DC 37, Local 768, 4 OCB2d 41 (BCB 2011)

(Arb.)(Docket No. BCB-2918-10) (A-13646-10).

***Summary of Decision*:** The Union filed a Request for Arbitration alleging that HHC violated the terms of the parties' Agreement by failing to follow the Position Description for a job title for the Grievant's supervisor, failing to provide a performance evaluation, and that HHC wrongfully terminated the Grievant. HHC filed a Petition Challenging Arbitrability alleging that the Union could not establish the requisite nexus between the Grievant's termination and the Agreement because the termination was not a disciplinary action and her Position Description was not a written policy of the employer. The Union asserted that HHC acted to avoid the disciplinary process by permitting the Grievant's supervisor to cease supervising her, and as a result, the Grievant lost her Limited Permit to work as a creative arts therapist. The Union also argued that HHC violated a performance evaluation policy by giving the Grievant a performance evaluation and then not allowing her an opportunity to improve. Further, the Union argued that HHC violated the Position Description, which it claimed is a written policy of the employer, and thus grievable. The Board found that the requisite nexus existed as to the claims of wrongful discipline and violation of the performance evaluation policy, but not as to the claim arising from the Position Description. Accordingly, the Petition Challenging Arbitrability was denied in part, and granted in part. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 768, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On November 23, 2010, District Council 37, Local 768, AFSCME, AFL-CIO ("Union") filed

a Request for Arbitration alleging that the New York City Health and Hospitals Corporation ("HHC") violated the terms of the parties' Health Services Agreement ("Agreement") by failing to follow the position description for the job title of the Grievant, Stacie Brown's ("Grievant") supervisor, failing to provide a performance evaluation, and wrongfully terminating the Grievant. On December 15, 2010, HHC filed a Petition Challenging Arbitrability alleging that the Union cannot establish the requisite nexus between the Grievant's termination and the Agreement. HHC asserts that the Grievant's termination was not a disciplinary action and that the Position Description for her title is not a written policy of the employer. The Union asserts that HHC acted to avoid the disciplinary process by permitting the Grievant's supervisor to cease supervising the Grievant, and as a result, the Grievant lost her Limited Permit. The Union also argues that HHC violated a performance evaluation policy by giving the Grievant a performance evaluation and then not allowing her an opportunity to improve. Further, the Union argues HHC violated the Position Description, which it claims is a written policy of the employer, and thus grievable. The Board finds that the requisite nexus exists as to the claims of wrongful discipline and violation of the performance evaluation policy, but not as to the claim arising from the Position Description. Accordingly, the Petition Challenging Arbitrability is denied in part, and granted in part.

BACKGROUND

The Grievant was employed by HHC as a Creative Arts Therapist ("CAT") Level I. The Union represents employees in the CAT title. The CAT Position Description states that in order to qualify as a CAT Level I, an employee must have a "valid License or Limited Permit issued by the New York State Education Department to practice as a [CAT]." (Pet., Ex. C). In order to qualify

as a CAT Level III, an employee must hold a "valid License issued by the New York State Education Department to practice as a Creative Arts Therapist." (Pet., Ex. C).

The Grievant was a probationary employee, and as such was subject to HHC's Operating Procedure 20-40, which states in pertinent part:

> Probationary employees shall receive at least one written interim evaluation during their probationary period, to be completed no later than midway though the probationary period. A final evaluation shall be completed before the end of the probationary period.

(Ans., Ex. U).

HHC and the Union are parties to the Agreement, which governs the employment of CATs. Article VI, § 1, of the Agreement defines "Grievance" as, among other things:

> 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 terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the [HHC] with respect to those matters set forth in the first paragraph of [§] 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration . . . .
>
> h. A claimed wrongful disciplinary action taken against a non-competitive employee as defined in [§] 10 of this Article VI.[1]

(Pet., Ex. A) (emphasis in original).

