DC 37, Local 372 and Local 983, **4 OCB2d 25 (BCB 2011)**
(Arb.)(Docket No. BCB-2897-10) (A-13549-10).

***Summary of Decision*:** The City challenged the arbitrability of the Union's grievance alleging that the Department of Education violated the parties' Memorandum of Economic Agreement. The City argued that the Board lacks jurisdiction over the Department of Education and, even if the Board has jurisdiction, the Union cannot submit a valid waiver, as required by the NYCCBL, because it submitted the underlying grievance to PERB. The Union asserted that the Board should dismiss the petition challenging arbitrability because the City is not a party to the underlying grievance and therefore lacks standing, and the Union's right to arbitrate violations of the Memorandum of Economic Agreement arises from that Agreement, not from the NYCCBL. The Board found that, under the NYCCBL, it does not have jurisdiction over the Department of Education, and dismissed the petition. However, the Board declined to dismiss the Request for Arbitration inasmuch as there is a pending court proceeding to compel arbitration under the Memorandum of Economic Agreement. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 372 and LOCAL 983, AFSCME, AFL-CIO,

Respondents.

DECISION AND ORDER

On August 2, 2010, District Council 37, Local 372 and Local 983, AFSCME, AFL-CIO ("Union") filed a Request for Arbitration alleging that the New York City Department of Education ("DOE") violated the terms of the 2008 District Council 37 Memorandum of Economic Agreement

("MEA") between the parties by failing to provide the Union with advance notice of its intent to enter into a contract with an outside vendor and failing to provide information to enable the Union to prepare a proposal to demonstrate the cost effectiveness of keeping the work in-house. On September 24, 2010, the City of New York ("City") filed a petition challenging the arbitrability of the Union's grievance based on lack of jurisdiction because the DOE is not subject to the New York City Collective Bargaining Law ("NYCCBL"). The City also asserts that the Union submitted the same claim to the New York Public Employment Relations Board ("PERB") and, consequently, is unable to submit a valid waiver to the Board, as required by the NYCCBL and the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter1) ("OCB Rules"). The City claims that the DOE is the public employer in this dispute; however, the DOE has not appeared, nor does the City purport to be acting on its behalf. Rather, the City challenges the arbitrability of the grievance to the extent that the Request for Arbitration affects its own legal rights and obligations as a signatory to the MEA. The Union counters that the City is not a party to the grievance and therefore lacks standing to bring an arbitrability claim. It also argues that the right to arbitrate violations of the MEA arise from that contract and not from the NYCCBL, and therefore the Board should dismiss the City's petition for lack of jurisdiction. The Union further asserts that the waiver provisions are inapplicable to the instant grievance.

Because the Board does not have jurisdiction over the DOE, we dismiss the City's petition challenging arbitrability. However, we decline to dismiss the Request for Arbitration inasmuch as there is a pending court proceeding to compel arbitration under the Memorandum of Economic Agreement.

BACKGROUND

The Union represents the Loaders and Handlers and Motor Vehicle Operators titles in the City school district. On October 30, 2008, multiple parties, including the Union, the City and the DOE, executed the MEA.[1] Section 11 of the MEA, titled "Privatization/Contracting-Out/Contracting-In" provides, in pertinent part:

> a. 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 2008 DC 37 MEA. 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.
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> b. 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.
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> c. 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 such 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.

(Pet. Ex. 1). Section 12 of the MEA addresses the resolution of disputes, including those concerning the application of the provisions of Section 11, and provides, in pertinent part:

> a. . . . any dispute, controversy, or claim concerning or arising out of the

[1] The parties to the MEA are: DC 37, Local 372, Civil Service Technical Guild Local 375, the City, the DOE, and the New York City Health & Hospitals Corporation.

> execution, application, interpretation or performance of any of the terms or conditions of this 2008 DC 37 MEA shall be submitted to arbitration upon written notice therefore by any of the parties to this 2008 DC 37 MEA to the party with whom such dispute or controversy exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining pursuant to Title 61 of the Rules of the City of New York. Any award in such arbitration proceeding shall be final and binding and shall be enforceable pursuant to Article 75 of the CPLR.

(Pet. Ex. 1).

According to the City, on June 22, 2010, the Office of the New York City Comptroller registered a vendor contract entered into between the DOE and APPCO Paper & Plastics Corporation ("APPCO Contract"), pursuant to which APPCO agreed to deliver various products to DOE schools. This work, according to the Union, is "traditionally performed by bargaining unit members." The Union sent the DOE a letter objecting to its use of APPCO workers to perform deliveries, expressing its belief that this registration of the contract violated Section 11 of the MEA, demanding that DOE cease such action until the parties had reached an agreement, and seeking additional information about the APPCO Contract. The Union claims that the DOE entered into the APPCO Contract without providing the Union with advance notice of its intent to do so, refused to provide the Union with information to allow it to make counterproposals to keep the work in-house, as required by Section 11, and thereafter refused to rescind the APPCO Contract. The Union contends that the APPCO Contract will "adversely affect bargaining unit members," within the meaning of Section 11, and has already diminished bargaining unit work.

