United Marine Division, Local 333, ILA, **4 OCB2d 37 (BCB 2011)**
(Arb.) (Docket No. BCB-2862-10) (A-13475-10).

Summary of Decision: The City challenged the arbitrability of a grievance brought by the Union, which asserted that DOT's creation and implementation of a new sick leave regulation violated the parties' collective bargaining agreement. The City contended that *res judicata* mandates that the grievance be denied, as the issues presented already have been decided by this Board. The City further contended that the Union could not execute a proper waiver and that the Union's request for arbitration failed to establish the necessary nexus between the subject matter of the grievance and the source of the alleged rights. The Board found that *res judicata* did not apply, but that, in the wake of recent judicial decisions reinterpreting the waiver provision of the NYCCBL, that the waiver was not valid. Accordingly, the City's petition is granted and the request for arbitration denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

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

Petitioners,

-and-

UNITED MARINE DIVISION, LOCAL 333, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent.

DECISION AND ORDER

On May 26, 2010, the City of New York ("City") and the New York City Department of Transportation ("DOT") filed a petition challenging the arbitrability of a grievance brought by the United Marine Division, Local 333, International Longshoremen Association, AFL-CIO ("Union" or "Local 333") on behalf of the entire bargaining unit. The grievance, filed on June 1, 2009 at Step

I, asserts that DOT violated the parties' collective bargaining agreement by creating and implementing SMS Alert No. 94, which mandated that employees in certain titles on sick leave for three or more consecutive days submit to a specific type of examination and have their examining physician provide certain necessary documentation. The City contends that the grievance is not arbitrable because the same dispute has already been decided by the Board of Collective Bargaining ("BCB" or "Board") in *United Marine Division, Local 333*, 2 OCB2d 44 (BCB 2009), *affd*., *Matter of City of New York v. Bd. of Coll. Barg*., Index No. 400177/10 (Sup. Ct. N.Y. Co. Oct. 7, 2010)(Schlesinger, J.). Further, the City argues that arbitrability should be denied because the Union cannot execute a valid waiver and that, substantively, Local 333 failed to establish the nexus necessary for allowing a grievance to proceed to arbitration. The Board rejects the City's argument of *res judicata* because the Board lacked the jurisdiction in the previous improper practice proceeding to decide an issue which involved contractual interpretation and been deferred to arbitration. However, constrained by the recent decision of the Appellate Division, First Department, in *Matter of Roberts v. Bloomberg*, 83 A.D.3d 457, 458 (1st Dept. 2011), the Board finds that the Union submitted an invalid waiver because the required waiver must encompass an agreement "to arbitrate the entire dispute, not just contractual claims" *Id*. Accordingly, the City's petition is granted, and the request for arbitration denied.

BACKGROUND

DOT is responsible for all the functions and operations of the transportation systems throughout the City of New York including the maintenance and operation of the Staten Island Ferry. One of its primary missions is to provide for the safe, efficient, and environmentally responsible

movement of people and goods in the City of New York. In furtherance of this mission, DOT is committed to providing a safe working environment for its employees, and to ensure the safety of the public that it serves. Local 333 represents DOT employees who are members in the marine consolidated job titles, including Deckhand, Ferry Terminal Supervisor, Dockmaster, Ferry Agent, and Marine Oiler, which have been characterized by DOT as "safety sensitive" and "physically taxing" positions. (Ans., Ex. E). These parties are subject to a collective bargaining agreement covering the period from April 27, 2008 to April 26, 2010, which is still in full force and effect ("Agreement").

Previous Litigation History

On June 5, 2009, the Union filed an improper practice petition against the City and DOT alleging that DOT violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4).[1] The Union claimed that DOT's issuance of SMS Alert No. 94, which required certain employees involved in specific seafaring titles who are absent from work due to injury or illness for three or more

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[1] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees; . . .

Further, § 12-305 of the NYCCBL provides, in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

consecutive days to undergo a specific type of medical examination and obtain a specific type of medical note from a doctor prior to returning to duty ("SMS Alert"), constituted a change in a mandatory subject of bargaining. Further, the Union contended that this regulation contradicted the sick leave provisions contained in the Agreement. The Union sought a declaration by this Board that DOT violated the NYCCBL, the posting of notices indicating the same, and an order making all affected DOT employees whole.

