in the purported [RFA], materially changing or altering the [proposed] issue." (NYCHA Pet., ¶ 145).

Finally, Section 11, pertains to "Privatization/Contracting Out/Contracting-In," does not relate to staff reductions made for economic purposes. Therefore, there is no nexus between the allegedly violated contractual provision and the offending actions, namely the layoffs of the affected employees.

Union's Position

The Union contends that there is a clear nexus between the contract and the dispute in that "this grievance alleges that NYCHA, with assistance from the City of New York and the Department of Youth and Community Development, contracted out bargaining unit work without meeting its obligations under Section 11 of the 1995 MCMEA." (Ans. to NYCHA, ¶ 76). This nexus is evidenced by the City's providing funding to keep the community centers open and the City's exerting control over the decision to contract out the services instead of providing funding to prevent the lay-offs. Further, "in conformity with [the Board's] statutory policy favoring arbitration, doubtful issues of arbitrability are to be resolved in favor of arbitration." (Ans. to City, ¶ 47).

The arbitration should not be severed into separate matters as the issues are identical in both matters and no party would be prejudiced by consolidation. Moreover, since the Union will be presenting the same documentary evidence against both parties, consolidation would be more efficient and would avoid prejudice or contradictory rulings. Also, the City is indeed a proper and necessary party to this arbitration because "[w]hile the laid-off bargaining unit members were employed by NYCHA, there are issues of fact regarding control the City and DYCD had over requiring NYCHA to contract out/privatize these community centers," and also because any relief granted at arbitration would impact the City. (Ans. to City, ¶ 32). While the affected employees were employed by NYCHA, the City exercised control over the decision to contract out the services offered at the community centers. Such control is illustrated by the fact that a news conference was held at which City and NYCHA representatives were in attendance. At this conference, it was announced that the community centers would remain open and that funding from the City "will allow 19 NYCHA centers to remain open that were previously slated for immediate closure." (Ans. to City, ¶ 34, quoting City Ex. 6).

Further, the Union asserts that the City and NYCHA are both covered by Section 11 of the MCMEA. Although the Petitioners claim that Section 11, which pertains to privatization, does not apply to a situation where an agency decides to lay off employees for economic reasons, this is an inaccurate description of this situation in which the centers remain open and functioning. In fact, the work that was previously performed by bargaining unit members is virtually identical to that now being performed by private organizations.

While the Union does not dispute that the City and NYCHA are separate legal entities, both are covered by § 11 of the MCMEA as the City is a signatory to it and NYCHA incorporated the

section by reference in its collective bargaining agreement. The Union asserts that Section 11 has not been modified since the 1995 MCMEA and that, because both employers are signatories to agreements with the Union with identical language, they are both covered by Section 11 of the MCMEA. (Ans. to NYCHA, ¶ 106). Moreover, both are proper parties to this arbitration as "the City and DYCD required, as condition precedent to funding the community centers, that NYCHA contract these services to community centers overseen and regulated by the City and DYCD." (Answer to NYCHA, ¶ 78). NYCHA's claim that the Union's waiver was procedurally defective is the result of NYCHA's misreading the RFA and the waiver, particularly in the Union's use of a "hereinafter" term to refer to NYCHA, DYCD and the City of New York as the "City;" the Union understands that NYCHA and the City are distinct legal entities.

Concerning the waiver filed pursuant to this arbitration, the Union argues the executed waiver is valid. Although the descriptions of the issue as stated on the RFA and the waiver are not identical, they are substantially the same; the RFA puts all parties on notice that the grievance alleges that NYCHA employees were displaced by the actions of NYCHA and the City. Further, regarding the pending lawsuit, both the lawsuit and the grievance arise out of similar facts, the Union seeks different legal determinations from the court and the arbitration. In the lawsuit at issue here, the Union has not raised any contractual claims, but instead alleges a violation of the City Charter. The grievance is brought pursuant to §11 of the MCMEA while the lawsuit seeks to enforce rights under § 312 of the City Charter. Moreover, it is possible for an agency to be in compliance with one set of legal obligations while violating the other; for example, and the agency could comply with Section 312 while violating Section 11, or vice versa. The Union also notes that "Section 11 of the [MC]MEA pre-dates Section 312 of the City Charter." (Ans. to City, ¶ 41).

DISCUSSION

The NYCCBL embodies and expresses a public policy "to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances," and this public policy informs our determinations as to whether a matter is substantively subject to arbitration. *DC 37, Local 376*, 1 OCB2d 36, at 10 (BCB 2008) citing *COBA*, 53 OCB 14, at 5 (BCB 1994); *see also Local 924, DC 37,* 1 OCB2d 3, at 8 (BCB 2008). In determining arbitrability, 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.