On or about August 2, 2010, the Union filed a Request for Arbitration for violation of Section 11 of the MEA. Specifically, the Union sought resolution of the following dispute:

> Whether the New York City Department of Education violated the terms of Section

> 11 of the MEA regarding the letting of a contract to APPCO Paper and Plastics Corporation for the direct delivery of goods to the Department of Education schools, in that
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> 1) DOE has failed to give the Union advance notice of the employer's intentions to let the above-described contract, thereby denying the Union the ability to review the plans for letting said contract; and
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> 2) DOE has 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.

(Pet. Ex. 2). As required by NYCCBL § 12-312(d) and OCB Rule § 1-06(b), on August 12, 2010 and September 8, 2010, the Union filed waivers executed by Executive Director Lillian Roberts and President Veronica Montgomery Costa, respectively.

On August 19, 2010, the Union filed an improper practice charge with PERB on the grounds that the DOE violated Sections 209-a.1(a) and (d) of Civil Service Law, Article 14 ("Taylor Law").[2] The Union alleged five causes of action against the DOE, including failure to bargain over the impact of its decision to subcontract with APPCO; failure to bargain in good faith; failure to bargain over a mandatory subject; failure to bargain over increased workload and safety; and failure to provide

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[2] Section 209-a.1 provides, in pertinent part:

> It shall be an improper practice for public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; . . . (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees.

Section 202, in turn, provides:

> Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

information necessary for the administration and enforcement of a collective bargaining agreement. (Pet. Ex. 4).

The City, not listing the DOE as petitioner nor claiming to act on its behalf, filed the instant petition on September 24, 2010. On November 15, 2010, after filing a notice of claim, the Union filed a motion to compel arbitration in the Supreme Court, New York County, pursuant to Article 75 of the Civil Practice Law and Rules. That matter is now pending.

POSITIONS OF THE PARTIES

City's Position

The City challenges the arbitrability of the Union's grievance on three grounds. First, it argues that the DOE is not subject to the NYCCBL's jurisdiction. Citing §§ 12-303 and 304 of the NYCCBL,[3] the City states that the DOE is a separate legal entity from the City and is not a

[3] NYCCBL § 12-304 reads in full:

> This chapter shall be applicable to:
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> a. All municipal agencies and to the public employees and public employees organizations thereof;
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> b. any agency or public employer, and the public employees and public employee , organizations thereof, which have been made subject to this chapter by state law;
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> c. any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable, subject to approval by the mayor, provided, however, that any such election by the New York city board of education shall not include any teacher as defined in section 13-501 of the administrative code or any employee who works in that capacity or any paraprofessional employees with teaching functions; and

"municipal agency," as defined by the NYCCBL. Moreover, the DOE has not elected to be covered by the NYCCBL. Therefore, the Board lacks jurisdiction over the DOE and accordingly cannot reach the issue as to whether the Union's grievance is arbitrable. The City points out that the Board has previously ruled that it is without jurisdiction to determine "even threshold questions of arbitrability," concerning DOE employees as a result of its lack of jurisdiction.

Second, the City contends that the DOE's execution of the MEA does not constitute an election of coverage under the NYCCBL § 12-304(c). The City asserts that, in order for a public employer to elect coverage under the NYCCBL, it must affirmatively elect to be covered and the Mayor of the City of New York must affirmatively approve the public employer's election of coverage. The City acknowledges that the MEA provides for the arbitration of disputes pursuant

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> d. any public employer, and the public employees and public employee organizations thereof, to whom the provisions of this chapter are made applicable pursuant to paragraph four of subdivision c of section 12-309 of this chapter.

NYCCBL § 12-309(c)(4), in turn, reads in full:

> On the request of the mayor, to make available the mediation, impasse, and arbitration services of the office of collective bargaining to public employers and public employee organizations not otherwise entitled to make use thereof at a cost to them to be determined by the board;

NYCCBL § 12-303(d) reads in full:

> The term "municipal agency" shall mean an administration, department, division, bureau, office, board, or commission, or other agency of the city established under the charter or any other law, the hear of which has appointive powers, and whose employees are paid in whole or in part from the city treasury, other than the agencies specified in paragraph two of subdivision g of this section.

NYCCBL 12-303(g)(2) provides, in pertinent part: "the board of education, the New York city health and hospitals corporation. . ."

to the OCB Rules, but argues that the execution of the MEA cannot override NYCCBL's coverage requirements. In addition, the Mayor's approval is absent from any election of coverage that the Union may claim the MEA represents. According to the City, the fact that the Union filed an improper practice charge with PERB is an acknowledgment by the Union that the DOE has not elected to be covered by the NYCCBL.