The City argued that DOT's issuance of the SMS Alert did not violate the NYCCBL because this regulation merely clarified the existing sick leave provisions in the Agreement and did not contradict these provisions. Also, the City maintained that this regulation was issued in order to ensure DOT's compliance with existing federal statutes, regulations, and maritime industry standards. Such compliance was designed to protect the public utilizing DOT's ferry system, which was an important public policy. Finally, the City argued that any change to the existing sick leave policies caused by the SMS Alert were de minimis.[2] Remedially, the City requested this Board to dismiss the Union's improper practice petition, thereby allowing the issuance and implementation of the SMS Alert to stand.

On November 23, 2009, the Board issued its decision in *United Marine Division, Local 333*, 2 OCB2d 44.[3] The Board found that DOT violated NYCCBL § 12-306(a)(1) and (4) because the SMS Alert involved the mandatory subject of bargaining of sick leave and DOT unilaterally issued

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[2] The City, in its answer to this improper practice petition, did not raise the affirmative defense of deferral.

[3] This decision contains a more in-depth recitation of the specifics concerning the SMS Alert, as well as the fuller explanation of the term "fit for duty," the expressed rationale offered by the City for issuing the SMS Alert, and the federal and maritime guidelines DOT attempted to mimic when it issued this regulation.

this new regulation, which altered the existing sick leave provisions contained in the Agreement, without collectively bargaining over it.[4] Accordingly, this Board found that DOT failed to bargain in good faith by issuing and implementing the SMS Alert.

As a remedy, this Board ordered the City to rescind the SMS Alert and its requirements for medical documentation, restore the medical documentation procedures that existed prior to the issuance of the SMS Alert, bargain in good faith with the Union before implementing any changes to the medical documentation procedures required by sick leave provisions in the Agreement, and post the attached notice detailing its violations of the NYCCBL. However, this Board did not order DOT to make all the allegedly adversely affected employees whole, as had been requested by the Union. Furthermore, the Board's order provided that nothing therein should be construed as a limitation of DOT's managerial authority.[5] Accordingly, DOT retained the authority to assign or reassign adversely affected employees to whatever duties it deems appropriate.

The City appealed the Board's determination in *United Marine Division, Local 333*, 2 OCB2d 44 on the grounds that, *inter alia*, this decision was "arbitrary, capricious, and contrary to law" and "violates public policy." (Pet., Ex. D). On October 7, 2010, Supreme Court affirmed the Board's decision. , *affd*., *Matter of City of New York v. Bd. of Coll. Barg*., Index No. 400177/10

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[4] The Board held that the City's arguments related to statutory and regulatory preemption did not apply in this particular instance. Furthermore, this Board rejected the City contention that the changes to the sick leave policies caused by the issuance and implementation of the SMS Alert were *de minimis*. Finally, this Board held that the public policy exception to the statutory mandate requiring bargaining was misplaced in this instance because the sources relied upon by the City evince a disconnect with the "strong public policy."

[5] Our decision and order in the previous matter did not require DOT to re-assign the employees affected by this regulation to be re-assigned to their safety-sensitive duties, and DOT remained free to assign its staff to such duties as it deemed these employees were competent to perform.

(Sup. Ct. N.Y. Co. Oct. 7, 2010)(Schlesinger, J.).

Union's Grievance and City's Petition Challenging Arbitrability

As referenced above, on March 6, 2009, DOT issued the SMS Alert which states, in pertinent part:

> Employees in safety sensitive or physically taxing positions who are absent for three or more consecutive days due to injury or illness must meet the following requirements before being allowed to return to work:
> a. The employee must submit a full "fit for duty" from their physician.
> b. The "fit for duty" must state: "I have been advised that (employee's name) performs safety sensitive and/or physically taxing work and attest that he/she can perform his/her duties without any restrictions."

(Pet., Ex. B).[6] In furtherance of the SMS Alert, DOT issued a form for Local 333 members to provide their treating physicians in order to ensure that its employees were in compliance with the SMS Alert. This form, on DOT letterhead, provides spaces for the treating physician's name, the physician's signature, and the date such signature was affixed thereto.