OSA, 1 OCB2d 42, at 16 (BCB 2008) (citations omitted). This test is used to determine "whether there is a nexus . . . between the subject matter of the dispute and the general subject matter of the [collective bargaining agreement]." *Id.*

In the instant case, the Union argues that there is a clear nexus between the issue they raise and collective bargaining agreements to which the Union is a signatory because, the Union alleges, the NYCHA and the City essentially acted in concert to contract out work; they held a joint press conference and issued a joint press release announcing the decision. The Union asserts that the City exerted control over the decision by providing money to outside contractors to perform the work formerly performed by the affected employees instead of providing money directly to NYCHA, which would have avoided layoffs. Finally, the City and NYCHA are both covered by an MCMEA,

albeit the 1995 or the 2008 iteration, and the differences between the two versions is insignificant.[3]

Addressing the first prong of the arbitrability test, we find that the grievants named in the RFA have a contractual relationship providing for arbitration of disputes with NYCHA only; the City is not similarly bound. The undisputed facts clearly establish that the DC 37 members who were employed at the community centers were solely employed by NYCHA; their collective bargaining agreement was with NYCHA only. While the Union asserts that the City should be considered a "necessary party" based on its involvement in the events described above, and based on its signatory relationship with DC 37 in its capacity as representative of City employees, neither of these arguments defeat the simple fact that the City has no collective bargaining agreement with the Union covering the employees formerly employed in NYCHA's community centers. Thus, we find that the Union is able to meet the first element as it pertains to NYCHA only. We also find that the RFA must be dismissed *in toto* as to the City.

As to NYCHA's claim that the RFA does not state a cognizable grievance, we find that the Union's agreement with NYCHA does not encompass the particular controversy presented here, and thus fails to satisfy the second prong of our arbitrability test. The Union cites to the contractual provision covering privatization, contracting-out and contracting-in. However, given that NYCHA terminated the affected employees after its decision to cease operating the community centers and has never resumed operating the centers or hired employees to perform similar functions, we are unable to find any relation between the contractual provision cited by the Union and the factual circumstances of this case. NYCHA's decision to allow the City to operate community centers on

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[3] The Union argues that the 2008 version of Section 11 is unchanged from the 1995 version, but this is not true. After examining both documents, it is apparent that the documents are not identical.

NYCHA property does not permit, let alone require, a finding that NYCHA is the operator of the centers. Absent anything more, we are unable to find any issue arising under the applicable agreement between NYCHA and the Union.

The Union notes correctly the Board's preference of resolving doubtful issues of arbitrability in favor of arbitration; still, "[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties."[4] *DC 37, Local 376*, 1 OCB2d 36, at 10 citing *COBA*, 53 OCB 14, at 5. After examining the facts presented in this case, we find that the Union has failed to show that its presented issue is arbitrable.[5]

We take administrative notice of the fact that, subsequent to the completion of pleadings in the instant cases, a decision was rendered by the Supreme Court, New York County, in a related matter in which this Board was not a party. In *Matter of Roberts v. City of New York,* Index No. 101881/09 (Tolub, J.), decided on December 22, 2009, District Council 37 challenged the same actions by NYCHA and the City involved in the grievances herein, on the different ground that the actions of the respondents violated New York City Local Law 35 of 1994 (codified in New York City Charter § 312(a)) and the merit and fitness clause of Article V, § 6 of the New York State

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[4] Section 12-302 of the NYCCBL provides in pertinent part that:

> Statement of policy. It is hereby declared to be the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

Pursuant to NYCCBL 12-309(a)(3), this Board has the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter;" NYCCBL 12-312 governs grievance procedure and impartial arbitration.

[5] Given our finding herein, we need not address other arguments made by the parties.

Constitution. Local Law 35 requires notice to the City Council and affected unions, submission to them of a comparative cost analysis, and an opportunity for the City Council to hold a hearing on the matter, whenever an agency's contracting-out of services will result in the layoff of public employees. The City moved to dismiss on the ground, *inter alia*, that the waiver filed by the Union with the Office of Collective Bargaining, pursuant to NYCCBL § 12-312(d), in connection with the requests for arbitration herein precluded the submission of statutory and constitutional claims arising out of the same factual transaction to a judicial forum.[6] As stated above, the request for arbitration claimed violations of § 11 of the MCMEA, which provides for advance notice, discussions with the Union, and the opportunity for the Union to make a proposal for work-related changes by its members that would achieve savings to make it cost effective to perform the work in house, before a covered employer may contract-out work.

The court granted the City's motion to dismiss, interpreting the "underlying dispute" language of NYCCBL § 12-312(d) to preclude the submission of statutory and constitutional claims, as well as contractual claims, to any forum other than arbitration once the Union has executed the waiver. Finding that the question of the scope of NYCCBL § 12-312(d) was purely one of statutory interpretation, and thus one as to which the court need not defer to the administrative agency's

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[6]Section 12-312(d) of the NYCCBL provides:

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

expertise, the court declined to apply this Board's decisions finding that the waivers executed by parties pursuant to that section of the NYCCBL are limited to contractual claims arising out of collective bargaining agreements. (Slip Op. at 13-14). In so holding the court appears to have adopted the City's argument that the waiver

> . . . was designed to have the arbitration process resolve the entire matter placed in dispute, not just a fragment of the issues.[7]

Slip Op. at 12. Thus, the court ruled that:

> . . . the only possible interpretation of the statute is that in order to invoke arbitration of an issue, the entire issue must be submitted . . . . (Emphasis in original).

Slip Op. at 14.

Though not referenced in the court opinion, the court disregarded this Board's decision in *UFA*, 73 OCB 3A (BCB 2004) (which the parties' submissions before the Court make clear was brought to the court's attention in the Union's memorandum of law). In *UFA*, after conducting an extensive review of recent federal and state court decisions regarding arbitration and the question of waiver of statutory rights, this Board held that consistent with the current state of the judicial case law,

> the scope of the OCB waiver is limited to contractual claims under the collective bargaining agreement. In other words, the "underlying dispute" referred to in the OCB waiver does not encompass all statutory, constitutional, or common law claims arising from the same factual circumstances.

73 OCB 3A, at 13. Our decision further held that, to the extent the Board's prior decisions were

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[7] No legislative history was cited by the City or the court in support of this claimed "design."

inconsistent, they were overruled.

At the time of the submissions in the present matters, the Union could not have anticipated that the court in *Matter of Roberts* would rule, inconsistent with our well-settled case law, as well as with the court decisions relied upon in our 2004 *UFA* decision, that statutory and constitutional claims must be submitted to arbitration before the OCB panel of labor arbitrators.[8] Therefore, we are constrained by the court's decision to entertain consideration of whether the statutory and constitutional claims ruled by the court to be within the scope of the Union's waiver are, therefore, subject to arbitration under the NYCCBL.[9]

Accordingly, while for the reasons stated above we find that DC 37's contractual grievances are not arbitrable, we do not opine on the arbitrability of the statutory and constitutional claims which the court in *Matter of Roberts v. City* evidently assumed were arbitrable. Should the Union submit a request to arbitrate the related statutory or constitutional claims, we will address at that time any question raised concerning whether the request is timely, given the unique circumstances of this case, and whether the claims are arbitrable.

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[8] "Statutory and constitutional claims" would include claims under Title VII, the ADA, the FLSA, and other anti-discrimination and regulatory statutes, as well as the violations of the City Charter and the State Constitution claimed by the Union herein. While it appears a logical consequence of its decision, it seems questionable that the court in *Matter of Roberts* could have intended such a broad sweep for the NYCCBL waiver requirement, inasmuch as this would be contrary established precedent from the state and federal courts.

[9] The court's opinion notably is contrary to Court of Appeals precedent requiring that any waiver of statutory or constitutional rights be "clear, explicit and unequivocal." *See Waldron v. Goddess*, 61 N.Y.2d 181, 183-184 (1984). Moreover, the collective bargaining agreement in the present case contains no language that could be said to constitute a "clear and unmistakable" agreement to arbitrate the statutory and constitutional claims raised by the Union, as required by the United States Supreme Court. *See 14 Penn Plaza v. Pyett*, 129 S.Ct. 1456 (2009).

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 Department of Youth and Community Development, docketed as No. BCB-2752-09, hereby is denied; and it is further

ORDERED, that the petition challenging arbitrability filed by the New York City Housing Authority, docketed as No. BCB-2757-09, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 768 and SSEU Local 371, docketed as A-12994-09, hereby is denied.

Dated: February 10, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

I dissent in part and concur in part - see my separate Opinion below.

CHARLES G. MOERDLER
MEMBER

I dissent on the issue of arbitrability regarding DC 37's contractual grievances, but concur on the expansion

GABRIELLE SEMEL
MEMBER

of OCB's jurisdiction to determine the arbitrabiliity of statutory claims in light of the decision in *Matter of Roberts*.

Opinion of Member Charles G. Moerdler, Dissenting in Part and Concurring in Part

The majority's well-reasoned commentary upon the holding of the Supreme Court, New York County, in a related matter, *Matter of Roberts v. City of New York*, Index No. 101881/09 (Tolub, J.), decided on December 22, 2009, and its application here illustrates an important lesson: "Be careful what you wish for (or, as here, ask a Court to determine), for it may just be granted."

The Office of Labor Relation, which ably acts for the City and its agencies before this Board, challenged arbitrability of the contract grievance here tendered. A majority of the Board agreed (although I dissent from that determination). The Office of the Corporation Counsel represented the City Respondents in *Roberts* and there prematurely precipitated, on motion to dismiss, a judicial finding of broad arbitrability (in direct conflict with the result which a majority of this Board would have reached here). Importantly, the Court's decision -- entered while the Board's decision here was sub judice – implicates a far more expansive view of arbitrability than had heretofore been recognized (or which the City might have contemplated).

Not only does the Court's determination result in a decisional conflict with the views of this Board – the agency expert in the application of the relevant laws and regulations –, it seemingly upends a body of law of consistent application.

As noted, I would urge arbitrability of the contractual issues here tendered and dissent from the Board's contrary finding. In my view, arbitrability is to be favored not shunned. Further, since we are constrained to follow Supreme Court's determination, the majority is entirely correct and I

concur in its view that, if timely request therefore be made in accordance with the majority decision and direction, we must now consider applications for arbitration of a broad range of issues, including statutory and constitutional issues.

Feb 10, 2010.

Charles G. Moerdler