Third, the City asserts that even if the Board determines that it has jurisdiction over the DOE, the Request for Arbitration must be denied because the Union has submitted the underlying grievance to PERB. NYCCBL § 12-312(d) and OCB Rule § 1-06(b) mandate that, as a prerequisite to arbitration, a union waive its right to submit an underlying dispute to any other forum.[4] The City states that the Board has previously granted petitions challenging arbitrability because unions have

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[4] NYCCBL § 12-312(d) 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.

61 RCNY § 1-06(b) provides, in pertinent part:

> (1) A public employer or certified or designated public employee organization which desires to arbitrate a grievance shall:
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> * * *
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> (iii) when the party requesting arbitration is a public employee organization, file a waiver, signed by the grievant(s) and the public employee organization, waiving any rights to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

submitted the same underlying dispute to PERB. It alleges that, in both the improper practice charge submitted to PERB and this dispute, the Union's claim is based on the execution of the APPCO Contract, of which it seeks recission.

The City disputes the Union's argument that, because PERB does not have a waiver requirement analogous to that of the NYCCBL, the NYCCBL's waiver requirement is inapplicable in the instant case. The City reasons that this argument would only have value if it sought to invalidate the PERB charge. However, since it is only seeking to invalidate the Request for Arbitration, NYCCBL's waiver provision applies to the instant matter.

In reply to the Union's argument that the City lacked standing to file the petition, the City claims that the Board has previously considered its petitions "challenging arbitrability of grievances in which the City was not named as the responding public employer."[5] Here, because the City is a signatory to the MEA, it has a greater stake in the outcome of the instant arbitration than in the referenced Carpenters and Plumbers cases. Further, it replies that the City is a party to the grievance – in addition to the DOE – because OCB Rule § 1-06(b)(1)(ii) states that a designed public employee organization shall "serve the request for arbitration upon all parties to the agreement under which the request is made," and the City is a party to the MEA. As a remedy, the City requests that the Board dismiss the Request for Arbitration.

Union's Position

The Union contends that the issue of whether the grievance is arbitrable is not properly

[5] *See New York City District Council of Carpenters, UBCJA*, 1 OCB2d 33 (BCB 2008), *affd*, *Matter of NYC Dist. Council of Carpenters v. Gold*, *et al.*, Ind. No. 114353/08 (Sup. Ct. N.Y. Co.. Feb. 2, 2010)(Goodman, J.); and *Plumbers Local Union No. 1, U.A, AFL-CIO*, 1 OCB2d 28 (BCB 2008), *affd, Matter of Plumbers Loc. Union No. 1 v. Gold*, Ind. No. 112139/08 (Sup. Ct. N.Y. Co., Feb. 2, 2010)(Goodman, J.).

before the Board because (1) the City lacks standing to bring a petition challenging arbitrability, and (2) the right to arbitrate violations of the MEA does not arise from the NYCCBL.

The Union states that NYCCBL § 12-309(a)(3) only authorizes the Board to make determinations of arbitrability "on the request of a public employer or a certified or designated employee organization which is a party to a grievance." Here, the City is not a party to the Union's grievance, which is a prerequisite for bringing a challenge to arbitrability. The Mayor's Office of Labor Relations ("OLR"), which represents the City in this matter, represents mayoral agencies of the City of New York. The OLR does not represent the DOE, which is the respondent in the Union's grievance.[6]

The Union asserts that the right to arbitrate MEA violations under Section 11 does not derive from NYCCBL § 12-312, as the Board's limited jurisdiction and authority prevent it from determining rights other than those involving interpretations of the NYCCBL or those enumerated in § 12-309. Therefore, the petition should be dismissed for lack of standing and jurisdiction.

Nevertheless, the Union argues that the MEA is an enforceable agreement and it has raised an arbitrable matter. If the DOE were subject to the NYCCBL, the matter would be arbitrable because there is a direct nexus between the MEA and the conduct at issue. The cases cited by the City are not dispositive of the arbitrability of the Union's request to arbitrate the MEA. Accordingly, the dispute should be brought to arbitration, consistent with the MEA's terms.

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[6] The Union asserts that service of a copy of the Request for Arbitration upon OLR Commissioner Hanley was merely a courtesy, because during the course of discussions between the DOE and the Union concerning the APPCO Contract, the DOE invited OLR officials to participate.

In response to the City's challenge to arbitrability, the Union contends that it has never asserted that the DOE is subject to the NYCCBL, either by election, state law, or the execution of the MEA. Instead, the Union seeks to follow the MEA's grievance procedure, which designates the three impartial members of the Board to hear disputes, to resolve the instant dispute.