According to the Union, after DOT implemented the SMS Alert, at least four members of Local 333 "were prevented from returning to work" after sick leave absences of three days of more.[7] (Ans. ¶ 21). Further according to the Union but denied by the City, DOT refused to allow one member of Local 333 to return to duty after a three days absence for a period of five weeks because this individual was unable to find a physician who was able to conduct a "fit for duty" examination

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[6] We take administrative notice that the term "fit for duty" requires an extensive and detailed medical obligation, and requires a full medical examination, including blood, laboratory, and radiological tests, be performed by a doctor who is familiar with the physical requirements imposed upon seafarers by their normal duties and with all maritime regulations, policies and procedures. *See MEBA*, 3 OCB2d 4, at 5-10 (BCB 2010); *UMD, L. 333*, 2 OCB2d 44, at 5-7.

[7] The City denied knowledge or information sufficient to form a belief regarding this assertion made by the Union.

and complete the requisite paperwork under the SMS Alert. (*See* Pet., Ex. A). DOT's refusal to allow this employee to return to work caused this employee to lose his accrued leave time and borrow additional leave time. (*Id.*). According to the Union, these individuals produced medical documentation that satisfied Article IV-A § 10(b)(4) of the Agreement, but was not in compliance with the "fit for duty" standard used in the SMS Alert.

Article IV-A § 10(b)(4) of the Agreement memorializes the sick leave provision governing employees. It states, in pertinent part:

> a. A verifying statement from the Employee's doctor shall not be required by the Employer for sick day claims of two (2) days or less.
> b. For claims of more than two (2) working days, the Employee must secure a verifying statement from his doctor to support his claim. This statement should be sent in as soon as possible after the period of absence is over.

(Pet., Ex. E).

On June 1, 2009, Local 333 filed a grievance, in accordance with Article VI § 1 of the Agreement, alleging that DOT violated the Agreement by creating and implementing the SMS Alert and sought rescission of this regulation as its requested remedy. This provision defines the term "grievance" as:

> a. A dispute concerning the application or interpretation of the terms of this Agreement;
> b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting the terms and conditions of employment . . .;

(Pet., Ex. A). In the grievance, Local 333 complained that the issuance and implementation of the SMS Alert violated the sick leave provisions memorialized in the Agreement, by heightening the

requirement for DOT employees who take three or more consecutive days of sick leave to return to work. The Union sought the rescission of this regulation. Due to DOT's failure to respond to Local 333's Step I grievance, the Union filed a Step II request on August 6, 2009.

Then, on January 5, 2010, the Union filed a Step III request with the City. The Union again asserted that DOT violated the Agreement by unilaterally implementing the SMS Alert and thereby altered the existing sick leave provisions contained in the Agreement. In response, on January 7, 2010, the City wrote to Counsel to the Union asking them to provide greater specificity regarding what provision of the Agreement DOT allegedly violated when it issued the SMS Alert. On January 27, 2010, the Union responded, enunciating that DOT violated Article IV-A § 10(b)(4) of the Agreement when it issued the SMS Alert.

On April 7, 2010, a Step III conference was held, and on April 29, 2010, the City issued a Step III decision. This determination found that "no grievable issue" existed because the creation and implementation of the SMS Alert did "not fall within the definition of 'grievance' contained in Article VI" of the Agreement. (Pet., Ex. A). This determination further held that Local 333's request for restoration of leave time lost by individual grievants fell outside the scope of the Union's grievance. On May 12, 2010, the Union filed a request for arbitration in connection with this grievance and framed the issue as follows: "Whether the employer has violated the [Agreement] by creating and implementing [the SMS alert]." (*Id.*). Local 333, as a remedy, sought the rescission of the SMS Alert and the "making all adversely affected members [of the Union] whole in all respects." (*Id.*). Annexed to this request for arbitration, the Union submitted a waiver, dated May 12, 2010, that was executed by the President of Local 333 and one of the allegedly adversely affected members of Local 333.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's request for arbitration should be denied on the grounds that *res judicata* precludes Local 333 from relitigating the exact same issues that were decided in *United Marine Division, Local 333*, 2 OCB2d 44. In applying the three-part standard used by this Board in analyzing *res judicata* in the previous case, there was a final judgment on the merits; identical issues and causes of action were litigated in the previous matter; and the parties in the previous and current proceedings are identical. Accordingly, the Union's instant request for arbitration should be denied, so to prevent Local 333 from having "another bite at the apple." (Rep., p. 4).

The City further argues that the Union's failure to submit a valid waiver in connection with its request for arbitration prevents the Union's grievance from advancing. As set forth in New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-312(d), the Union, as a condition precedent to taking a grievance to arbitration, must file a waiver, thereby preventing multiple litigation of the same dispute and preclude any attempts to relitigate the same claims.[8] Local 333, in the instant request for arbitration, is attempting to relitigate the issues determined in this Board's prior decision concerning the SMS Alert and the current court action. Even though the Union submitted a waiver in connection with the instant request for arbitration, the Union's waiver is ineffective because Local 333 is litigating the

[8] NYCCBL § 12-312(d) provides in pertinent part:
> 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.

underlying issues contained in the instant grievance. Therefore, this waiver does not satisfy the requirements set out in the NYCCBL.

Finally, the City argues that there is no nexus between the act complained of, the issuance of the SMS Alert, and the source of the right being invoked, the Agreement. The SMS Alert addresses the issue of whether employees in certain positions within DOT are "fit for duty" and can return to work after an absence associated with illness that is three days or longer. The sick leave provisions in the Agreement address the requirements an employee must satisfy in order to use accrued sick leave time in order to be compensated for his/her time off. Furthermore, the SMS Alert was issued in order to ensure the safety of DOT employees and the passengers utilizing DOT services, while the sick leave policies in the Agreement were designed to ensure proper usage of sick leave time and prevent abuse of said leave time by DOT employees. Accordingly, no nexus exists between the SMS Alert and the Agreement; and the City's petition challenging arbitrability should be granted.

Union's Position

The Union contends that the City's petition challenging arbitrability should be dismissed because *res judicata* does not apply to the instant matter. The issues addressed in this Board's prior decision concerning the SMS Alert are distinct from the issues raised in the Union's instant request for arbitration. In this Board's prior decision, it was found that DOT violated NYCCBL § 12-306(a)(1) and (4) because the City failed to bargain in good faith over DOT's unilateral issuance and implementation of the SMS Alert, which involved a mandatory subject of bargaining. In the Union's instant request for arbitration, the Union seeks a determination regarding the issue of whether, by issuing and implementing the SMS Alert, DOT violated Article IV-A § 10(b)(4) of the Agreement.

Additionally, the Union, in initiating the previous improper practice petition, sought to enforce its statutory rights under the NYCCBL, whereas here, Local 333 seeks to redress a claimed violation of the Agreement, specifically the sick leave policies set froth therein.

The Union, along those lines, also argues that the remedies in these two actions are distinct. In the improper practice matter the Union sought and received an order from BCB ordering the City to bargain over the issuance of the SMS Alert. In its request for arbitration, the Union is seeking a make-whole remedy for the adversely affected members of Local 333, who would have been able to return to work under the sick leave policies in the Agreement, but for the fact that DOT issued the SMS Alert that heightened the requirements for the documentation of sick leave absences. Thus, the differences in the remedy highlight the fact that *res judicata* is inapplicable and does not preclude the Union's grievance from advancing to arbitration. Therefore, the City's petition challenging arbitrability should be dismissed.

The Union also contends that the City's argument that Local 333 failed to execute an effective waiver under NYCCBL § 12-312(d) is meritless. Waivers are only ineffective when proceedings in both forums arise out of the same factual circumstances, involve the same parties and seek determinations on common issues of law. Additionally, the waiver requirement is an attempt to prevent re-litigation of the same dispute; and "the waiver does not waive all statutory, constitutional or common law claims," rather the waiver only encompasses those claims properly raised before an arbitrator. (Ans. ¶ 81). As stated above, the request for arbitration in dispute herein addresses distinct legal issues. The prior decision involving the SMS Alert addressed DOT's violation of the NYCCBL, while the instant request for arbitration is an attempt to have an arbitrator decide whether DOT violated the terms and conditions of the sick leave policy contained in the

Agreement. The Agreement prescribes the requirements for the return to duty of employees who are absent from work due to illness, and to the extent the SMS Alert requires more, it violates the Agreement. Furthermore, the waiver that was annexed to this request for arbitration was signed by an aggrieved employee of DOT and member of Local 333. He, along with at least four other members of Local 333, were not parties to the previous BCB matter, and therefore they are not getting another bite of the apple.

Finally, the Union contends that its request for arbitration should not be denied because it established a nexus between the act complained of, the issuance and implementation of the SMS Alert, and the source of the right enunciated therein, the Agreement. Despite the City's attempt to confuse the issue with *post hoc* justification and rationalization for the issuance of the SMS Alert and the meaning of the sick leave policies set forth in Article IV-A § 10(b)(4) of the Agreement, there is a reasonable relationship between the grievance and the Agreement. The instant request for arbitration claims that Article IV-A § 10(b)(4) of the Agreement was violated, misinterpreted, and/or misapplied when DOT issued and implemented the SMS Alert. The sick leave policies contained in the Agreement already set forth the documentation employees are required to submit when they are absent due to illness for three or more days. DOT, by issuing and implementing the SMS Alert changed the requirements that had been agreed to and thereby misapplied and misinterpreted a provision of the Agreement.

DISCUSSION

Before this Board may examine whether the Union established a nexus between the grievance at issue herein and the alleged right invoked in that grievance, we must address the City's

preliminary contentions seeking to preclude the Union's grievance from progressing to arbitration. The City first contends that the doctrine of *res judicata* precludes the submission to an arbitrator of Local 333's grievance regarding the SMS Alert; the City second contends that the Union, by failing to execute a valid waiver in connection with this grievance, has not satisfied the statutory condition precedent to arbitration.

Regarding the doctrine of *res judicata*, this Board has stated that, as a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Howe, 79 OCB 19, at 7 (BCB 2007) (citing Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347-348 (1999)). Thus, res judicata bars a cause of action that could have been presented properly in a prior proceeding "against the same party, based upon the same harm and arising out of the same or related facts." Id. However, the parameters of the preclusive effect of res judicata are measured by a "pragmatic test" analyzing "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 64, 100-101 (2005) (quoting *Smith v. Russell Sage College*, 54 N.Y.2d 185, 192 (1981)). Therefore, while "a valid final judgment bars future actions between the same parties on the same cause of action, a subsequent action will not be barred by *res judicata* where the nature or object of the second action is distinct from that in the prior action in which the judgment was rendered." G*TFM, LLC v. Nagy*, 18 A.D.3d 266, 268 (1st Dept. 2005) (quoting *Parker*, 93 N.Y.2d at 347).

In addition, this doctrine will not preclude a subsequent action when that claim could not have been heard properly during the previous proceeding. *Gladman v. Mount Vernon Hosp.*, 2004

WL 848225, at *7 (S.D.N.Y. 2004) (federal court refused to apply *res judicata* because the state court, which ruled on a state law arbitrability claim, could not rule on nor redress whether an employer had violated the Employee Retirement Income Security Act, which, based upon the specific facts of that employee's claim, falls exclusively under federal jurisdiction); *see also Kowaleski v. Lewis*, 643 F.Supp.2d 259, 269 (N.D.N.Y. 2009); *Newman v. Harmon*, 965 F.Supp 503, 507 (S.D.N.Y. 1997) (holding that, in the context of an Article 75 proceeding, the court did not have the authority to address issues of coercion or fraud regarding the execution of a contract, and such issues would be for an arbitrator to decide); *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 265 (2d Cir.1997) (*res judicata* does not apply where "formal jurisdictional or statutory barriers prevented [the plaintiff] from presenting to a court in one action the entire claim including theories of recovery or demands for relief that might have been available to him under applicable law").

Here, we find that *res judicata* does not prevent this matter from being heard by an arbitrator. *Res judicata* is applicable when a cause of action that could have been presented in a prior proceeding involves the same parties, is based upon the same harm, arises out of the same or related facts. In the previous proceedings, the issue presented before this Board was whether "DOT violated the NYCCBL by issuing the SMS Alert and by refusing the Union's request to bargain over the implementation of these new requirements." *UMD, L. 333*, 2 OCB2d 44, at 18-19. In that case, we found that the SMS Alert addressed a mandatory subject of bargaining, that DOT issued the SMS Alert without bargaining with Local 333 about this regulation, and that DOT's action constituted a failure to bargain in good faith, in violation of NYCCBL § 12-306(a)(1) and (4). In contrast, in the grievance at issue herein, Local 333 seeks a determination from an arbitrator concerning the issue of whether DOT's issuance of the SMS Alert violated the terms and conditions of the Agreement

addressing sick leave, most notably Article IV-A § 10(b)(4). The central questions of law in these two matters implicate different legal standards and distinct dispositive facts.

More fundamentally, the contractual claim sought to be arbitrated is outside of the jurisdiction of this Board, and thus could not have been brought successfully before us in the improper practice proceeding. *See DC 37*, 1 OCB2d 4, at 8-10 (BCB 2008); *SSEU, Local 371*, 1 OCB2d 20, at 12 (BCB 2008) (citing N.Y. Civ. Serv. Law § 205.5(d)) (Board lacks jurisdiction to enforce provisions of a collective bargaining agreement). Where such is the case, the claim excluded from an administrative body's jurisdiction cannot be precluded by its ruling. *See, e.g., Shuttle Contracting Corp. v. Planning Bd. Of Inc. Village of Great Neck*, 73 A.D.3d 789 (2d Dept. 2010) (citing *LeBaron v. DPL & B, LLC*, 35 A.D.3d 391 (2d Dept. 2006)); *see also GTFM, LLC v. Nagy*, 18 A.D.3d 266, 268; *Jefferson Towers, Inc. v. Public Mutual Insurance Group*, 195 A.D.2d 311, 313 (1st Dept. 1993); *Coliseum Towers Associates v. County of Nassau*, 217 A.D.2d 387, 391-392 (2d Dept. 1996). Although the parties and the precipitating act are identical, the exclusion from our jurisdiction of contractual claims prevents *res judicata* effect on claims that could not be litigated before the Board. *Id.* Based upon the above-enunciated standard, we cannot find that the Union is precluded by *res judicata* from advancing this grievance to arbitration.

However, our finding as to *res judicata* does not end the matter. The City further asserts that Local 333 failed to submit a valid waiver with its request for arbitration. NYCCBL § 12-312(d) states, in pertinent part:

> 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.

See also DC 37, L. 376, 1 OCB2d 36, at 11 (BCB 2008). Additionally, we have consistently held this waiver requirement constitutes a condition precedent to arbitration which must be satisfied before the request for arbitration may be considered, regardless of the merits of the underlying grievance. *See SSEU, L. 371*, 67 OCB 8, at 7 (BCB 2001); *see also PBA*, 23 OCB 8, at 4 (BCB 1979).

The City contends that the waiver submitted by the Union does not satisfy the requirements of NYCCBL § 12-312 (d), in that, at the time the Union submitted the request for arbitration, it was, and indeed still is, litigating the underlying issues sought to be arbitrated. This argument conflicts with our decisions since at least 1992. However, we are constrained to accept it, based upon the recent decision of the Appellate Division in *Matter of Roberts v. Bloomberg*, 83 A.D.3d 457 (1st Dept. 2011). In *Matter of Roberts*, the Court, finding our decisions in "conflict with the clear wording of [the] statutory provision," found that as a matter of law, the submission of a waiver pursuant to 12-312(d) constituted agreement "to arbitrate the entire dispute, not just contractual claims." Id. at 458. The Court went on to find that "there is nothing in the statute or its legislative history to support [the] position that statutory or constitutional claims are exempt from the waiver."

While we are constrained by this decision by the Appellate Division, we note that it not only conflicts with the long-standing practice of the parties, and thus their settled expectations, but that it places municipal employees in New York City in a specially disadvantaged position. *See, e.g., Wharton v. Town of North Hempstead*, 22 Misc.3d 83, 84 (App. Term., 9th & 10th Dists. 2009).[9]

[9] Moreover, we further note that the Appellate Division decision did not address the fact that (continued...)

Nevertheless, the decision is clearly authoritative, and therefore we have no choice but to grant the petition challenging arbitrability, and dismiss the request for arbitration.

[9](...continued)
the allegedly "clear wording of [the] statutory provision" had been read in exactly the way the Board has applied it in not one but three federal court decisions. *Scheiner v. New York City Health and Hospitals*, 152 F. Supp. 2d 487 (S.D.N.Y. 2001) (Koeltl, U.S.D.J.); *Khamba v. SSEU Local 371, No.* 97 CIV. 4461 (DLC), 1999 WL 58924 (S.D.N.Y. Feb. 5, 1999) (Cote, U.S.D.J.), *affd*., 225 F.3d 646 (2d Cir. 2000); and *Giles v. City of New York*, 41 F. Supp. 2d 308 (S.D.N.Y. 1999) (Motley, U.S.D.J.).

ORDER

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

ORDERED, the petition challenging arbitrability filed by the City of New York and the New York City Department of Transportation, docketed as No. BCB-2862-10, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by the United Marine Division, Local 333, International Longshoremen's Association, docketed as A-13475-10, hereby is denied.

Dated: June 29, 2011
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