In February 2009, the Grievant began working for HHC's Bedford Stuyvesant Alcoholism Treatment Center at Kings County Hospital Center ("KCHC") as a CAT Level I. It is undisputed that before the Grievant accepted the position at KCHC, HHC managers assured her that she would

[1] Section 10 of Article VI states that "[t]he provisions contained in this section shall not apply to . . . [p]robationary employees." (Ans., Ex. R).

receive supervision from a Licensed CAT whom HHC was in the process of hiring. When she began her employment, the Grievant was seeking to obtain a Limited Permit to work as a CAT.

New York State Education Law, Title 8, Article 163 requires that applicants for a CAT License operate first under a Limited Permit and be supervised by a Licensed CAT. New York State only issues Limited Permits to specific sites under a qualified supervisor deemed to be acceptable by the New York State Education Department.[2]

When the Grievant first started working at KCHC in February 2009, she worked without a Limited Permit under the supervision of two individuals, neither of whom holds a CAT license. In April 2009, HHC hired a CAT Level III. The CAT Position Description states that a typical task performed by a CAT Level III is to "provide[] clinical supervision for [CATs] practicing under a Limited Permit as required by the New York State Education Law, Article 163." (Pet., Ex. C).

On May 13, 2009, the New York State Education Department issued the Grievant a Limited Permit to practice Creative Arts Therapy under the license of the newly-hired CAT Level III. As part of the required clinical supervision, the Grievant met with the CAT Level III on April 21, April 29, May 8, and May 13, 2009. On May 8, 2009, the CAT Level III told the Grievant that she should not provide individual therapy sessions with patients. Also, some time in early May 2009, the supervising CAT Level III met with other HHC managers, including an HHC Director and expressed

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[2] The Union argues that the Grievant was eligible to perform her duties even without a Limited Permit because it asserts that the Grievant's workplace was considered an "exempt setting" and therefore excluded her from otherwise relevant statutory requirements. The Union cites a memorandum from the Office of the State Board for Mental Health Practitioners, which states "[e]ffective January 1, 2006, an individual must be licensed, hold a limited permit, or be in an exempt setting in order to practice creative arts therapy and psychotherapy. . . . The law defines an exempt setting as a program that is regulated, funded, operated or approved by the Office of Mental Health, Office of Mental Retardation and Developmental Disabilities, Office of Alcoholism & Substance Abuse Services." (Ans., Ex. U).

her concern that the Grievant should not provide individual art therapy. On May 13, 2009, the Director sent an email to the Grievant in which she requested that the Grievant cease performing individual counseling.

On June 12, 2009, the Director of Activity Therapy Services sent an email to KCHC Labor Relations stating "we have decided to terminate employment for [the Grievant]" because HHC managers perceived that the Grievant had challenges with supervision and implementing feedback. He asked for advice on how to proceed in light of this decision to terminate the Grievant. Later that day, KCHC Labor Relations responded:

> Unfortunately, you do not have the authority to simply terminate [an] employee. You should be requesting disciplinary action with my office. Be advised that each employee has certain contractual disciplinary rights written in their Unit contract. . . [The Grievant] has more than 3 months of employment within her probationary period, therefore she is entitled to a Step 1A disciplinary conference before we can terminate her services. . . Did you or her supervisors do an evaluation on [the Grievant] indicating any of the below problems? Did anyone conduct any counseling or establish any paper trail that was given to [the Grievant]. . . [That] would be helpful when we conduct the step 1A conference.

(Ans., Ex. D).

After receiving this guidance, the Director of Activity Services requested more guidance, to which KCHC Labor Relations responded:

> Please do her evaluation ASAP then send me over the request for disciplinary action. Clearly her evaluation should be less than satisfactory. We will terminate her employment which will be implemented immediately after the step 1A.

(Ans., Ex. D).

The Grievant's performance was evaluated during the summer of 2009. Two Performance

Evaluation forms were issued and signed by HHC managers, specifically, the CAT Level III and the Director of Activity Services. Except for the dates, the Performance Evaluations are virtually identical. On both of the Performance Evaluations, the Grievant received an overall rating of "Needs Improvement/Below Standard." The first Performance Evaluation is dated June 22, 2009; the second is dated July 23, 2009. (Ans. Exs. E, F). The Grievant submitted similar rebuttals to each Performance Evaluation in which she stated, in pertinent part:

> I began working at KCHC on February 9, 2009. I did not begin supervision sessions with [the CAT Level III] until April 29th. . . [The CAT Level III] has never observed me leading a group at the Bedford Stuyvesant Alcoholism Treatment Center, which is my site.
>
> [I] feel that the problems that I am having with [the CAT Level III] have to do more with personality than my skills as an art therapist.

(Ans., Exs. F, G.). In her rebuttals, the Grievant noted that at the time of her first evaluation, she had only met with her supervisor for five supervision sessions and that at the time of her second evaluation, she had only met with her supervisor for seven supervision sessions.

On July 17, 2009, KCHC issued a Notice and Statement of Charges to the Grievant, charging her with "Incompetency," and specifying that she "received a 'less than satisfactory' rating on [her] performance evaluation during [the] evaluation period February 9, 2009 through July 23, 2009." (Pet., Ex. G). A Step 1A conference was scheduled to be held on August 6, 2009, but was cancelled and never rescheduled.

On August 7, 2009, the CAT Level III wrote to the New York State Education Department, stating "I am requesting that [the Grievant] be removed from my license immediately on this day." (Ans., Ex. I). On August 11, 2009, the New York State Education Department wrote to the Grievant, stating:

> You were issued a limited permit on 5/13/2009 to practice under the supervisor [CAT Level III] at [KCHC] until 12/26/2009. We received notification that you have terminated from that setting and your permit will be cancelled. . . At this time, you do not have a permit and may not practice creative arts therapy, psychotherapy or any restricted activity.

(Ans., Ex. L).

Also on August 11, 2009, the Director of Activity Services wrote to the Grievant, stating:

> [T]his is to inform you that at this time your limited permit is no longer being held under the license of the [CAT Level III]. As per the Office of Profession New York State Education Department, you will no longer be able to practice Creative Arts Therapies or psychotherapy without a limited permit.
>
> At this time, you can provide services such as groups that allow clients opportunities for creative expression, activities that promote general health and fitness, activities to stimulate cognitive/social functions, and experiences designed to meet patients' individual community re-integration, rehabilitation and recovery. You will remain as a member of the interdisciplinary team and may participate in the comprehensive treatment plan and writing appropriate input on treatment plan as well as progress notes.

(Ans., Ex. J).

Thereafter, on August 12, 2009, KCHC Labor Relations wrote to the Grievant and stated:

> The Human Resources Department has been notified that your limited permit to practice as a CAT I has been cancelled. Since you no longer have a valid limited permit, you are ineligible to work as a CAT I. Therefore your employment as a CAT I is terminated effective close of business August 14, 2009.

(Ans., Ex. K).

The Union filed a grievance at Steps I, II, and III, with no violation being found. On November 23, 2010, the Union filed a Request for Arbitration, alleging a violation of Article VI, § 1(b) & (h) of the Agreement, and articulating the grievance as:

> Whether the employer [HHC] violated the collective bargaining agreement by: (1) wrongfully terminating the grievant and (2) by violating, misinterpreting or misapplying its own rules, regulations, written policies or orders by failing to follow the Position Description for [CAT] title and/or properly providing a performance evaluation for the grievant.

(Ans., Ex. R). As a remedy, the Grievant seeks "[r]einstatement, expungement of all disciplinary records, back pay with interest and any other remedy necessary to make the grievant whole." (Ans., Ex. R).

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the Union's Request for Arbitration must be dismissed in its entirety because the Union has failed to state an arbitrable claim. HHC alleges that the Union cannot establish the requisite nexus between the Grievant's termination and Article VI, § 1(h) or § 1(b) of the Agreement.

In the first challenge, HHC contends that the Grievant's termination was not a disciplinary action; rather, it was predicated on the fact that the Grievant was not qualified to work in the title of CAT Level I because she no longer possessed a Limited Permit to practice**.** However, the Grievant was no longer qualified to serve in her title as dictated in HHC's position description, which requires that an employee in the CAT Level I title is required to possess a License or a Limited Permit. HHC could terminate the Grievant from her employment after her Limited Permit was cancelled by the State, even if the center where she worked was an "exempt setting," because the loss of her Limited Permit made her unqualified to serve in the CAT Level I position.

The Board has held, a termination for failure to maintain a state license or certification does not give rise to rights under parties' wrongful disciplinary procedures. Furthermore, an employee's failure to maintain a license is distinguishable from engaging in misconduct in the performance of work. The fact that the Grievant lost her Limited Permit is not misconduct and does not give rise to arbitration rights under the disciplinary procedures of Article VI, §1(h), of the Agreement.

Further, HHC contends that the Union has not demonstrated how the facility failed to follow the Grievant's position description for the CAT title. HHC alleges that the Union failed to identify a particular policy that it believed HHC had violated in connection with the position description. HHC argues that a job description is not a written policy of HHC; it merely lists examples of tasks or duties of employees in the title. Even if the position description was deemed a written policy, the Union has failed to establish a nexus between the request to remove the Grievant from her license and the items articulated under "Example of Typical Tasks."

Finally, the Union did not demonstrate how the facility failed to properly provide a performance evaluation for the Grievant, and also did not identify a particular policy that HHC violated in by failing to properly provide a performance evaluation. Since the Grievant's separation from service was predicated upon the fact that she was no longer qualified for the position of CAT Level I and not upon her performance evaluations, there is no nexus between the performance evaluations and the Grievant's termination.

Union's Position

The Union argues that there is a clear nexus between HHC's actions and Article VI, § 1(h) and 1(b), of the Agreement. The Union cites the HHC Position Description for CAT Level III, which includes providing "clinical supervision for CATs practicing under a Limited Permit." (Ans.,

¶ 66). It argues that by allowing the CAT Level III to not perform her duties, a nexus is established between the termination of Grievant's employment and a violation of Article VI, § 1(b), of the Agreement.

Although HHC argues that the termination of the Grievant's employment resulted from the loss of her Limited Permit to practice as a CAT Level I, under relevant licensing statutes, the Grievant was not required to hold a limited license to practice because HHC is considered an "exempt setting" under State law. Indeed, HHC permitted the Grievant to work for more than three months as a CAT Level I before she received her Limited Permit, which strongly indicates that HHC was aware that she could operate without the Limited Permit.

Further, the Union argues that the Grievant lost her Limited Permit not because she was legally ineligible to practice as a CAT Level I, but because the CAT Level III refused to supervise the Grievant any longer. HHC did not assign another CAT Level III to supervise the Grievant so she could maintain her Limited Permit. The CAT Level III did not have the discretion as a public employee to decide whether or not to perform her duties; she did not volunteer to supervise the Grievant, but rather was directed to supervise the Grievant as part of her job duties. HHC managers were aware of the CAT Level III's actions and she was working under their direction. Moreover, there are several other CAT Level III employees employed at KCHC, any one of whom could have been directed to supervise the Grievant instead. The fact that these steps were not taken indicates that the withdrawal of the supervision necessary for the Grievant to maintain her Limited Permit was indeed a disciplinary action.

The Union argues that his matter is distinguishable from cases where employees needed their licenses or certifications to legally perform their jobs. It is also noteworthy that the Grievant

lost her Limited Permit by no fault of her own; the revocation of her license was within the control of HHC, which is distinguishable from the Board's cases concerning the loss of a license as a valid reason for a termination.

Additionally, there is a nexus between HHC's actions regarding the evaluation procedures and Article VI, § 1(b), of the Agreement, which pertains to written policies of the employer. HHC's Operating Procedure 20-40 requires that probationary employees receive at least one written interim evaluation and a final evaluation during their probationary period. The Union argues that HHC gave the Grievant only one real performance evaluation, and did not give her a chance to improve her performance. Therefore, the Union argues, HHC violated the intent and purpose of Operating Procedure 20-40, which is to allow employees an opportunity to improve performance. The Union claims that the "performance evaluation was given at the suggestion of Labor Relations with the purpose of terminating her employment," which establishes the nexus between the Grievant's termination of employment and the alleged violation, misinterpretation, and/or misapplication of HHC's policy on performance evaluations. (Ans., ¶ 71).

DISCUSSION

The New York City Collective Bargaining Law ("NYCCBL") provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010) (citing NYCCBL § 12-302); *NYSNA*, 69 OCB 21, at 6 (BCB 2002).[3] To carry out this policy, the "Board is charged with the task of making threshold determinations of substantive

[3] NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

arbitrability." *ADA/DWA*, 4 OCB2d 21, at 10 (BCB 2011) citing *DEA*, 57 OCB 4, at 9-10 (BCB 1996); *see also* NYCCBL § 12-309(a)(3).[4] The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the Agreement." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). "[T]he presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). However, the Board cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (citation omitted); *Local 924, DC 37*, 1 OCB2d 3, at 8 (BCB 2008); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

UFOA, 4 OCB2d 5, at 8-9 (BCB 2011) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969).

It is undisputed that the parties have agreed to arbitrate certain disputes. The Union articulated three sources of right, specifically, the Agreement, Article VI, § 1 (b) and (h), the CAT Position Description, and the Operating Procedure 20-40. After examining these allegations, we find

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[4] NYCCBL § 12-309(a)(3) grants the Board the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure . . . ."

that the Union has demonstrated a nexus between these sources of rights and its claims arising under Article VI, § 1(h) of the Agreement and the Operating Procedure 20-40.

As a general matter, termination of employment resulting from the loss of a qualification is not within the scope of matters the parties have agreed to be subject to arbitration. However, we have long held that, where a grievant makes a sufficient showing that an action ostensibly within management's discretion is in fact undertaken as a form of discipline, such action may be arbitrable under the wrongful discipline provisions of the parties' grievance procedure. *See*, e.g., *Local 375, DC 37*, 51 OCB 12 (BCB 1993), *affd.*, *Matter of NYC Dept. of Sanitation v. MacDonald*, Index No. 402944/93 (Sup. Ct. N. Y. Co. Dec. 20, 1993) (Ciparik, J.), *affd.*, 215 A.D.2d 324 (1st Dept. 1995), *affd.,* 87 N.Y.2d 650 (1996). In pleading such a claim,

> The grievant is required to allege sufficient facts to establish an arguable relationship between the act complained of and the source of the alleged right. The bare allegation that a [action] was for a disciplinary purpose will not suffice. Thus, in any case in which the City's management right . . . is challenged on the ground that the [action] is of a disciplinary nature, the burden will not only be on the Union ultimately to prove that allegation, but the Union will be required initially to establish to the satisfaction of the Board that a substantial issue is presented in this regard.

Local 375, DC 37, 51 OCB 12, at 12 (BCB 1993).

In the instant case, HHC argues that the Grievant was terminated due to her lack of proper qualifications, and that the action was thus not related to discipline. However, we find that a substantial question has been raised as to whether Grievant's termination was disciplinary in nature. The record establishes that Grievant's supervisors were dissatisfied with her performance and inquired with KCHC Labor Relations as to how to terminate her employment; KCHC Labor Relations responded that the Grievant had certain disciplinary rights to which she was entitled before

termination. Only after HHC began the disciplinary process with the aim of terminating the Grievant did the CAT Level III move to have the Grievant taken off her License and ceased supervising the Grievant, which are necessary as a matter of law if the Grievant were to maintain her Limited Permit. As a result of this action, the Grievant subsequently lost her Limited Permit and, consequently, was disqualified from her position. It was for this disqualification that the Grievant was terminated despite the disciplinary process already underway. Therefore, we conclude that a substantial question exists as to whether stopping the Grievant from working under the CAT Level III's License was a pretextual effort to avoid disciplinary rights KCHC Labor Relations attributed to the Grievant. We order that the matter go forward to arbitration in order to determine whether any disciplinary rights are implicated here.

Likewise, we also find that an arbitrable question has been raised as to whether HHC violated Operating Procedure 20-40, which states, in pertinent part, that "[p]robationary employees shall receive at least one written interim evaluation during their probationary period, to be completed no later than midway though the probationary period [and a] final evaluation shall be completed before the end of the probationary period." HHC asserts that there is no nexus between Operating Procedure 20-40 and the grievance, in view of the fact that the Grievant was terminated for lack of certification, and not for her performance evaluations. However, HHC's contention that the Grievant's termination was unrelated to the evaluation process referred to in Operating Procedure 20-40 does not negate the claimed violation of that procedure, but rather goes to the merits of the claim, including the question of remedy.[5] The Union argues that Operating Procedure 20-40

[5] Similarly, HHC's contention that the Request for Arbitration failed to identify the nature of the violation of the procedure and to identify the particular policy violated does not provide a basis for denying arbitration. The Union's reference to Operating Procedure 20-40 was specifically stated

contemplates that employees shall receive two separate evaluations, and that the two identical evaluations issued a month apart, the first on June 22, 2009, and the second on July 23, 2009, do not suffice to comply with Operating Procedure 20-40. The Union argues further that the intent of this provision is to give the evaluated employee an opportunity to improve performance, and that to issue identical evaluations within one month does not comply with the spirit of the policy. We find that this claim states a sufficiently reasonable relationship between the source of the right and the claim itself, and thus warrants an arbitrator's review.

Finally, the Union claims that HHC violated Article VI, § 1(b) of the Agreement by not complying with the CAT Position Description, which the Union asserts is a written policy of the employer. Even if the Board were to find that the Position Description constitutes a written policy, we find that the Union's claimed violation of the Position Description is not arbitrable. The Union complains that the CAT Level III failed to supervise the Grievant despite the fact that the CAT Position Description articulates that a CAT Level III should "provide[] clinical supervision for [CATs] practicing under a Limited Permit as required by the New York State Education Law, Article 163." On its face, the Position Description does not require that an employee in the title perform every listed task; the tasks are not mandatory, but merely "typical." *SSEU, L. 371*, 4 OCB2d 38, at 6 (BCB 2011) (finding that a written policy was not arbitrable because it did not set out any rights or entitlement to which the grievant could be deprived). Accordingly, we do not find that the Union has established a nexus on this claim and grant the Petition Challenging Arbitrability as to the

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in its Answer to the Petition. As to the timeliness of that reference, we have recently reaffirmed, HHC's contention "is an argument for the arbitrator to consider, not for the Board." *SSEU, L. 371*, 3 OCB2d 53, at 8 (citing *NYSNA*, 69 OCB 21, at 5-6 (BCB 2002) ("We now hold that this Board will no longer determine whether a respondent raised a belated claim and that the parties here should proceed to arbitration, at which point Petitioner may raise the issue of notice before the arbitrator").

claimed violation of the CAT Position Description.

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 New York City Health and Hospitals Corporation, docketed as BCB-2918-10, hereby is granted as to the claimed violation of the CAT Position Description, and denied in part as to the alleged violation of Operating Procedure 20-40 and as to the alleged discipline; and it is further

ORDERED, that the Request for Arbitration filed by District Council 37, Local 768, AFSCME, AFL-CIO, docketed as A-13646-10, hereby is granted to determine whether HHC's actions were disciplinary, and whether HHC violated HHC Operating Procedure 20-40, and denied as to the claimed violation of the CAT Position Description.

Dated: August 18, 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

PETER PEPPER
MEMBER