The Union also disputes the City's argument that it has not submitted a valid waiver to the Board because it filed an improper practice charge at PERB. Similar to the City, the Union takes the position that, since the Board lacks jurisdiction over the DOE, the NYCCBL is not applicable to the grievance. The NYCCBL's waiver provision must therefore also be inapplicable to the grievance. Alternatively, assuming the waiver provision is applicable, the Union's waiver is sufficient because the causes of action submitted to PERB allege violations of the Taylor Law, not of the MEA. Therefore, the events at issue in the grievance and the improper practice charge are distinct.

DISCUSSION

Our jurisdiction is limited to claims concerning parties subject to the NYCCBL. Section 12-304 of the NYCCBL provides that the statute is applicable to (i) all municipal agencies; (ii) public employers which have been made subject to the NYCCBL by state law; and (iii) any other public employer which elects, with the mayor's consent upon executive order, coverage under the NYCCBL. *See* NYCCBL § 12-304. The NYCCBL defines a "municipal agency" as an "administration, department, division, bureau, office, board, or commission, or other agency of the city established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the city treasury, other than the agencies

specified in paragraph two of subdivision g of this section." NYCCBL § 12-303(d). Section 12-303(g)(2) of the NYCCBL, in turn, specifically excludes the "board of education" from the definition of the term "municipal agency." *See* § 12-303(d).

NYCCBL § 12-303(f) states that "[t]he term 'mayoral agency' shall mean any municipal agency whose head is appointed by the mayor." We have previously determined that the employer of City school district employees - whether referred to as the Board of Education ("BOE") or the DOE – cannot be a mayoral agency for purposes of the NYCCBL. *See Carpenters,* 1 OCB2d 33; *Plumbers*, 1 OCB2d 28. In those cases, we held:

> Since NYCCBL § 12-303(d) explicitly excludes from its definition of municipal agency any agency specified in NYCCBL § 12-303(g)(2), any such agency - even if the head thereof is appointed by the Mayor – is not a municipal agency. Therefore, any agency specified in NYCCBL 12-303(g)(2) is not a mayoral agency. NYCCBL § 12-303(g)(2) specifies the BOE - the employer of City school district employees - and that employer (whether known as the BOE or the DOE) cannot be a mayoral agency for purposes of the NYCCBL.

Plumbers, 1 OCB2d 28, at 20; *Carpenters*, 1 OCB2d 33, at 21. Thus, the DOE does not fall within the definition of a mayoral agency.

The parties further agree that the DOE has not elected to be subject to the NYCCBL under the procedures set forth in NYCCBL § 12-304, pursuant to which a party seeking to submit to NYCCBL jurisdiction must both affirmatively elect to do so and obtain the approval of the mayor. *See* NYCCBL § 12-304(c). Simply, there is no evidence to suggest that the parties to the MEA elected to be covered by the NYCCBL. Accordingly, we deny the City's petition challenging arbitrability because the Board lacks jurisdiction over the DOE pursuant to the NYCCBL.

We similarly deny the City's petition for lack of jurisdiction as it pertains to the waiver argument. As both parties concede, because the Board lacks jurisdiction over the DOE, the

NYCCBL is not applicable to the grievance. The waiver provision of the OCB Rules, §1-06(b)(1)(iii), is derived directly from and implements the statutory waiver rule, NYCCBL § 12-312(d). Since we have no jurisdiction under the NYCCBL to rule on the waiver issue, there exists no basis for us to rule on this issue under the OCB Rules.

However, we find no basis compelling the dismissal of the Union's Request for Arbitration. Pursuant to the MEA, the parties agreed to arbitrate disputes, including grievances pertaining to Section 11, under a certain set of procedures. Those procedures expressly provide that the parties shall submit their disputes to the three impartial members of the Board, pursuant to the OCB Rules. We believe that in making available the agency's arbitration procedures for use in this matter, the Office of Collective Bargaining would be acting permissibly in its administrative capacity and not in the exercise of any statutory authority, which we here find lacking in basis.

Consequently, we decline to dismiss the Request for Arbitration. In doing so, we note that a motion to compel arbitration in this same matter is currently pending in the Supreme Court, New York County, that may present issues not placed before this Board. However, in the event the arbitration proceeds under the OCB Rules, since the instant petition has been put before the Board, including the three impartial Board members, for determination, said members will recuse themselves from hearing the underlying arbitration of this matter. Pursuant to the OCB Rules and consistent with the MEA, the parties are free to select a panel of arbitrators from the Register of Neutrals maintained by the Board.

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, docketed as No. BCB-2897-10, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 372 and Local 983, AFSCME, AFL-CIO Union, docketed as A-13549-10, hereby is granted.

Dated: June 1, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER